HOW CAN PAKISTAN GRANT NATIONALITY TO CHILDREN OF AFGHAN REFUGEES BORN IN PAKISTAN: THE COMPARATIVE STUDY OF INTERNATIONAL LAW AND DOMESTIC LAW OF PAKISTAN

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Approval Sheet

This is to certify that we evaluated the thesis entitled "HOW THE GOVERNMENT OF PAKISTAN CAN GRANT NATIONALITY TO THE CHILDREN OF AFGHAN REFUGEES BORN IN PAKISTAN: COMPARATIVE STUDY OF INTERNATIONAL LAW & NATIONAL LAW OF PAKISTAN" submitted by Ramzan Ali Registration No. 322-FSL/LLMIL/F17 in partial fulfillment of the award of the degree of LLM International Law. The thesis fulfills the requirements in its core and qualifies for the award of the degree.

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DECLARATION

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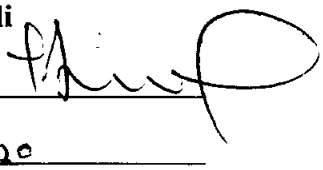
Signature: 

Date: 21/12/20

DEDICATION

To my daughter

"RUMAISA ALI"

ABSTRACT

The thesis in hand studies the obligation of Islamic Republic of Pakistan owed to Afghan migrants under International Law for grant of nationality. Although the issue of nationality falls within the purview of state powers, International Law does define the scope of such powers and provides broader guidelines to states in grant of nationality. There is Citizenship Act 1951 enacted in Pakistan to deal with the issues pertaining to grant of nationality. However, there are provisions in the act that are manifestly in contrast with the International Law obligations. The paper intends to bring such inconsistencies into limelight and to provide recommendations in order to reconcile these provisions with the International practices and obligations enumerated in the International Law instruments like Universal Declaration on Human Rights. In consideration with the judicial interpretation of various courts in Pakistan regarding the grant of nationality by virtue of birth as enunciated in the Citizenship Act, the paper has made some recommendations like legislation by the parliament in order to remove the inconsistencies exist in the citizenship Act of Pakistan.

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CHAPTER – I: INTRODUCTION

According to International Law, the two main principles governing the grant of nationality are (i) by descent from a national (*ius sanguinis*); and (ii) by birth within state territory (*Jus Soli*). Except for the presumption against statelessness (where the *Jus Soli* applies in case of doubt), it is incorrect to regard the two principles as mutually exclusive: in varying degrees, the law of a large number of states rests on both.[1] A common special stipulation is that children born to non-nationals who are members of diplomatic and consular missions do not thereby acquire the nationality of the receiving state.[2]

The position as regards naturalization is also important. It has been defined as the grant of nationality to an alien by a formal act, on an application made for the specific purpose by the alien. Hence, it is considered as another mode of acquiring nationality. Although, the conditions for acquiring nationality through naturalization vary from country to country, the residence for a certain period of time would seem to be a fairly universal requisite.

The third category under which, nationality is usually granted is *ex necessitate iuris* which means from the necessity of thing.[3] It is not in all respects satisfactory, since acquisition by marriage, legitimating, and adoption might also be so described. However, the cases to be mentioned are sufficiently clear to justify the concept. For example, there is in the

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[1] The Harvard draft provided that states must choose between the two principles: (1929) 23 *AJILSupp* 1, 27 (Art 3). But there is no legal basis for such a stipulation (cf Weis (2nd edn, 1979) 95); hybrid sets of nationality laws have not attracted criticism as such, provided they address the question of statelessness.

[2]VCDR, Optional Protocol concerning Acquisition of Nationality, 18 April 1961, 500 UNTS 223, Art II; Johnson (1961) 10*ICLQ* 597; ILC *Ybk* 1958/II, 89, 101; VCCR, Optional Protocol concerning Acquisition of Nationality, 24 April 1963, 596 UNTS 469, Art II; ILC *Ybk* 1961/II, 92, 122.

[3] https://dictionary.thelaw.com/ex-necessitate-legis/

legislation of many countries a provision that a child of parents unknown, is presumed to have the nationality of the state where the child is found.[4] In a great many instances it is provided that the rule applies to children born to parents of unknown nationality or who are stateless. The rule as to foundlings appears in the Convention on Certain Questions relating to the Conflict of Nationality Laws, Article 14,[5] and in the 1961 Convention on the Reduction of Statelessness, Article 2.[6]

The thesis paper explains the criteria/ qualification as set out in International Law for grant of nationality and the incorporation of those conditions in Pakistan Citizenship Act 1951 and the interpretation of such provisions by the court. In addition, the paper also elaborates the reasons why the Citizenship Act 1951 has not been implemented in the cases of Afghan children born in Pakistan.

Objectives of the research:

The Federation of Pakistan is under dual obligations to consider the grant of nationality to the Afghan children born in Pakistan: Firstly, the International Law prohibits the statelessness and requires all the signatories, by specifying the condition, to grant the nationality to every such children who born in that state; secondly, this principle of International Law has also been incorporated in the Pakistan Citizenship Act 1951. The question that remains unattended is the implementation of the Act in cases of Afghan children born in Pakistan. Although the law does not consider any bar to grant nationality to the Afghan children born in Pakistan, they are often denied the grant of nationality on ground of

[4]Carens, Joseph H..*Who Belongs? Theoretical and Legal Questions About Birthright citizenship in the United States.* Toronto: The University of Toronto Law Journal, Autumn, 1987, Vol. 37, No. 4 (Autumn, 1987).

[5]12 April 1930, 179 LNTS 89

[6]30 August 1961, 989 UNTS 175

security. The objective of this paper is look to into these excuses and to consider whether they are sustainable in the eyes of law or otherwise.

Literature Review:

The denial of citizenship, by virtue of birth, is also denial of at least fourteen (14) fundamental rights which are protected under the Constitution of Islamic Republic of Pakistan 1973. These rights include the Security of person (Art.9), Safeguards as to arrest and detention (Art.10), Protection against double punishment and self-incrimination (Art.13), Inviolability of dignity of man (Art.14), Freedom of Movement (Art.15), Freedom of assembly (Art.16), Freedom of association (Art.17), Freedom of Trade, business or profession (Art.18), Freedom of speech (Art.19), Freedom to profess religion (Art.20), Provisions as to property (Art.23), Protection of property rights (Art.24), Non-discrimination in respect of access to public places (Art.26) and Safeguard against discrimination in services (Art.27). However, all these rights are exclusively enjoyable by the citizens; whereas the individuals who are not granted citizens cannot enforce their rights. Therefore, to enjoy the basic rights in Pakistan, the issue of nationality becomes highly expedient and relevant.

Pakistan Citizenship Act 1951

Pakistan Citizenship Act 1951 deals with the power of the state to grant citizenship and nationality. Under Section 4 of the Pakistan Citizenship Act, 1951 it is provided that every person born in Pakistan after the commencement of this Act shall be a citizen of Pakistan by birth: Provided that a person shall not be such a citizen by virtue of this section if at the time of his birth: (a) his father possesses such immunity from suit and legal process as is accorded to an envoy of an external sovereign power accredited in Pakistan and is not a citizen of Pakistan; or (b) His father is an enemy alien and the birth occurs in a place then under occupation by the enemy.

The issuance of National Identity card i.e. Computerized National Identity Card (CNIC) is regulated by National Database and Registration Authority (NADRA). NADRA is a body corporate established by the Federal Government in pursuance of Section 3 of the National Database and Registration Authority Ordinance, 2000, NADRA. Under Section 10, it is provided that the Authority i.e. NADRA *shall issue* or renew, or cause to be issued or renewed, in such manner and on terms and conditions, subject *to every citizen* who has attained the age of eighteen years and got himself registered under section 9, *a card to be called National Identity Card* in such form, with such period of validity upon payment of such fee in such form and manner as may be prescribed. Hence, NADRA is legally obliged to issue an ID card to every citizen who has obtained a proper birth certificate (under Section 9) and has attained the age of 18 years. It is also worth mentioning here that NADRA Ordinance does not provide any independent definition of the term "citizen"; instead, it refers us to Pakistan Citizenship Act, 1951 (II of 1951). As such it is provided under Section 2 of the Ordinance that unless there is anything repugnant in the subject or context, "Citizen" means a person who is, or is deemed to be a citizen Pakistan, under the Pakistan Citizenship Act, 1951 (II of 1951).

In various judgments, the superior courts of Pakistan have declared citizenship as the most fundamental of all fundamental rights; therefore, the courts of law must vigilantly protect this right. In this regard, landmark ruling of Lahore High Court reported as ***Umar Ahmad Ghumman v. Government of Pakistan and Others*** **(PLD 2002 Lahore 521, per TassadduqJillani, J)** may be quoted here, "The right to be a citizen is, therefore, a precious right. It is the most valuable right that an individual may have in a State". It was further stated, "The right of citizenship is not an ordinary right. A study of the Constitution of Islamic Republic of Pakistan would indicate that certain rights have been granted to all "persons" residing in the State while some rights are available to only "citizens". For instance

the right be treated in accordance with law (Article 4), right of freedom of movement (Article 15), right of freedom of assembly (Article 16), of freedom of Association (Article 17), of trade (Article 18), of speech (Article 19) and to profess religion and of equality before law and equal protection of law (Article 25) are available to citizens alone. On the other hand right to life (Article 9), right to safeguard against illegal detention (Article 10) and of inviolability of dignity of man (Article 14) are available to all persons irrespective of their nationality or citizenship. The citizen under the Constitution enjoys a special status. The right to be a citizen is, therefore, a precious right. It is the most valuable right that an individual may have in a State".

James Crawford in his book *"Brawnlie's Principles of Public International Law"* discusses various aspects of International Law on the issue of nationality. Part VII of the book is more relevant to the topic, which brings into limelight the "nationality and its related concept" under International Law. In this chapter, the author analyzes the doctrine of freedom of state in the matter of nationality. The criteria for grant of nationality, as set out in the International law, have also been discussed in this chapter by pointing out certain legal and conceptual problems attached with the general principle on the law of nationality. The chapter emphasizes that the law and the rules that regulate the grant of nationality is a subject matter which falls within the domain of state matter, yet the broader criteria have been provided by the International Law that obligates the member states to discourage 'statelessness'.

Gina Clayton and Georgina Firth in their book *"Immigration and Asylum Law"* discuss three different but interconnected concepts: nationality, citizenship and right of abode. The authors have elaborated that while some countries like United Kingdom use the terms 'nationality' and 'citizenship' as synonyms; certain other countries make a distinction between these two terms: the nationality refers to ethnic identity; whereas the citizenship is

regarded as 'citizen' of a certain 'political entity'. The Right of abode, on the other hand, is a right which is granted by state to an individual to live within a territory by virtue of a special status enjoyed by that individual. The paper will thrive to find out whether the present status of Afghan refugees living in Pakistan is that of 'right of abode' granted to certain individuals in UK and whether the children of Afghan refugees born in Pakistan can be granted nationality and citizenship through the process of naturalization.

Authored by Brook Kirkland, the paper *"Limiting the Application of Jus Soli: the Resulting Status of Undocumented Children in the United States"* explores as how limiting the application of International Principle for obtaining the nationality i.e. *Jus Soli* would deprive the children born in United States of their basic rights. The findings of the paper are highly relevant to the situation here in Pakistan in two perspectives: Firstly, the government of United States decided to limit the application of *Jus Soli* after a surge in the wage of terrorism. Advocating that the measures would serve as deterrent to stop illegal immigrants from entering into the territory of US, the US government principally decided to refuse the children born in United States the nationality. Likewise, the decision not to issue nationality to the children of Afghan refugees born in Pakistan came after the law and order situation deteriorated in Pakistan. Secondly, the paper pinpoints that by limiting the principle of *Jus Soli*, the US government has infringed almost all the fundamental rights guaranteed in the US constitution. Similarly, the children of afghan refugees, who born in Pakistan have been deprived of their fundamental rights when they are refused the nationality ignoring their entitlement under *Jus Soli* principle. Although the paper has discussed various implications of limiting the *Jus Soli* on undocumented children, the prime focus of the paper is the security related concerns. However, in my proposed topic, I have endeavored to focus on constitutional and legal aspects of the issue: the legal and constitutional implication of

limiting the principle of *Jus Soli*. In addition, I would also emphasize as how the limitation of Jus Soli in case of Afghan refugees would lead to 'Statelessness'.

Research Methodology:

i. Opinion Analysis

Purpose: the fundamental goal of the opinion analysis is to achieve the goals of the study and address the research questions. Since it is often difficult to propose suggestions to individuals without understanding what they really want, it is imperative that their opinions must be gathered, particularly from educated young people who can play a dominant role in the future.

Details: Via interviews, opinions of students who already have a fundamental understanding of the law and rules regulating the grant of nationality in Pakistan are collected. In this respect, the population includes university students in Pakistan who have basic knowledge or experience in the field. For the opinion study, the sample size is 40. These 40 students are chosen from 02 cities as samples, by purposeful sampling. These students belong to various Pakistani universities including the International Islamic University, Islamabad, National Defense University Islamabad, Balochistan University, Quaid e Azam University Islamabad and Punjab University. The affiliation of the university is, however, not considered a critical condition of the study. Since certain legal terms and technicalities are involved in the understanding the nationality law and legal knowledge in understanding the consequences, the sample is a deliberate sample and is chosen with particular consideration that the respondents already have adequate details.

This argument is very critical and raises debate that is crucial. A sample of 40 students may seem tiny, but it has been taken into account to pick a sample that meets and serves the function of all the above requirements. It would end up in a sample that would be

poorly aware of the subject and the situation by stressing number alone. In addition, it takes more time, energy, and human resources to pick a large number of samples from Pakistan's major universities and conduct interviews with them. A sample size that can provide adequate information and serve the function of the analysis has been selected, taking into account all the determinants.

a. Details on Methodology

It is possible to break the implemented qualitative approach into two sections. These two sections relate to two forms of studies, historical analysis and opinion analysis, which are mentioned above. In order to ensure proper outcomes from the studies that are different in their design, these two aspects of the technique are considered. The Qualitative Historical Analysis Approach (Thies, 2002) was used for historical analysis, while the Three Level Data Encoding Method was used to produce findings for opinion analysis. To evaluate the historical context of Afghan refugees in Pakistan, the Historical Analysis Approach was used, whereas, the Three Level Data Encoding Method has been used for the current opinions regarding the municipal law governing the grant of nationality in Pakistan.

i. Qualitative Historical Analysis

"Qualitative Historical Analysis refers to a scientific methodology using qualitative rather than quantitative measurement and the use of primary historical sources or the interpretations of historians in the production and testing of theory" (Thies, 2012, p. 352). The technique is widely used in political science and international relations studies since the historical and evolutionary history of a theory phenomenon plays a key role in this discipline. In this report, therefore, Qualitative Historical Research is used to examine the historical development of Afghan refugees in Pakistan with particular reference to government policies to monitor their affairs. In addition, the basic parameters considered during the study include adequacy and equitability. Different nationality law provisions have been examined with the

criteria to decide if their implementation is reasonable or fair, adequate sense, sufficient (within a range of 50% to 100%) and fair meaning engaging with all involved in a fair and unbiased manner" (within a range of 0% to 50%) to satisfy clear criteria. These definitions are important since the words are both vague and can imply different uses and viewpoints differently.

ii. Three Level Data Encoding Method

In particular, this approach was used to produce useful, reliable and accurate data from the interviews carried out as part of the study. They were transcribed into electronic format after interviews were finished and data was collected in order to integrate them with the data collected during an online interview. A text analysis was carried out to analyze interview syntax and decode the data determining keywords and phrases, which were basically the ones that were most commonly used by the interviewees. These key words then further analyzed for encoding into suitable categories. In fact, three categories of encoding were carried out:

Primary Level Coding.

Primary level coding was used to divide the data into categories and themes. Considering the nature of the questionnaire, this coding was comparatively easier. Since, the answers to the questions mostly contained four options; it was easier to distinguish the respondents into four categories.

However, to categorize the answers that required further details, they were gauged as per strength of agreement or disagreement. In certain cases, the questions required that the respondents should provide certain levels or range of data, which made it easier to divide the data into different ranges and categories. Moreover, the questionnaire also required the respondents to mention their city, which further made it more feasible to categorize the

responses of the interviewees in their respective cities. In addition, two important themes that the answers encompassed were equitability and adequacy.

Secondary Level Coding.

Secondary level coding, pattern coding, was used to determine the relationship among the categories and themes. For example, some of the patterns observed within the study included: the disagreement shown by the interviewees of the city with lesser percentage of compliance and adherence of government to legal requirement for grant of nationality. The pattern coding, thus, generated the meta-code containing data that determined patterns within themes. These patterns determined how the answers to different questions related to one another and how the later answers were generated from the previous ones.

Third Level Coding.

The third level coding was applied to analyze the results that were generated from the first two levels of coding. The coding, the categorization process and the relationship and patterns among themes were scrutinized to attain rigor and confirmation. The level three coding ensured that the data was ready to use for further analysis and generation of results.

CHAPTER - II: THE DILEMMA OF AFGHAN REFUGEES IN PAKISTAN

The movement of a person from one place to another for a better life condition is called migration.[7] The person who travels is called migrant; whereas 'refugee' has been defined as 'particular kind of migrant'.[8] A refugee under the statute of United Nations High Commissioner for Refugees (UNHCR) refers to a person who is outside of his country owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.[9] The definition of 'refugee' has been extended by the Organization of African Unity to include the person within the definition of refugee, who is compelled to leave his place of habitual residence either due to external aggression, occupation, foreign domination or even seriously disturbance public order.[10]

The Rehabilitation and Resettlement of Afghan Refugees in Pakistan:

Pakistan has remained a major recipient of Afghan Refugee owing to its strategic location and socio-religious ties with Afghanistan. The first influx of refugees from Afghanistan was reported in 1978 when King Mohammad Zahir Shah was overthrown in 1973. Resultantly, more than 1,400 Afghans entered Pakistan as refugee.[11] The available data suggest that the monthly inflow of Afghan Refugees from 1978 to 1983 was more or less

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[7] Oxford Dictionary. Retrieved from https://www.lexico.com/en/definition/migration on 12.07.2020.

[8] Rizvi, Hassan-Askari; "Afghan Refugees in Pakistan: Influx, Humanitarian Assistance and Implications"; JSTOR, First Quarter 1984, Vol. 37, No. 1.

[9] *The New Encyclopedia Britannica,* Macropaedia, Vol. 15, 1980, p. 568.

[10] Rizvi, Hasan-Askari, "The Afghan Refugees"; *The Muslim,* Islamabad: 19 March 1982.

[11] Rizvi, Hassan-Askari; "Afghan Refugees in Pakistan: Influx, Humanitarian Assistance and Implications"; JSTOR, First Quarter 1984, Vol. 37, No. 1.

44118 refugees.[12] In addition, Pakistan also hosted about 2,600,000 Afghan refugees who were displaced as a result of Soviet military intervention in early eighties.[13]

To understand the legal dilemma of Afghan refugees in Pakistan, it is significant to know the dynamics of afghan refugees. The political analyst and well known academia Dr. Hassan Askari Rizvi has divided the Afghan refugees who migrated to Pakistan in five major categories. First, the prominent and rich Afghan families who initially migrated to Pakistan, but left for Europe and other developed countries. Second, the afghan refugees who entered Pakistan along with their movable assets like trucks and started transport business in NWFP (now KP) and Balochistan. Third, among the afghan refugees were also some well-educated who were either attached with teaching profession in Afghanistan or civil administration. Fourth, the afghan refugees who brought with themselves their livestock started working in Pakistan as laborers in agricultural fields. Fifth, the major portion of Afghan refugees consisted of ordinary Afghan who entered Pakistan penniless and in the most miserable conditions.[14]

The most vulnerable among the five categories of Afghan refugees were the fourth and fifth categories. The imminent challenge for the government of Pakistan in relation to Afghan refugees was twofold: the rehabilitation and resettlement.[15]

Afghanistan has witnessed four major influxes in the last five decades. The first of these major influxes caused when Democratic Republic of Afghanistan was established in 1978. The new regime introduced fundamental reforms which resulted in resentment among

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[12] Ibid.

[13] Ibid.

[14] Akbar S. Ahmed, "Resettlement of Afghan Refugees and the Social Scientists," *Journal of South Asian and Middle Eastern Studies*, Vol. IV, No 1, Fall 1980, pp. 77-89

[15] Noor, Sanam, "Afghan Refugees After 9/11"; *JSTOR*; Pakistan Horizon, January 2006, Vol. 59, No. 1 pp. 59-78.

various factions in Afghanistan.[16] To quill the resentment, Babrak Karmal requested Soviet Union for intervention which resultantly led the Mujahidin to wage a war against the foreign intrusion. The war forced many Afghans to flee their country. The second major influx was witnessed following the withdrawal of Soviet Forces when the mujahidin confronted the forces of Najibullah during 1989 – 92. The third and the most important influx of Afghan refugees occurred when Taliban fell in throne. The religious reforms introduced by the Taliban like banning the women from getting education and other strict *Shariah Law* forced many people to flee the country and take refuge in neighboring countries.[17]

Although Afghanistan shares border with China, Turkmenistan, Tajikistan, Uzbekistan, Iran and Pakistan, majority of the displaced Afghans took refuge either in Pakistan or Iran. The reason as why the Afghan refugees chose Iran or Pakistan as their first destination has been explained by Noor Sanam in her paper on "Afghan Refugees". She believes that the choosing of destination by the Afghan refugees is often based on their ethnic connection. Hence, for Shiite Afghan living in the east of the country, Iran is the preferred haven; whereas Pushto-speaking Sunnis find it easier to live in Pakistan where they assimilate without much difficulty. Whatever may be the reason, Pakistan and Iran are the major concentration of the Afghan refugees.[18]According to data compiled by the UNHCR, in September 2001, 26 million Afghans migrated out of which four million took refuge largely in Pakistan and Iran.[19]

The ethnic connection between the people from the both sides of the border is so strong that they move freely on border without any restriction from either side. For example,

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[16]*Dictionary of Twentieth Century World History* (Oxford: OUP, 1997), pp 6-7.

[17] Noor, Sanam, "Afghan Refugees After 9/11"; *JSTOR*; Pakistan Horizon, January 2006, Vol. 59, No. 1 pp. 59-78.

[18] Ibid.

[19] Arthur C. Helton, 'Rescuing the refugees', *Foreign Affairs (Washington D.C.)*, vol. 81, no. 2, March-April 2002, p. 72.

the nomad Afghans known as *Kuchis* and *Powindahs* even do not recognize the existence of any international border between the two countries. They maintain family relations with the other side of border. Hence, in late 70s when Afghan refugees started pouring in Pakistan the number drastically grew from 12,000 Afghan refugees in November 1978 to 462,000 in January 1980.[20] Such ties when existed across the borders, the question for regulating the registration of new born children and their identity become highly significant under International Law.

Open Door Policy:

Pakistan implemented an 'Open door policy' for Afghan refugees, and the influx of refugees persisted in the 1980s. There were also periods of repatriation where it was felt that some normalcy had returned to Afghanistan, as occurred after the Soviet withdrawal. The highest concentration of Afghan refugees in Pakistan remained in the NWFP and Balochistan provinces, largely because of ethnic and linguistic links between the local population and the Afghans.[21] Around 350 'Refugee Tented Villages' (RTV) were built in those provinces. The RTV had basic life necessities, including food, schooling, a pharmacy and a mosque. The office of the Chief Commissioner for Afghan Refugee – now the Commissioner for Afghan Refugees (CAR) – was set up in February 1980 to oversee refugee – related affairs.[22] The 'open door policy' adopted by Pakistan encouraged the Afghan refugee to migrate to Pakistan in high number. In 2001, it was estimated that more than two million Afghan refugees were living in Pakistan, of which 1.2 lived in 203 refugees villages clustered into 127 refugee villages. Out of these, 105 were in the NWFP (now KPK), 21 in Balochistan and 1 in Punjab.

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[20] Beverly Male, 'A tiger by the tail: Pakistan and the Afghan refugees,' in Milton Osborne, Beverly Male et al, Refugees: Four Political Case Studies (Canberra: Australian National University, 1981), p. 38

[21] Edgar O' Balance, Afghan Wars: Battles in a Hostile Land 1839 to the Present *(London: Brassey's, 2002)*, p. 134.

[22] Beverly Male, op. cit., p. 4.

The cold shoulder given to refugee related issues by the international community compelled the Government of Pakistan to review its 'open door policy'. For, the biggest issue confronting Pakistan during the 1990s was the shortage for funding from the international community. In 1995, donor organizations, including the UNHCR and the World Food Program, stopped funding to Pakistan for Afghan refugees, citing 'donor fatigue' as the key reason and claiming that the refugees had become self – sufficient. Of this reason, Pakistan discontinued its recognition of those Afghans as legitimate refugees who entered its territory after 1995. The year 2000 saw another surge of Afghan refugees that was the biggest in four years – over 172,000 arrivals in Pakistan. Islamabad claimed that these refugees should be treated as 'economic migrant' and should be returned as 90% of Afghan territory was peaceful.[23] The cessation of assistance and the rising problems associated with the refugees prompted Pakistan in November 2000 to officially close its border with Afghanistan. The move was opposed by the relief agencies but because of lack of funds, Pakistan cited an inability to accommodate the new arrivals. At this time, Pakistan tried to solve the problem through talks with the Taliban government, and the later agreed to set up camps within Afghanistan and to recover arms from the Pakistani Afghan refugees.[24]

The question whether the Afghan migrants who arrived Pakistan after 1995, were refugees as defined under the International Law or otherwise, was a matter of discontent between the UNHCR and the Government of Pakistan. The Government of Pakistan claiming these migrants 'economic migrants' was insisting for their repatriation through UNHCR.[25] However, the UNHCR, on the other hand, was advocating that these were the 'legal refugees' as they were registered with the office of UNHCR and were the products of the war crimes. To settle the dispute, the Government of Pakistan and the UNHCR agreed on joint screening

[23]*The Statesman* (Peshawar), 10 June 2001.

[24]*The Dawn* (Karachi), 26 July 2001.

[25] The Statesman (Peshawar), 13 June 2001.

of the Afghan Refugees through 30 teams. Nevertheless, an agreement could not be reached between the two on the 'criteria' for the legitimate refugees.[26]

International Law Obligation:

The principle of non-refoulment is contained in the Convention Relating to the Status of Refugees 1951 and its Additional Protocol 1967. It is provided under this International customary law that a refugee cannot be returned or expelled to the originating country. The affairs of refugees world-wide are regulated under this International instrument. However, Pakistan is neither signatory to Convention 1951, nor to its additional protocol 1967. Hence, the Government of Pakistan cannot be forced, under customary international law, to restrain from expelling the Afghan refugees from its territory.

The movement of Afghan refugees and their affairs, in Pakistan, are regulated through the Foreigners Act 1946. In this statutory act, it is provided that all foreigners, without proper documentation and valid visa, shall be subjected to detention and compulsory deportation. The principle of 'compulsory deportation' is incongruent with established customs of the International Law. However, Pakistan cannot be forced to adhere with such principles of International law; as Pakistan is not the signatory to the Convention of 1951. In order to secure the interests of Afghan refugees, UNHCR is insisting the Government of Pakistan to bring reforms in the Act by including the definition of 'refugee' and the principle of 'non-refoulement' through protection status.

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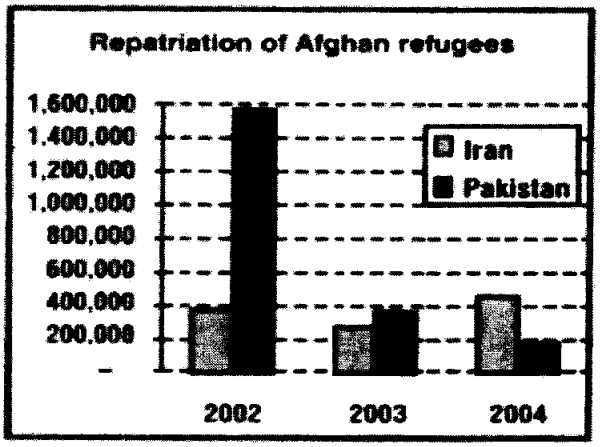
[26] *Dawn* , 3 August 2001.

Figure 1: The Map of Afghanistan

Another important reason for the Government of Pakistan to be reluctant to settle the Afghan refugees is the stigma of militarization attached with these refugees. There was a deep concern from International community for the infiltration of Taliban and Al Qaeda in Pakistan under the guise of refugees; as it would have jeopardized the security of entire region, if the militants were allowed to cross the border. The Indian Security Advisor Barajeh Mishra expressed his deep reservation over the Taliban exodus into Pakistan. The challenging task for the government of Pakistan was to sift out the 'civilian refugees' from the 'militant refugees'.[27]Although the task was very demanding, the government managed the movement of Afghan refugees by settling them in refugee camps



Source: The UNHCR, www.unhcr.ch

Figure 2: Repatrian of Afghan Refugees

[27] http://archives.cnn.com

near the borders. The settlement of Afghan refugees near borders allowed them to mix the local population and establishing conjugal relationships with them. Given that the measures appeased the concerns of International Community, it however gave birth to the most complicated issue: the identity of the children born from such transnational marriages.

There is no denying the fact that the enjoyment of civil and constitutional rights in Pakistan has been attached with the identity. From the purchase of property to the sale of property, from enrollment in the educational institutions to the pursuit of career and from the enforcement of one's right through civil suits to the freedom of movement, everything is conditioned with the proof of proper identity. The valid form of such identity is the Computerized National Identity Card (CNIC) issued by the government of Pakistan.

The Afghan refugees are not entitled to apply for the issuance of CNIC. On the other hand, their sustenance is entirely dependent on such document. Therefore, they started forging the documents and many Afghan refugees succeeded to obtain CNIC through facilitators known as 'agents'. The process of issuing CNICs without proper proof and valid documents enticed the feeling among the local population especially among Balochs in Balochistan that the demography of their province may be changed. Hence, the then Provincial Minister for Industries and Commerce in Balochistan Sardar Muhammad Ali Jogezai warned the refugees for interfering in the internal matters of the country.[28]

The concern of local population with regard to changing the demography by the Afghan refugees and that of the International Community compelled the government of Pakistan to seriously start thinking about the repatriation of Afghan refugees. In 2002, as a result of a massive repatriation about 1.6 million Afghan refugees were repatriated to their country. In order to ensure that repatriation is not forceful rather voluntary, a tripartite

[28]*Dawn*, 17 October 2001.

agreement reached between UNHCR, Pakistan and Afghanistan in Brussels. The stakeholders agreed for 'voluntary and phased repatriation' of Afghan refugees. In addition, the accord also provided for monetary compensation to those being repatriated.[29]

It is astonishing to note that number of Afghan refugee's world – wide is decreasing gradually. Before discussing the reasons and the methods adopted by the International Community to deal with the issue of refugee, it would be pertinent to pinpoint the number of Afghan refugees world – wide. The Figure No. 01 indicates that the number of Afghan refugees at the start of year 2016 was 26 million; whereas it was reduced to 25 million at the end of year 2016.

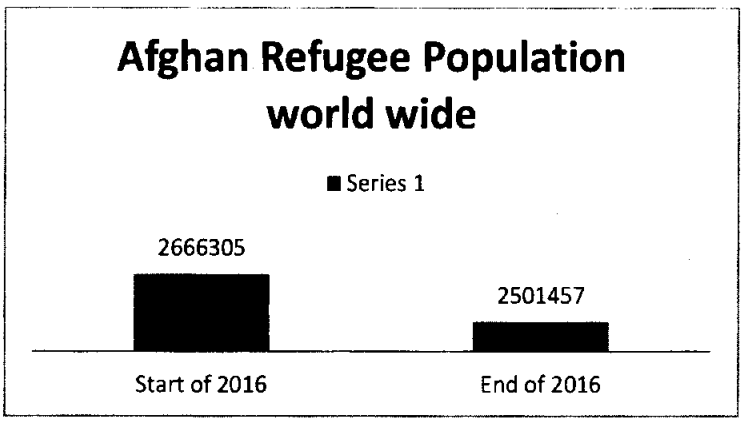


Figure 3: Afghan Refugees world wide

The graph given below shows the major methods of responding to the issue of refugee and causing the graph line to lower. It is given that the most viable procedure adopted by the International Community to deal with the issue of refugee is 'repatriation'. According to the report of UNHCR, nearly 0.3 million Afghan refugees repatriated to their home country during the year of 2016. However, it has to be noted that this repatriation is voluntary and with the consent of the migrants. In addition, the host countries also settled 4518 Afghan Refugees; whereas 1388 Afghan refugees were granted the nationality through the process of naturalization by the host countries in 2016.

[29] Noor, Sanam, "Afghan Refugees After 9/11"; *JSTOR*; Pakistan Horizon, January 2006, Vol. 59, No. 1, p 11.

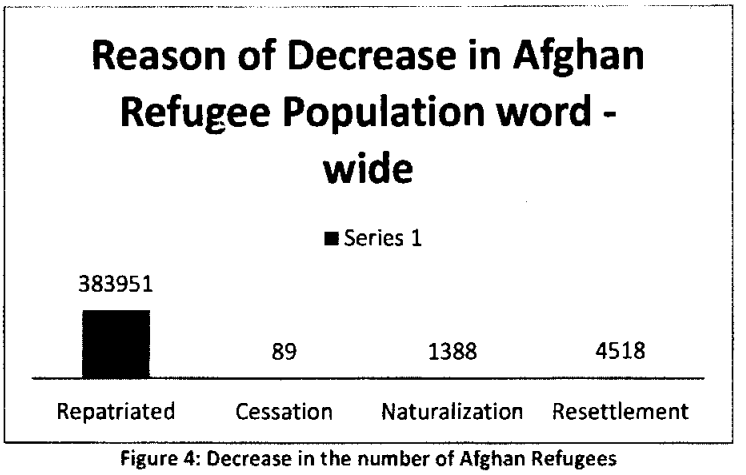


Figure 4: Decrease in the number of Afghan Refugees

The Government of Pakistan with the assistance of UNHCR took extraordinary measures for the rehabilitation of the Afghan refugees. For example, the Afghan refugees who were registered with the government were compensated through monthly stipends. In addition, they were also provided ration on daily basis. The refugees camps established for the rehabilitation of these Afghan refugees were sufficiently staffed. There were dispensaries in the camp and also specialist units like orthopedic and artificial centers. UNHCR also assisted the government of Pakistan in rehabilitation of the Afghan refugees. A veterinary program was launched by the UNHCR and mobile units were established. These veterinary mobile units thrived to provide medical care for the 2.5 million heads livestock which the Afghan refugees brought with themselves from their country.[30]

Primary Schools	405
Middle Schools	5
Vocational Centers	4
Total Number of students in these institutions	69557
Afghan Refugees students admitted to Pakistani universities colleges and schools	623

Table 1: Facilities to Afghan Refugees in Pakistan

Despite the commendable efforts of our government for the rehabilitation of the Afghan refugees, the resettlement of these vulnerable fellows has never been considered

[30] Ekber Menemencioglu, "From Tents to Katchas," *Refugee Magazine (published by UNHCR)*, No. 1, September 1 982, pp

seriously. The failure to resettle such a large population entailed certain social and economic repercussions. For example, some influential Afghan refugees managed to purchase immovable properties in Peshawar late in 1980s. Since there was a ban on purchase of real estate properties by non-Pakistanis, the issue was underlined by the locals. The then Provincial Law Minister of KPK (then NWFP) expressed Government's firm resolve to curb the purchase of real estates by affluent afghan refugees.[31] The government imposed a condition of producing National Identity Card for purchase of real estate properties in order to curb the purchase of properties by Afghan refugees. The measure bore reverse implication; as the affluent Afghan refugees now started purchasing National Identity Card through forged documents and they succeeded to obtain domiciles and Identity cards through 'agents'.[32] Another important problem with regard to Afghan refugee was the birth of their Children in Pakistan. According to the statistics compiled by the UNHCR the 43.55% population of the refugee camps in 1980 comprised of children under twelve; whereas the ratio has not been changed since then.[33]

Percentage of Age Group

21	20	17	59	37	04
492292	468849	398523	1383106	867372	93770

Table 2: Age Group of Afghan Refugees in Pakistan

[31]Interview of the Provincial Law Minister, The Muslim, 8 December, 1.

[32]*FauziaRafiq, "Survey of Buying Property by Afghan Refugees", The Muslim, 27 August, 1983.*

[33] News from UNHCR , No. 4, October- November 1980, p. 6.

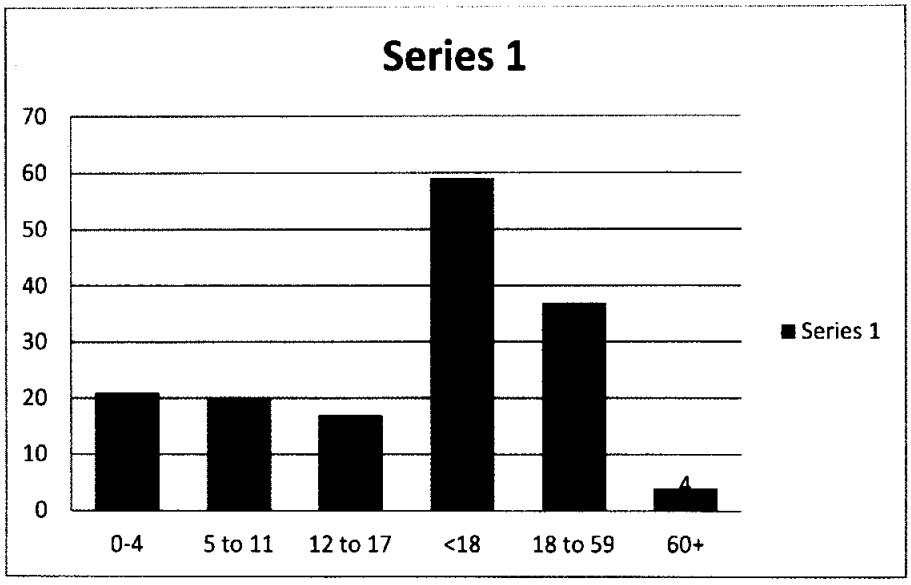


Figure 5: Age Group of Afghan Refugees

The figure is based on the data compiled by the UNHCR. It is depicted that Children (of both genders) constitute the major portion of the Afghan Refugees. It can be seen from the figure that among all the Afghan refugees in Pakistan the refugees below the age of 18 (the age of adulthood) is 59% of the total number of Afghan refugees. Out of these Afghan refugees, the children below the age of 4 year is 21%; 20% of Afghan Refugees is 5 to 11 years; whereas 17% age from 12 to 17 years. The least number of Afghan refugees is above the 60 years which constitutes only 4% of the total migrants to Pakistan.

The figure given below represents the female age group of Afghan Refugees who have migrated to Pakistan. It is depicted in the figure that 50% of female migrant to Pakistan are aged between 5 to 11 years and also the age group of 18 to 59 years. The figure also shows that migrant above the age of 60 years is higher in female as compared to male migrants.

Percentage of Female per age group

48	50	48	49	50	46
1125239	1172124	1125239	1148681	1172124	1078354

Table 3: Female Afghan Refugees in Pakistan

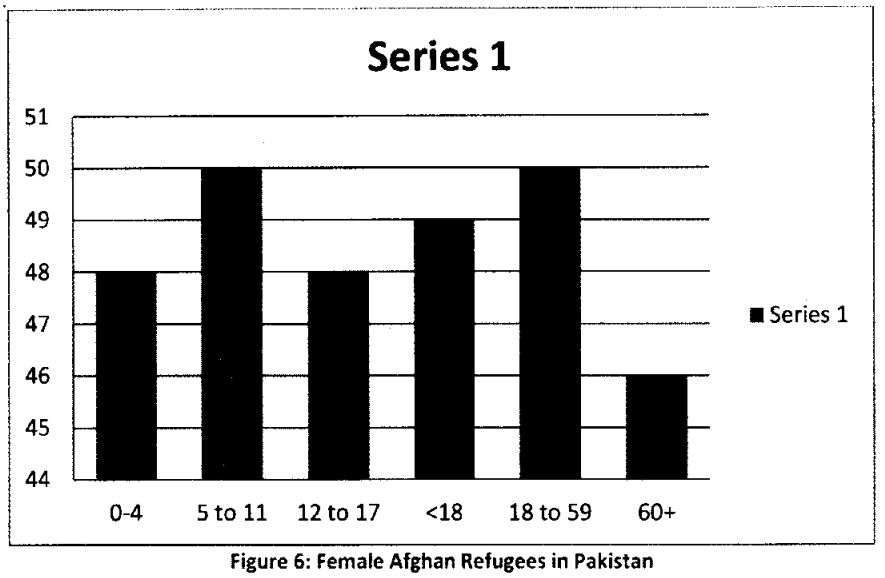


Figure 6: Female Afghan Refugees in Pakistan

Afghan Refugee Census:

To handle the refugee affairs more efficient, the population Census Organization (PCO) conducted the first – ever census of Afghan refugees in Pakistan in February 2005 under an agreement with the UNHCR. All Afghan refugees and migrants who had lived in Pakistan since 1 December 1979 were included in the census. The census results called the Census of Afghan Refugees in Pakistan, released a report in 2005 wherein it was revealed that 3 million Afghans are still living in Pakistan. After 2002, more than 2.5 million Afghans have returned to Afghanistan, which means the number of Afghans remaining in Pakistan in 2002 was 5 million, a figure that was higher than expected at the time. According to the survey, after the tripartite agreement expires, 2.5 million refugees residing in Pakistan want to continue to live in the country beyond March 2006. Eighty percent of them cited the absence of jobs, 60% lack of housing and 40% lack of protection as the main irritants to remain in Afghanistan. The census further reported that 62% of Afghans live in the NWFP (now KPK), 25% in Balochistan, 7% in Punjab and 4% in Sindh. The main ethnic group is Pashtuns, who make up 82% of the total population of Afghan refugees. This also reported that 42% of the

Afghan population was concentrated in camps supported by UNHCR while 58% lived outside the camps.[34]

The Afghan Refugee Population in Pakistan:

The refugee population is estimated by the UNHCR taking into consideration 10 years of refugee recognition. In these 10 years, UNHCR considers 'major increase' and 'major decrease' in the population of the refugees. However, the host countries often through administrative measures such as birth and death registration of refugees or naturalization cause the population to decrease. The administrative measures of the host-countries are ignored by UNHCR in compilation of the data concerning the refugee population.

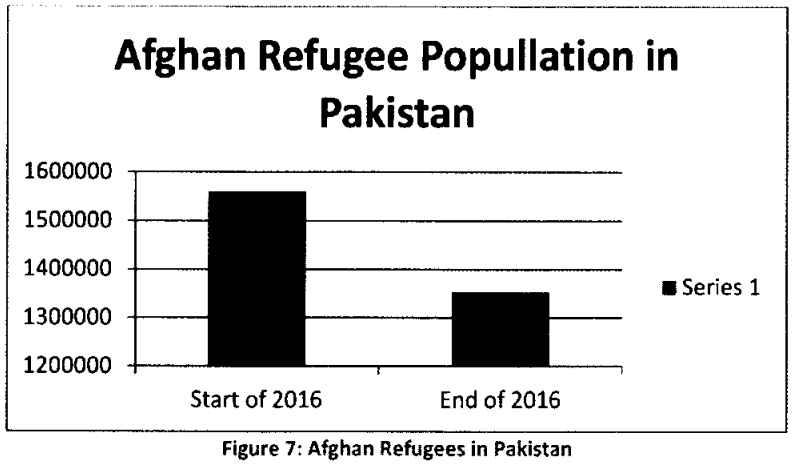


Figure 7: Afghan Refugees in Pakistan

According to the data compiled by the UNHCR, the total population of Afghan Refugees was reported at the start of 2016 was 1.5 million world-wide; which was reduced to 1.3 million with a difference of 2 million. It is very astonishing to note that the major cause of reduction was repatriation; as 0.3 million was repatriated either forcefully or voluntarily;

[34]Zubeida Mustafa, Will they return home?/*Dawn* , 25 May 2005. Also see www.unhcr.org

whereas no Afghan refugee was granted nationality through the process of naturalization. However, 2061 Afghan refugees were settled.

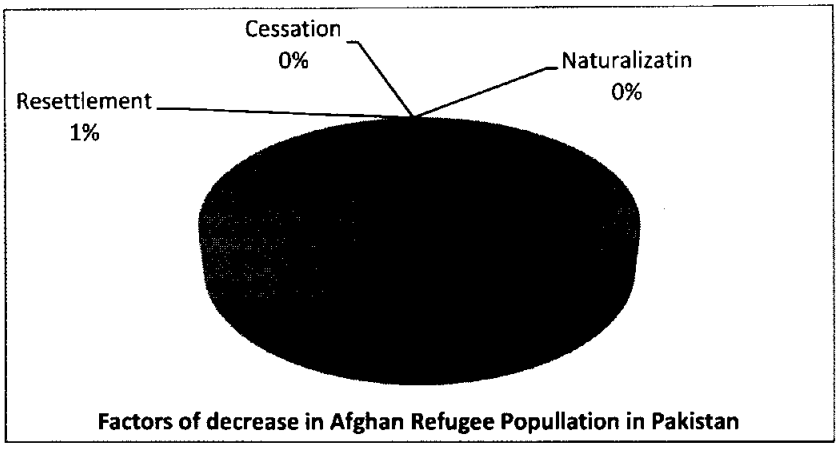


Figure 8: Settlement of Afghan Refugees in Pakistan

The paper at hand stresses that vulnerable Afghan Refugees, especially the children of Afghan refugees who are born are Pakistan can be settled through naturalization. It is revealed in the report of UNHCR that during the year of 2016 Canada was the country that naturalized the highest number of Afghan refugees; whereas Belgium with naturalizing 121 Afghan refugees stands in second at the row. Most surprising aspect of the report was the revelation that even Indian naturalized 79 Afghan refugees and stood as the third country with highest number of naturalizing the Afghan refugees. However, Pakistan despite the claims of having strong social and religious ties with Afghanistan did not grant nationality to even a single person through naturalization.

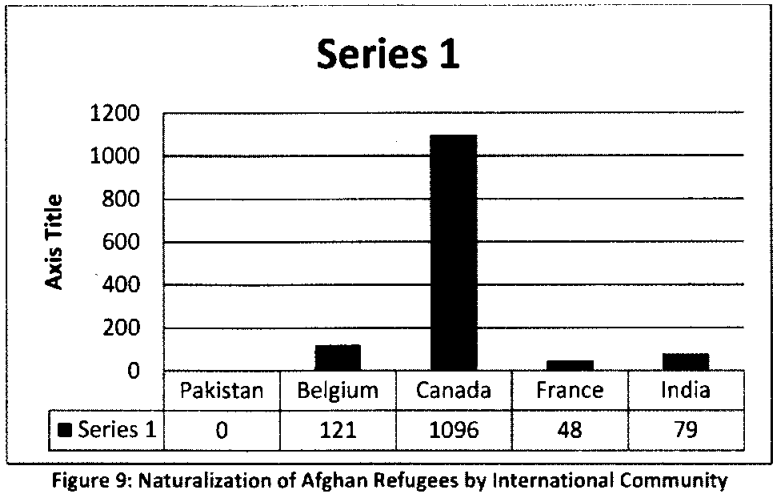


Figure 9: Naturalization of Afghan Refugees by International Community

The children of afghan refugees can be divided into two categories: first, the children who were born in Afghanistan; yet they migrated to Pakistan with their parents as refugees. Second the children of Afghan refugees who are born in Pakistan. The second category is the concern of our study, which can be divided further into two sub-categories: firstly, those Afghan Children whose one parent is at least Pakistani; and secondly the Afghan Children whose both parents are Afghan refugees. The case for the resettlement of the first main category of Afghan Children is very simple as they are not entitled for grant of citizenship. However, the case of Afghan Refugee's Children falling in second category is complicated. With regard to first sub-category in which at least one of the parents of Afghan Children is Pakistani, it is an international practice that they are granted nationality. However, the Afghan Children of second – sub category (a child born in Pakistan with no Pakistani parents) is undocumented and unregistered. The major legal problem arising from the non-registration/ non – resettlement of these children can be discussed as under:

- Transnational marriage is being celebrated between the Pakistan and Afghan Refugees. According to the data available with UNHCR 50% of the total Female migrant from Afghanistan to Pakistan is in the age group of 18 to 59. In addition, another 50% of the Afghan female migrants are between the ages of 5 to 11. Based on the cultural values of Afghan tribes and the Islamic norms which require the

individuals to enter into wedlock timely, there is very high possibility of these Afghan female entering into wedlock with Pakistani male resulting in Transnational Marriages.

- The Afghan children born from the transnational marriages have to follow a lengthy and cumbersome procedure provided in the Citizenship Rule of Pakistan in order to obtain Birth Registration Certificate, Form B and subsequently Computerized National Identity Card (CNIC) as the Birth Certificates are not issued unless the CNIC of both parents are produced before the issuing authority.
- The Afghan Refugee's Children without identity and registration will not be able to get themselves enrolled in the government schools, colleges and universities. Hence, they shall be denied the fundamental rights guaranteed under Article 25 of the Constitutions of Islamic Republic of Pakistan 1973.
- These Afghan Children when grow up in Pakistan shall also be denied the basic rights such to choose a profession of his own choice, the right to be dealt in accordance with law (Article 10 of the Constitution 1973) as they are bared to bring a Case against the Federal Government for the enforcement of their fundamental rights.
- The Afghan Refugee's Children are also condemned with statelessness which is in itself the breach of International Law and policies. A Child born from non-Afghan parent outside the territory of Afghanistan is not entitled to get nationality of Afghanistan under the Constitution of Afghanistan (the relevant law of Afghanistan on this subject shall be discussed in details in subsequent Chapters). Hence, if these children are denied nationality by Pakistan, it will result in statelessness.
- The Afghan Refugee's Children who are born in Pakistan are entitled for grant of nationality by the government of Pakistan based on the principle of '*Jus Soli*'. Limiting or restricting the principle of '*Jus Soli*' is considered a glaring breach of International norms and policies.

CHAPTER - III: INTERNATIONAL LAW ON NATIONALITY

The term 'nationality' is derived from the word 'nation'. Etymologically, the term 'nationality' refers to condition of belonging to a nation; whereas the term 'nation' itself is alien in International Law. On the other hand, the word 'nation', under Municipal Law, means the group of people tied together by race, religion or economic for a common pursuit. Hence, nationality may be defined as a link with state through which an individual can enjoy the benefits of the law of nation.[35] Being a subject matter of state, it is incumbent upon the each state, under International Public Law, to decide as who should be admitted as member of such nation.[36]

The issue related to nationality can only be resolved through legislation by a state; as nationality is a subject that is dealt with under the municipal law. Having a very limited role to play, the International law has only recognized some core principles e.g. *Jus Soli* and *Jus Sanguinis*. Under these recognized principles, if an individual is born in a country of parents who are the nationals of another country, the individual has the right to claim nationality of first country on the basis of *Jus Soli*; and the individual can also rightfully claim nationality of the second country on the basis of *Jus Sanguinis* (nationality by descent). However, it is very important to bear in mind that under International Law practices neither of the country can enforce the claim of an individual when the individual is within the jurisdiction of the other country.

International Practices:

The United States of America is also one of the countries that have recognized both the principles i.e. *Jus Soli* and *Jus Singuinis*. Although the nationality is granted by the

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[35]Oppenheim-Lauterpacht, Vol-I, 5thEdn. Para 291, P. 508.

[36]*Nationality in International Law*; Transaction of Grotius Society; 1942, Vol. 28, Problems of Peace and War, Papers Read before the society in the year 1941, pp. 151-168.

government of U.S by virtue of birth, the Act of Congress of February 10, 1855 (R.S 1933) has also accepted the principle of *Jus Singuinis* for grant of nationality. Under this provision, an individual has the right to claim the nationality on the basis of his father's U.S nationality provided that his father has resided in the U.S.

Based on the international practices, another principle of 'election' has been coined by various countries like U.S.A and British. Under this principle, an individual who is born abroad of parents having the nationality of British or U.S.A has to make a declaration and election at the age of attaining majority whether he wants to divest himself of his parent's nationality or make an allegiance to the country of his parents. It is provided in the Section 6 of the Act of March 2, 1907 that an individual who is born broad of American parents must register himself with the American Consulate and make a declaration of allegiance to the Constitution of U.S.A at the age of attaining majority.

Table 4: International Practices for grant of nationality

1	U.S.A	✓	✓	✓	
2	U.K	✓	✓	✓	
3	Germany	×	✓	×	
4	Austria	×	✓	×	
5	Australia	✓	✓	✓	
6	Hungary	✓	✓	×	
7	France	×	✓	×	
8	Pakistan	✓	×	✓	
9	Afghanistan	✓	×	✓	

The Continental Europeans are the countries where the law of nationality of is regulated under the principle of *Jus Singuinis*. For example, under Article 8 of the French Civil Code, an individual born of French parents whether inside France or outside, is considered French and the individual can rightfully claim nationality of France. Similar law has been enacted in Bulgaria. Under Section 2 of the Nationality Law of Sweden (enacted on 1st January 1925) an individual whether born inside or outside of Sweden of Swedish parents are also Swedish. However, if an individual is born of alien parents inside the Sweden, the individual can formally elect the Swedish nationality at the age of twenty-two. Germany, Austria and Hungary have even adopted stricter laws regulating the issue of nationality. Under their respective laws of nationality, the nationality can only be granted through descent *(Jus Singuinis)*; whereas no individual can be granted the nationality on the basis of their birth right. Article 1 of the Italian law of nationality enacted on June 13, 1912 also recognizes the principle of *Jus Singuinis* and provides that an individual born of Italian parents is Italian. The law of nationality in Japan is also based on *Jus Singuinis* with the only variation that Japanese born in certain countries shall loose his Japanese nationality either if their parents are domiciled in that country or if their parents renounced their Japanese nationality.

There are countries on the other hand that have recognized the principles of *Jus Soli* as well as *Jus Singuinis*. For example, under the law of nationality of Brazil (14 May, 1908) an individual can rightfully claim the Brazilian nationality either if he is born in Brazil or born of Brazilian parents. However, the grant of nationality is regulated by certain conditions there.[37]

Having been failed to codify the principles concerning the grant of nationality, the International community has only introduced either some principles like 'election' within

[37] Flournoy, Richard W. Jr. *International Problems in Respect to Nationalit* ; Proceedings of the American Society of International Law at Its Annual Meeting (1921 – 1969), April 22-24, 1926, Vol. 20 (April 22-24, 1926), pp. 59-66. Available at http://www.jstor.com/stable/25656706

their municipal law or rules that drastically contrast from other countries. To end the anomalies in international practices relating to grant of nationality and to introduce uniform principles, the International Law Association took a pragmatic step in September 8, 1924 by tabling an 'International Code' in the form of Model Statute. The proposed model reemphasized on the ratification of the International Code concerning the issue of nationality by the states. It is important to note that the model was solely based on the principle of *'Jus Soli'* and it was an invitation for the International Community to adopt the principle of 'Jus Soli' as their touch stone of their nationality law.[38]

There are two main reasons as why the countries like European Continentals base their nationality law on *'Jus Singuinis*". Firstly, the countries that believe in the purity of blood always emphasize on the principle of *'Jus Sanguinis'*. For example, the Israeli government pretends the Israeli nation as supreme; as such the nationality in Israel is being regulated through the principle of *'Jus Sanguinis'*. Secondly, the countries that want to dominate the rivalling countries through manpower also promote the principle of *'Jus Sanguinis'*. For example, France in order to dominate through man power emphasizes on the principle of *'Jus Sanguinis'*.[39]

Nevertheless, it is very pertinent to bear in mind that over emphasis of *'Jus Sanguinis'* has resulted in many international problems. For example, the United States of America bases its law of nationality on *'Jus Soli'* as such the individual born of French parents are granted the U.S nationality; whereas the French law of nationality is based on *'Jus Sanguinis'* and the

[38] Ibid.

[39] Shachar, Ayelet. "Children of a Lesser State: Sustaining Global Inequality Through Citizenship Laws." 2003. http://www.jstor.com/stable/24220081

child born of French parents is considered as French. In this situation, if a child is born in America of French parents will never be able to visit France as American.[40]

Individual is considered as the object of International Law. It is the nationality through which an individual can claim the benefit of International Law. In other words, in order to claim any protection available under International Law, the individual has to prove first his nationality. Hence, the individuals who are either deprived of their nationality or stateless cannot claim any protection of their fundamental rights under International Law.[41]The question as to whether the question of nationality being subject matter of state should be left unattended by the Public International Law has been debated by the experts of International Law. Individual is the thread that runs through the fabric of state which is why C.B. Fawcett in the New Commonwealth Quarterly of January 1942 has defined state to mean 'group of humans based on the civilized needs.' Stressing more on the value of individuals, Professor Julian S. Huxley has denounced such concept of state that degrades the individuals but glorifies the state and says that a state which is erected into something of higher value than the individuals who compose it, is false and dangerous connotation of state. In nutshell, Public International Law cannot leave an important issue like nationality on the state as the public international law is the branch of law that regulates the relations of states; whereas the state is composed of individuals; as such the individual is the object of Public International Law. In the modern concept of International Law, an individual is considered the member of the world community; whereas nationality is a label attached to every individual only for identification purpose. Being a member of world community, an individual is justified to call for protection of his rights by the community; as such the duty to

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[40]Carens, Joseph H..*Who Belongs? Theoretical and Legal Questions About Birthright citizenship in the United States.* Toronto: The University of Toronto Law Journal, Autumn, 1987, Vol. 37, No. 4 (Autumn, 1987).

[41]Oppenheim-Lauterpacht, Vol-I, 5thEdn. Para 291, P. 508.

protect is delegated by the world community to the group or the state of whom the individual is a member.[42]

From the modern definition of state, it can be ascertained that individual is the soul of every state. Being the soul, all the individuals have dual interests in the International Law: direct and indirect. The indirect interests of the individuals are always protected by the International Law through the medium of nationality; whereas the direct interest is the matters of individuals directly dealt by the International law. The role of international law also becomes highly relevant in situation where a state intends to severe or refuse to grant nationality. Since nationality links the individual with the International Law and enables it to claim protection, the individual should be allowed to invoke the international law in situations where this links is distorted by the state.[43]

Enforcement of International Rights: by state or by individual?

It has been established so far that 'nationality', under Public International Law, is a link that connects the individual with the International Law. There are three recognized modes establishing this link: firstly, the nationality can be based on the birth right i.e. *Jus Soli*; secondly, the grant of nationality can also be based on descent i.e. *Jus Sanguinis*; and thirdly an individual can also be granted through naturalization by specifying the period of stay within the jurisdiction of a state. Although the first two modes of acquisition of nationality are efficient, there are certain reservations attached with the mode of acquisition of nationality through naturalization. It has been validly argued by some critics that an individual who has been naturalized may still be reluctant to associate himself with the

[42] Flournoy, Richard W. Jr. *International Problems in Respect to Nationalit* ; Proceedings of the American Society of International Law at Its Annual Meeting (1921 – 1969), April 22-24, 1926, Vol. 20 (April 22-24, 1926), pp. 59-66. Available at http://www.jstor.com/stable/25656706

[43] *Nationality in International Law*; Transaction of Grotius Society; 1942, Vol. 28, Problems of Peace and War, Papers Read before the society in the year 1941, pp. 151-168.

country by conduct.[44] Hence, these individuals may have been divested of their nationality through denationalized. However, it has to be kept in mind that while divesting the individual through denationalization such individual should not remain stateless; rather he should be reverted to his previous nationality.[45]

To discuss the issues relating to nationality, a conference was held in 1930 at Hague on the progressive codification of the International Law. The conference through its designated committee, proposed three major solutions for the issues pertaining to nationality: Convention was proposed to be adopted in order to resolve the questions concerning the conflict of Nationality Law; secondly, a protocol relating to the military obligation with regard to double nationality; and finally, another protocol was proposed to be adopted concerning the issue of statelessness. Although the Committee did not reach to a uniform solution, it did persuade the High Contracting Parties to agree: firstly that every person should have one nationality; and secondly that all the states must thrive for ideal situation i.e. the abolition of statelessness.[46]

Professor Lauterpacht has argued that Hague Convention 1930 did identify an important problem concerning the nationality: the statelessness.[47] He argued in his speech that Convention did away with the typical cases of statelessness especially with the Status of Aliens Act 1933 of the British that dealt with the statelessness of married woman.

The International Court of Justice defined nationality in the famous Nottebohm case as a 'political relationship with a socio-economic link between life, desires and feelings, as

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[44]Flournoy, Richard W. Jr. *International Problems in Respect to Nationalit* ; Proceedings of the American Society of International Law at Its Annual Meeting (1921 – 1969), April 22-24, 1926, Vol. 20 (April 22-24, 1926), pp. 59-66. Available at http://www.jstor.com/stable/25656706

[45] Ibid

[46]*Nationality in International Law*; Transaction of Grotius Society; 1942, Vol. 28, Problems of Peace and War, Papers Read before the society in the year 1941, pp. 151-168.

[47] Ibid.

well as shared rights and duties. The German Constitutional Court has defined nationality as the legal status which determines the membership of a political community: "Nationality is, on the one hand, the legal prerequisites for equal citizenship, which implies equal political obligation, and, on the other, equality of democratic rights, which in democracy is the primary source of legitimacy." [48]

Moreover, the state has ceased to be the prime guardian of a person's rights. There are numerous international agreements and treaties allowing for the freedom of a citizens to lodge grievances against human rights abuses at a geographical and global level before foreign bodies.[49]

Consequently, the definition of diplomatic security was dismissed as outdated based on the myth of countries that safeguard their own interests by defending their citizens (Garcia-Amador 1958: 421, 437). Dugard correctly rejected this presumption as excessive in his first paper on diplomatic security. A state's exercise of diplomatic security remains an important weapon for successfully exercising the freedoms and human rights of an individual against another state. At international level, diplomatic security should not only be more successful than grievances to a foreign body. For certain cases, it can be the only viable method to enforce the human rights of a person. Once again, nationality has not lost its vital position as a State's legal duty for diplomatic security, while diplomatic security may be applied to non-nationals under extraordinary circumstances.

Citizenship of the European Union has also led to a somewhat altered identity view. The definition of citizenship has traditionally been defined as the incremental substitution of key elements of Member State nationality. Union citizenship is no longer restricted to

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[48] Decisions of the German Constitutional Court, vol. 83, 37, 51.

[49]Carens, Joseph H..*Who Belongs? Theoretical and Legal Questions About Birthright citizenship in the United States.* Toronto: The University of Toronto Law Journal, Autumn, 1987, Vol. 37, No. 4 (Autumn, 1987).

economic liberty, but instead means political freedoms and housing privileges – though in a small degree – that are largely independent of the conventional provisions of international law.[50]

International Law & Nationality:

Under Article 15 (1) of the Universal Declaration of the Human Rights everyone has the right to nationality. It was correctly pointed out that this Article does not specify the conditions according to which a person is entitled to a particular nationality (de Groot 2001: 67). State history does not offer much support to the assumption that the conventional definition of the nationality as a constitutional prerogative of the state is substituted by a free option of an individual to decide his or her fate as member of a social group legally established by nationality law.

According to an advisory opinion of the Inter-American Court of Human Rights, the right to nationality must be considered an intrinsic human right and States are defined in their responsibilities to guarantee complete respect of human rights through their powers to regulate matters affecting nationality.[51] Regarding migrant workers and their families, there is no such clause in the Treaty yet. Nevertheless, the latest trend by the European Union indicates a strong propensity, either *ex lege* or depending upon demand, to give those of citizens the right to gain nationality. Article 6 (3) in compliance with the European Convention on Nationality (ECN), domestic legislation shall contain laws authorizing foreigners to be naturalized lawfully and habitually in the territories of a country state. For naturalization, the maximum time of residency that will be required is period of ten years.

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[50] Flournoy, Richard W. Jr. *International Problems in Respect to Nationalit* ; Proceedings of the American Society of International Law at Its Annual Meeting (1921 – 1969), April 22-24, 1926, Vol. 20 (April 22-24, 1926), pp. 59-66. Available at http://www.jstor.com/stable/25656706

[51] See Amendments to the Naturalization Provisions of the Constitution of Costa Rica, OC-4/84, Human Rights Law Journal 1984, vol. 5, p. 14.

This is the same as in Europe, where most countries have five to ten years' residency. Furthermore, additional justifiable naturalization requirements may be required, especially in terms of language, lack of criminal record, and the capacity to earn a living.[52]

Refugees:

Article 34 of the Geneva Convention 1951 provides that states shall facilitate as far as possible the assimilation and naturalization of the refugees. Although the article does not establish an individual right, it does obligate the state to facilitate the naturalization of the refugees. According to the interpretation of German Federal Administrative Court Article 34 implies a directly applicable obligation which entitles the refugees to rely upon before the administrative authorities and courts applying for nationality.[53]It has been agreed by the jurisprudents that naturalization of refugees is a state discretion. However, the German Federal Court has subjected this discretion to the protection of refugees. According to the German Court, the application for naturalization can only be refused by a state if the predominant public interest is against the acceptance of the application. In nutshell, the German Court has held that refugees can only be protected if the process of their nationality is regulated properly.[54]

The Council of Europe Parliamentary Assembly proposed promoting the acquisition of nationality for young migrants if they are born or complete the greater part of their education in their region.[55] Such changes have been taken into account in the laws on nationality in Chapter III of the European Convention on Nationality. States Parties in compliance with Article 6 (4) shall make it possible for people who were born on their

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[52] See ECN, Explanatory Report, 177.

[53]Explanatory Report, p. 8

[54]See Federal Administrative Court, vols. 45, 47, 49; vols. 75, 86, 89; see also Administrative Appeal Court of Bremen of 18 May 1999, NeueZeitschriftfu¨rVerwaltungsrecht-Rechtsprechungs-ReportVerwaltungsrecht 2000, 58.

[55] Recommendation 841 (1978), in: Council of Europe Achievements, 2000, p. 80.

jurisdiction and reside legitimately and habitually there and people who are lawfully and habitually territory to obtain nationality under their internal laws for a period of time beginning before the age of eighteen, leaving that period to be determined by the internal law of the state party concerned. Nevertheless, the text and formal history as well as the general concepts surrounding the acquisition of nationality indicate that the criteria for simplification of customary law have not yet modified, which means that migrant workers and their heirs, unless those conditions are complied with, have an individual right to become citizens of the host country. Article 6(4) further allows the State bodies, for individual belonging to the groups of persons specified under parentheses, to have reasonable provisions for the acquisition of nationality. The explanatory text, however, makes it clear that States parties 'maintain authority to give these applicants their nationality.'[56]

The most relevant question is what obligation Article 34 of Geneva Convention imposes upon a signatory state. The plain reading of the provision reveals that it obligates the state only to facilitate the naturalization. Another connecting question is as what rule is to be applied while regulating the nationality of refugees through naturalization. Article 34 does not provide any modus operandi, as such the states can regulate the naturalization of refugees in accordance with their customary domestic law. The only limitation having been imposed by Article 34 is the requirement of taking into account the particular situation of a refugees while assessing the application for naturalization.

Children:

Children have been given a special status for their nationality under International law. Under Article 6(4) of European Convention on Nationality, special status has been given to the children and they have been divided into following three categories:

1. The children who are born in a territory and residing there lawfully and habitually;

[56] Explanatory Report, p. 8.

2. The children who are born of parents who are nationals of the particular country; and
3. The children who are adopted by the national;

What is the implication of the Article 34 of Geneva Convention 1951 in view of the Article 6(4) of ECN is the question that is very important to be answered? There are various rulings of the courts wherein it has been held that the state is under obligation to facilitate the naturalization of refugees; whereas children (of refugees) have been given a special status. The Administrative Court of Germany has held that while applying the domestic law during the assessment of naturalization, the particular situation of the refugee is to be taken into account. Hence, the special status of children requires the state to ensure the favourable conditions for the acquisition of the nationality in respect of the children. These conditions include the reduction in the required length of residence, less stringent language requirements, an easier procedure, lower procedural fees.[57] In nutshell, facilitation implies making the acquisition of nationality significantly easier than for foreigners generally.

Another important aspect of nationality under the International Law is the human rights implication of deprivation of nationality. The effect of nationality law on human rights has historically been acknowledged most prominently in the Treaty Protections for nationality impairment and deprivation. Although lack and poverty are still widely viewed as a concern by states, the limits of such power have been recognized early. Article 15 of the Universal Declaration of Human Rights already states that the right to change one's nationality shall be prohibited arbitrary deprivation, or refusal.

Following from the obligations to be adhered while assessing the naturalization of refugees, the International Law treaties also require the state to ensure the prohibition of the discrimination. Under Article 26 of the UN Covenant of Civil and Political Rights provides

[57]Explanatory report, p. 8

that the law 'shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. Art. 26 is interpreted as a clause precluding the legislation and administration from introducing arbitrary discrimination or differences in treatment without any objective justification whatsoever.[58]

While, as such clauses often exist in the Treaties on nationality matters, the scope of this clause to nationality law can be somewhat vague, there is no suggestion that Article 26 is necessarily inapplicable to legislation, such as that privation individuals from their nationality. Nonetheless, in granting nationality by naturalization, some of the grounds mentioned in Article 26 that logically explain discrimination in so far as they are used to distinguish ''more strongly affiliation'' with the citizens of the State concerned than with other states that are ''value system and interest'' and ''more closely connected, historically, culturally and spiritually'' (Hall 1999: 593) following the quotations to the Inter-American Court of Human Rights on proposed amendments to the naturalization provisions of the Constitution of Costa Rica.[59]

According to the advisory opinion of the Permanent Court of International Justice rendered in the case of Tunis and Morocco in 1923, the questions of nationality are reserved domain.[60] However, it has to be noted that the state discretion is subject to various international law limitation and restrictions. For example, a set of restrictions follows from definitions of human rights and similar principles long before human rights entered the field of international public law. The Hague Convention of 1930 contained provisions on the

[58]Capotorti, in 1982 ECR 3927, 3943, case 13-28/82.

[59]4th Advisory Opinion of 19 January 1984, 1984 Human Rights Law Journal 161, p. 173.

[60]Publications of the Permanent Court of International Justice (PCIJ) series B no. 4, 24.

reduction of statelessness. Expatriation was therefore not intended to lead to denaturalization; whereas expatriation was not intended to lead to denaturalization, unless the person concerned possessed or needed another nationality. Guidelines on the nationality of women as a result of marriage, dissolution of marriage or a change in the nationality of their husband were laid down in subsequent international treaties and Council of Europe guidelines. The rights of children of unknown or stateless parents and founding to obtain the nationality of the birth state or the state in which they were discovered were already laid down in Hague Convention 1930. All these treaties conventions and guidelines have to some degree affected current international law on the acquisition of nationality, although as the European Convention on Nationality points out, the principles and procedure of acquisition methods and the loss of nationality vary greatly.

Jus Soli or *Jus Sanguinis*?

The acquisition of nationality, either by birth *(Jus Soli)* or by descent *(Jus Sanguinis)* is basically the two criteria that have been recognized by the customary international law as the bases for the acquisition of nationality.[61] According to the states' practices these two criteria can either be used cumulatively or in association with any other principle.

It is important to note that some systems including the nationality systems of Afghanistan the acquisition of the nationality has been limited to the nationality of the father. Being in derogation of Article 26 of the Covenant on Civil and Political Rights which requires the nationality law to remove any discrimination based on gender, the European

[61] Carens, Joseph H..*Who Belongs? Theoretical and Legal Questions About Birthright citizenship in the United States.* Toronto: The University of Toronto Law Journal, Autumn, 1987, Vol. 37, No. 4 (Autumn, 1987).

states have accordingly adapted their nationality law accordingly by extending the *Jus Sanguinis* to the mothers as well.

In *Jus Sanguinis* principle the most perplexing issue arises in cases of mixed marriages in order to determine as to which parent a child should acquire the nationality from. According to Recommendation 1081 of the Council of Europe's Parliamentary Assembly regarding problems of nationality in mixed marriages[62] the children born of mixed marriages have been made entitled to the nationality of both parents. The states' practices also noticed a shift in attitude from the 1998 Recommendation made by the Council of Europe Committee of Ministers Resolution 7713 which propounded the insertion of a clause in national legislation for avoiding the dual nationality.[63] However, the implied change in the wording of the later Recommendation together with the Article 14 of the European Convention on Nationality suggests a considerable shift of attitude by the member states of European Union towards acceptance of dual nationality. The member states have been made obligated under Article 14, para. 1 ECN to allow the children to retain dual nationalities. No reservation so far seems to have been entered against this provision by any contracting state.

Jus Soli is another recognized and established principle of conferment of nationality. The second protocol amending the 1963 Convention on the Reduction of Cases of Multiple Nationality has implemented a rule whereby nationals of contracting party may acknowledge dual nationality, acquiring the nationality of another contracting party on whose territory they were either, born and resided or were ordinarily resident for a certain period of time. Although the emphasis is on broader recognition of dual nationality, the protocol is focused on the assumption that migrants who have settled permanently in Council of Europe Member States, especially in the case of second – generation migrants, will acquire the nationality of

[62]See Council of Europe Achievements, p. 97.

[63]Council of Europe Achievement, p. 27.

the *ex lege* host state. However, the second protocol did not attract the attention of member states and few states ratified the same by upholding that an obligation to grant *ex lege* acquisition at birth is only provided for children must fulfill two conditions: firstly, they must have been born on the territory of a contracting state; and secondly they had not acquired another nationality at birth.[64]

The application of the principle of *Jus Soli* has been made subject to certain limitations and restrictions. Firstly, the Vienna Convention on diplomatic relations of 18 April 1961 provides the rule that children of persons with diplomatic immunity do not acquire the nationality of the state where they are born.[65] Secondly, the children of persons exercising official duties on behalf of a foreign government have also been excluded from grant of nationality on *Jus Soli* principle. Thirdly, the application of *Jus Soli* principle has also been restricted in relation to persons having illegally entered the territory or having entered only for the purpose of temporary stay. The case of Ireland, a traditional Jus Soli country, is very relevant. In reaction to the European Court's judgment in the Chen case, Ireland voted by a clear majority in a referendum for a restriction of the *Jus Soli* rule to persons possessing a residence permit.

Another relevant issue within the sphere of nationality law is the conferment of nationality of spouses. The international practices suggest that there is no automatic conferment of the nationality of other spouse. It was clarified in the Resolution of Council of Europe 1977 under the title of nationality of spouses of different nationalities.[66] The council confirmed that both the genders should be treated equally in conferment of nationality of

[64] Article 6 of European Convention on Nationality.

[65] See art. 2 of the Optional Protocol concerning acquisition of nationality to both Conventions, UNTS vol. 500, p. 223; UNTS vol. 596, p. 469.

[66] Resolution (77, 12), Council of Europe Achievements, p. 26.

other spouse. It was further recommended that conferment of nationality upon husband or wife should be made under privileged procedure.[67]

Naturalization:

Naturalization, meaning the granting of nationality through a formal act to an alien, is also widely recognized as a form of nationality acquisition. There are many reasons for naturalization, ranging from service to residence for a state or ethnic or other group affiliations, which is the most common reason for voluntary nationality acquisition. Municipal rule is special, not only in terms of the requirements for naturalization to obtain nationality, but is often distinguishes between naturalization as a legal right naturalization by choice with growing awareness of the nationality's human right consequences, there is clearly a trend in most European states to grant these categories of foreigners by naturalization. The European Convention on nationality is careful not to interpret any language as a valid individual right to obtain nationality for the individual referred to in Article 6, paragraph 4. However, the obligation to facilitate the acquisition of nationality must have some connotation of individual right since Article 12 of the Convention requires that each party ensure that decision concerning the acquisition, preservation, loss, recovery or recognition of their nationality shall be subject to administrative or judicial examination in compliance with their internal law. That does not, of course, amount to a change in the substance of the obligation of the obligation set out in Article 6. It does, however, mean that state power cannot be treated as unrestricted and that individuals are entitled to challenge a decision taken on such grounds.

[67]For a predecessor recommendation focusing on the nationality of married women, see Recommendation 519/1968 of the Consultative Assembly of the Council of Europe recommending the right of a woman to acquire the nationality of her husband, see Council of Europe Achievements, p. 70.

The criteria used by states to confer nationality by naturalization have occasionally given rise to conflicting nationality claims. It is quite clear that certain criteria, such as prolonged residence, marriage, adoption and other types of particular connections, including immigration with the intention of staying permanently create sufficient grounds for nationality acquisition. Occasionally, disputes occurred in connection with the right of states to exercise diplomatic immunity for such individual son the basis of temporary residence with an individual intention to interact with a state. The International Court developed this theory of a genuine link in the famous *Nottebohm* case as a requirement to exercise diplomatic protection against other states in favor of its nationals.[68]The court needed a genuine relation between life, interests and feelings, along with the life of mutual rights and duties, as precondition for filing a claim for national that is internally recognized. Nevertheless, it made it clear its principle genuine relation in no way restricted the right of states to lay down the rules regulating the granting of their own nationality. The court argued: 'the reason for this is that, until now, the complexity of demographic factors has made it difficult to achieve any general agreement on the rules relating to nationality, while the latter affects international relations by its very nature. It has been suggested that the best way to put such rules into line with the various demographic circumstances in different countries is to leave the establishment of these rules to each state's competence. At the other hand, a state cannot say that the rules it has thus set have the right to be accepted by another state unless it has acted in accordance with that general objective of recognizing the legal bond of nationality with the genuine connection of the individual to a state which assumes the defense of its citizens through protection against other states.[69]

[68]ICJ Report 1955, p. 1 f

[69]ICJ Reports 1955, 23.

In the wake of this decision, there has been much discussion in jurisprudence and literature on the function of a genuine requirement for connection as a restriction on the freedom of states to regulate nationality. It is also argued that, as matter of fact, a state should only give its nationality to those individuals associated with the state by a certain relation recognized in the state procedure. In 1952, the German Federal Constitutional Court held that a state must confer its nationality only on individual with real close links to it.[70] Other German federal courts ruled that an arbitrary conferment of nationality without recognizing the existence of widely accepted relations constitutes a breach of public international law.[71]

A survey of literature and state practice shows that conflicts about nationality issues between states arose primarily in the context of involuntary or *ex lege* naturalization of certain categories of individuals. The United States has protested against naturalization b Latin American states of individuals who have been naturalized solely on the grounds of acquiring or residing in the territory for a period of time. In the form of collective forced naturalization under Nazi rule, German courts have ruled that these naturalizations constitute a breach of public international law in the absence of any clear relation with the German state. Furthermore, it is widely accepted that an occupying power must not confer its nationality on the inhabitants of the Occupied Countries to the rules of the law of war.[72] It is also frequently believed in the literature that a state will surpass its competence by naturalizing on the basis of a specific political or religious belief or association a certain group of individuals.

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[70]Decisions of the Federal Constitutional Court, vol. 1, 322, 329; see also Schnapp&Neupert 2004: 167; Hannappel 1986: 26.

[71]Decisions of the Supreme Court, vol. 5, 230, 234

[72]See art. 52-56 of the 1907 Hague Regulations on respecting the customs of war on land.

CHAPTER - IV: MUNICIPAL LAW ON NATIONALITY

a. Municipal Law of Pakistan:

The term 'Citizens' has not been defined clearly. Although it is provided in Article 260 of the Constitution of the Islamic Republic of Pakistan that citizen means the citizen of Pakistan as defined by the law, yet the Constitution has not clearly defined the term. Rather the constituent Assembly of Pakistan has been obligated to define the term. In exercise of such power, the legislation, in Pakistan, approved the Citizenship Act of Pakistan in 1951. The acquisition of the nationality is dealt under Pakistan Citizenship Act 1951. There are four modes of acquisition are provided in the Act: (a) by virtue of birth (Section 4 of the Act); (b) by virtue of descent (Section 5 of the Act); (c) by migration (Section 6 of the Act); and finally by naturalization (Section 9 of the Act).

It is pertinent to discuss the historical background of Citizenship Act 1951. In consonance with the obligation contained in Article 260 of the Constitution of Islamic Republic of Pakistan whereby the legislation was obligated to define the term 'citizen', the Select Committee on Citizenship Bill 1950 observed the following facts:[73]

- According to the Interim Report of the Basic Committee, citizenship and its modes of acquisition should be the subject matter of the law that should be made exclusively by the Central legislation;
- As reported and recommended in the report of Committee on Fundamental Rights, the acquisition and loss of the citizenship should be within the competence of the future legislation of Pakistan.

[73]Gazette of Pakistan, Extraordinary, 28.09.1950.

- The Naturalization Act 1926 shall be presented before the constituent assembly and be amended accordingly.
- It was understood that citizenship should not be a part of Constitution; rather it should be a piece of legislation that can be amended by the legislation by the Future legislature of Pakistan.

Citizenship, being a very critical matter during the inception period of Pakistan, was deliberated by the founding father of our country. When the Bill for citizenship was presented before the Constituent Assembly, Mr. Khawaja Sahabuddin who was then the Minister for Interior and Broadcasting highlighted the salient features while considering the grant of Citizenship:

- A person shall be eligible for the grant of citizenship who or whose parents or whose grandparents were born in territories which comprise the parts of Pakistan. However, they would lose their nationality if they migrated from Pakistan at the birth of Pakistan.
- The principle of *Jus Singuinis*. A person is also entitled for grant of citizenship whose father was born in Pakistan. A person of Pakistani father can also be granted citizenship if his birth is registered with the Consulate of Pakistan;
- A person who has migrated from undivided India shall also be eligible for grant of citizenship provided that he domiciled in Pakistan for one year. The wife and children of such migrants shall also be eligible for grant of citizenship;
- A person who was born in Indo – subcontinent but now living abroad can also apply for grant of citizenship. Provided that he has lived in Pakistan at least for one year.
- A person can also be naturalized by the Federal Government under Naturalization Act 1926. The Federal Government while considering the grant of citizenship can take

into account the character, the period of stay that should not be less than five years and the understanding of vernacular language of Pakistan.

- A woman can obtain the nationality of Pakistan automatically by marrying to a Pakistani husband. She can apply for the citizenship and her application shall be considered by the Federal Government. On the other hand, a Pakistani woman will not lose her nationality of Pakistan by marrying to an alien.

Concluding his speech on Bill of Citizenship, Mr. Khawaja Sahabuddin emphasized that with the passage of this Bill now several classes of people can acquire nationality of Pakistan by descent, by birth or by naturalization or by registration. In this way, five fundamental and salient features of acquisition of nationality in Pakistan were outlined. The criteria were provided and held that only those persons who fulfill any of the criteria will be eligible to claim the nationality: firstly, if the person is born in Pakistan, he can claim nationality by birth *(Jus Soli)*; Secondly, a person of Pakistani parent can also claim nationality by descent *(jus Singuinis)*; thirdly, a person who migrated from any part of Indo – subcontinent; fourthly, a person can also be naturalized by the Federal Government; and lastly a person who marries to a Pakistani spouse.

The Citizenship Act 1951 empowers the Federal Government to make policies and rules while dealing with the issues of the acquisition and seizure of nationality. In the case of Umar Ahmed Ghumman v. Government of Pakistan, the Division Bench of Lahore High Court interpreted Section 14 of the Citizenship Act of Pakistan and stipulated that citizens of Pakistan, in cases of dual nationality, shall retain their nationality unless the Municipal of Law of other country requires to renounce the first nationality.[74] However, Supreme Court of Pakistan differed from the opinion of Lahore High Court being against the spirit and intent of Section 14 of the Citizenship Act 1951. Supreme Court of Pakistan further observed in its

[74]PLD 2002 Lahore 521.

judgment that unqualified power, regarding the grant of nationality, vested with the Government is inconceivable under the constitution. The Federal Government was further directed to formulate the guidelines and parameters for the exercise of power under Section 14 (3) of the Citizenship Act 1951.

Pakistan is not a signatory to Refugee Convention 1951; as such the obligations contained in the convention cannot be imposed. It is intriguing to note that although not a signatory of the Convention, Pakistan is one of the largest recipient of Afghan Refugees. Hence, the question arises as how these refugees are regulated by the state of Pakistan. Currently, Pakistan is dealing the Afghan refugees under Foreigners Act 1946. The term 'foreigner' has been defined under Section 2(a) of the Foreigner Act which means 'a person who is not a citizen of Pakistan.' The foreigners have been granted certain benefits on the one hand, and have been restricted, on the other hand, under certain rules and laws. For example, under Rule 10 of Foreigners Order 1951 a foreigner is not entitled to government employment in Pakistan. In addition, the foreigners have also been prohibited to acquire land or landed property in Pakistan by the Ministry of Interior under Section 3 of the Foreigners Act 1946.[75]

Another category of nationals has been in the Citizenship Act of Pakistan. It is provided that the foreigners who are born of Pakistani origin fall within the category of 'foreigners' as defined in the foreigners Act 1946. These foreigners (of Pakistani origin) have, however, been entitled to certain facilitation like the registration. For example, it is provided in Section 11 of the National Database and Registration Authority Ordinance, 2000 (Ordinance 2000) that is read with the National Database and Registration Authority (Pakistan Origin Card) Rules 2002 that certain foreigners who fulfill specified requirements can obtain the Pakistan Origin Card under Rule 2(d), 2(e), 3, 4 and 5 of POC Rules. The

[75] Notification No. 18/153/84-Poll.E(II) dated 09.09.1984.

foreigners who bear the POC Cards shall enjoy the following benefits as provided under the rules:

- The holders of the POC shall be entitled to enter into Pakistan without visa from such port as prescribed by the citizens of Pakistan under Section 13 of the Passport Act 1974.
- They shall also be entitled to stay in Pakistan till the validity of the card;
- They shall also be exempted from the requirement to register with the law enforcing agencies during their stay in Pakistan;
- They shall also be entitled to open bank Account in Pakistan;
- They shall also be eligible to enter into transactions of purchase and sale of property in Pakistan subject to rules made from time to time.
- They can also use their card to establish and prove their identity in Pakistan;

***Jus Soli* (Citizenship as birthright) in Pakistan:**

The grant of citizenship by birth (*Jus Soli*) is dealt under Section 4 of the Citizenship Act 1951. The provision stipulates every clearly that a person born in Pakistan after commencement of the Act (1951) shall be a citizen of Pakistan by birth. However, there are two exceptions to this general rule: firstly, a person whose father possesses the immunity being the envoy of an external sovereign power; secondly, a person whose father is an enemy alien is also not entitled for grant of citizenship by birth.

The birthright nationality is one of the modes of acquisition of nationality prescribed in the Citizenship Act of Pakistan 1951. There are various interpretations provided by the High Courts of Pakistan on mode of acquisition of nationality by birth. In the case of Ghulam

Sanai v. Assistant Director, National Registration Office, Peshawar, the issue before the Honorable Peshawar High Court was whether a child of Afghan refugee can claim nationality on the basis of birth right or otherwise. The Honorable Peshawar High Court read Section 4 of the Citizenship Act which deals with the acquisition of nationality by birth with Section 3 of the Citizenship Act 1951 that deals with the acquisition of nationality by descent and provided a constructive interpretation. It was held that since the parents of the child obtained the national ID card on false and forged documents, the child who was born in Pakistan cannot be issued Identity Card.[76]

Considering the issue whether the constructive interpretation provided by Honorable Peshawar High Court is sustainable in eyes of law or otherwise, it is important to appreciate that the courts often resort either to rules of 'literal interpretation' or 'constructive interpretation'. Wherever the wording or phrases used in the provision of a statute are not clear, the court often resorts to constructive interpretation by giving the true intent and purpose of the legislature. However, the rule of literal interpretation prevails in cases where the wordings or phrases used in a statute are clear. There are various judgments of the Supreme Court of Pakistan wherein it has been held that the court has to give no interpretation other than the one intended by the legislature when the legislatures use a plain wording only straight meaning should be given.[77] It has been held by the Honorable Islamabad High Court, Islamabad in its judgment that the wording and phrases used in Section 4 of the Citizenship Act 1951 (regarding the acquisition of nationality by birth) are clear and require to be given straight interpretation.[78]

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[76]Ghulam Sanai v. Assistant Director, National Registration, Peshawar PLD 1999 Peshawar 18.

[77]GhulamHaider& others v. Murad through legal representatives, PLD 2012 SC 501.

[78] Saeed Abdi Mahmud v. National Database Registration Authority 2018 CLC 1588 Islamabad.

A person who is born in Pakistan can claim nationality by following the procedure prescribed in the Pakistan Citizenship Rules 1952. The Rule 2 of the Pakistan Citizenship Rules 1952 provides the following steps in order to apply for the grant of nationality under Section 4 of the Citizenship Act 1951:

1. If a person is born in Pakistan, he shall apply in Form 'B' in duplicate to the Authorized Officer for registration;
2. The Form 'B' is required to be accompanied with the two documents: (a) birth certificate duly issued by the village officer; In-charge of Police Station; Municipal of Town Committee; Registrar of Birth and Death appointed by the Government; (b) the statement of the parents recorded on oath if the applicant's age is below 21.
3. The Provincial Government shall be requested then to issue a Certificate in R-I if the Authorized officer is satisfied that all the facts narrated in the Form are correct.
4. On the recommendation of the Authorized Officer, the Provincial Government shall pass any such order which is deemed fit.

In order to obligate the NADRA authorities to issue Computerized National Identity Card (CNIC) under Section 10 of the NADRA Ordinance, the applicant is first required to fulfill the conditions and requirement of Rule 8 of Citizenship Rules 1952. After getting himself registered under Rule 8 in pursuance of Section 4 of the Citizenship Act 1951, the applicant can apply for issuance of CNIC to NADRA. Thereafter, the NADRA authorities are obliged to issue the applicant the CNIC under Section 10 of the NADRA Ordinance.

It is important to note that acquisition of the nationality by birth has been recognized a right by the Islamabad High Court, Islamabad in the case of Saeed Abdi Mahmud v. National Database Registration Authority (NADRA). In this case a Somalian boy whose birth was registered in Pakistan applied for issuance of CNIC under Section 4 of the Citizenship Act 1951. His application was refused on the ground that his parents are not Pakistan. Hence, he

instituted a Writ Petition before Islamabad High Court, Islamabad where the Court allowed the Writ Petition and directed the Ministry of Interior to decide the application of the petitioner for grant of nationality under Section 4 of the Citizenship Act 1951 within 03 months.[79]

Trans - National Marriages (Spouses) in Pakistan:

The persons whose spouses have nationality other than Pakistan can be divided into two categories: (a) persons with dual national spouses; and (b) persons with foreign spouses. In the first category call those persons whose spouses hold the nationality of any of 19 listed countries; whereas in the second category fall those persons whose spouses are not Pakistani citizens. The law does not recognize any restriction on Category (a) as the spouses are the Pakistani nationals, they are entitled for privileges prescribed for the Pakistani nationals. However, the persons who fall within the category (b) have been made subject to the following restrictions:

- A government servant in the Federal Government cannot marry or promise to marry to a foreigner; if he deviates from the rules such officer shall be dealt for misconduct under Efficiency and Disciplinary Rules.
- In Punjab, the government servant cannot marry a foreigner unless the restriction is relaxed by the provincial government;
- In Sindh, a government servant will be charged for misconduct if he marries a foreigner;
- In KPK, a government servant can marry a foreigner by obtaining permission from the government;

[79] Ibid.

- In Balochistan, a government servant will be dealt under Efficiency and Disciplinary Rules if he marries a foreigner;

It is provided in the rules that a foreign spouse of a Pakistani citizen can be issued POC. Under Rule 4(5) of the POC Rules 2002, a foreigner spouse till the time he remains married to Pakistani citizen shall be eligible to be issued foreigner of Pakistani Origin. In case the citizen of Pakistan dies, the spouse will continue to hold POC till the time a second marriage is contracted. However, POC will not be issued to a foreigner who is citizen or national of any of the three countries: (a) India; (b) state which is not recognized by the Pakistan; and (c) enemy state of Pakistan.

It is important to note that the rule referred above was amended by the Government through a notification in 2015 whereby the issuance of POC to foreign spouses was discontinued.[80] Since an immense hardship was experienced by those citizens with foreign spouses, a summary was moved to Cabinet through Ministry of Interior whereby the issuance of POC was restored.[81] It is important to note that Ministry of Interior after restoration of the earlier notification for issuance of POC, imposed a condition of five years marriage. It was surprising to note that the rule making power rests with the Federal Government i.e. Cabinet, as such Ministry of Interior was not competent to promulgate such conditions. Therefore, the Supreme Court of Pakistan in its landmark judgment declared the condition of five years marriage for issuance of POC *ultra vires*.[82]

There is certain procedure provided in the Citizenship Rules 1952 of Pakistan that has to be followed in order for the alien spouse to obtain POC Cards. According to the Rules, the Pakistani national spouse can fill in a form available in the Ministry of Interior, Government

[80] Notification No. 4-2/2012/NADRA dated 30.12.2015

[81] Notification No. 4/2/2012/NADRA dated 08.03.2018.

[82] Muhammad Ibrahim Sheikh v. Government of Pakistan 2019 PLD 133 Supreme Court.

of Pakistan incorporating therein all the necessary information and establishing his nationality and the geniuses of the marriage. The form is further required to be testified and verified by two Gazette Officers working in the Government of Pakistan. After fulfilling all the requirements, the form will be submitted in the Ministry of Interior, Government of Pakistan whereby the application shall be considered and assessed by the department. The government taking into accounts various aspects can decide whether POC has to be issued in respect of the alien spouse or otherwise. Once the approval is granted from the Ministry of interior, the applicant can apply for issuance of POC to NADRA whereby the POC will be issued to alien/foreign spouse.

b. Municipal Law of Afghanistan:

The law on citizenship of Afghanistan has provided two categories of citizens in Afghanistan: firstly, the individuals who were the citizens before the promulgation of the law on citizenship in Afghanistan; and secondly, the individuals who have acquired or who acquire the citizenship after the commencement of such law. The second category of individuals are required to follow certain procedures and rules in order to acquire the nationality of Afghanistan.

For Children:

The question that is related to our research problem is whether an individual born of Afghan parent in abroad can claim the nationality of Afghanistan or otherwise. It is provided in Article 5 of the law on Citizenship of Islamic Emirates of Afghanistan that an Afghan citizen who is living cannot be deprived of his Afghan nationality. It is important to pinpoint that this Article deals with the individual who have already acquire the Afghan nationality;

yet living abroad. As such the Article does not reciprocate to our question. A very relevant and important provision in Nationality law of Afghanistan is Article seven which prohibits the dual nationality; meaning thereby an Afghan national cannot hold a dual national.

Chapter Two of the Law on Citizenship of Afghanistan deals with the acquisition and loss of the nationality. It is important to note that Afghanistan has based its entire law on Islamic tenets. Hence, it is provided that the rules provided for the acquisition and loss of the nationality not be incongruent with the Islamic law or rules. Emphasizing on the principle of *Jus Sanguinis*, Article Nine of the nationality law provides that a person born of Afghan parent abroad or within the territory of Afghanistan will be considered as Afghan national. The plain meaning of the provision is that an individual in order to acquire the nationality of Afghanistan must submit his claim based on descent (*Jus Sanguinis*). However, it is important to note that the law on Citizenship of Afghanistan does not recognize the principle of *Jus Soli*; as such a person born in Afghanistan cannot claim nationality of Afghanistan on the basis of birth right.

Another very important aspect of our research paper deals with the question as how a child is granted the nationality in Afghanistan. Under Article 10 of the Law on Citizenship of Afghanistan, the children have been divided in three categories: the children who are born within the territory of Afghanistan (Category A); secondly, the children born of Afghan parents outside the territory of Afghanistan (Category B); and thirdly, the children born of Afghan parents abroad; yet the parents are settled abroad (Category C). According to the Rule of nationality in Afghanistan, the Children who fall in Category A are entitled to claim the nationality of Afghanistan. The children who fall within the Category B can apply for Afghan nationality provided that one of the parents are living in Afghanistan. The children of Category C can only apply for the nationality of Afghanistan if their parents by mutual consent choose the nationality of Afghanistan for the new born child. Article 10 (a) of the

Law on Nationality of Afghanistan deals with the situation where the parents do not choose the nationality of Afghanistan for their children; yet the child intends to apply for the nationality of his parents. In such situation, it is provided that the child after attaining the age of 18 can apply in black and white for the nationality of Afghanistan based on the documents and previous nationality of his parents; whereby the Government can consider his application and may grant him the nationality of Afghanistan. However, it has to be noted that the discretion rests with the government whether the application of the child is allowed or turned down taking into account various aspects.

There may be a situation where a child is born of Afghan parents abroad; yet one of the parent is Afghan national. Under Article 11 of the Law on Citizenship of Afghanistan it is provided that a child will be considered for the grant of citizenship of Afghanistan irrespective of the fact whether he is born within the territory of Afghanistan or outside; provided that one of the parents of the child is Afghan national; whereas the nationality of the other parent is not established. It is very important to note that the law on citizenship of Afghanistan does not discriminate on the basis of gender; as such the term 'on of the parents' has been employed. Hence, if one of the parents whether mother or father is Afghan national, the child can claim the nationality of Afghanistan on the basis of his descent and his application will be considered favorably. Article 12 of the Law Citizenship recognizes the principle of *Jus Soli* (nationality by birthright) and provides that if a child is born in Afghanistan whereas the documents of his parents proving their nationality are not available, the child will be considered for the grant of nationality.

The law of nationality prevailing in USA has introduced another important principle i.e. the principle of election. The principle has been discussed in details in the previous chapter. The law on citizenship of Afghanistan also recognizes such principle and it is provided in Article 13 that if an individual is born within the territory of Afghanistan but his

parents are foreigners, can elect whether he intends to reside permanently in Afghanistan or retain the nationality of his parents. If the boy intends to settle in Afghanistan and reside permanently in Afghanistan, the government will consider his application for grant of nationality. However, the children of diplomats and foreign missions have been exempted from this rule.

In Trans -National Marriages (spouses):

The rules regarding the nationality of spouses in cases of Trans – marriages have been discussed in Article eighteen and nineteen of the Law on Citizenship of Afghanistan. Article 18 deals with the alien spouses who contract marriage with Afghan nationals; whereas Article 19 deals with the individuals who do not have supporting documents to prove their Afghan nationality; yet they have contracted marriage with Afghan national. The law provides that they can apply for the Afghan nationality in black and white and the government of Afghanistan has the discretion to consider such applications on their own merits.

There is a very rare situation where a person marries Afghan national and by obtaining the Afghan nationality, his or her previous nationality is impounded; yet after some time they get separated. The question arises as what happens to the nationality of separating spouse whether he or she claim his or her previous nationality and in case of giving birth to a child what happens to the nationality of such child. Article 21 of the Law on Citizenship of Afghanistan provides that in case of divorce, the separated partner can get the previous nationality. However, in case of child if the parents do not agree with each other on the nationality of child, for the purpose of nationality of such child, both the parents shall be considered Afghan national. It is further provided that in case of death of one of the parents, the child can retain his Afghan nationality based on the principle of election. It is more clearly provided in Article 26 that if one of the parents abandons the citizenship of Afghanistan, such act shall not affect the nationality of other parents and the nationality of

child. In case the nationality of one of the spouses is forfeited by operation of the law, it is provided in Article 34 that such forfeiture does not affect the nationality of his/her spouse and the children.

CHAPTER – V : FINDINGS AND CONCLUSION

a. Findings:

Table 5: Comparison of Municipal law of Pakistan with International law

01	Art. 15 of UNDHR	Everyone has the right to nationality	• The children born of Afghan parents in Pakistan have remained unattended
04	Art. 15 of UNDHR	Prohibition of arbitrary refusal of nationality	• Only the citizens of 19 listed countries approved by the Government can apply for nationality through naturalization • Afghans are not entitled to apply for nationality through naturalization
02	Art. 34 of Geneva Convention 1951	Assimilation and naturalization of refugees	• The Afghan refugees shall not be naturalized • Only the migrants of divided India are subject to naturalization under Naturalization Act 1926
06	Art. 12 of Geneva Convention 1951	Decision on nationality shall be made subject to judicial examination	• The decision on nationality shall be made by the Government which is normally not assailable before Court of law.
03	Art. 6(4) of European Convention on Nationality	Special status of children in grant of nationality	• Special status of children has not been recognized in the Citizenship Act of Pakistan
05	Art. 26 of UN Covenant on Political and Civil Rights	Guarantee equal treatment and prohibit discrimination on the basis of race, colour, language etc.	• Afghans are not enlisted in the approved 19 countries • Children born of Afghan parents are discriminated based on their origin
• Pakistan is not the signatory of Geneva Convention 1951 • Pakistan is not the member of European Union; as such EU Convention is not binding on Pakistan.			

A summary has been given in the above table to show the obligations imposed by the international law and its treatment in the municipal law of Pakistan. It must be clarified at the very outset that 'nationality' is a subject matter of state. However, the international law has certainly provided some guidelines to the states. Hence, when the Pakistan Citizenship Act 1951 was tested on the touchstone of such guidelines, it was found out:

- Article 15 of United National Declaration on Human Rights recognizes that everyone has the right to nationality. Although it is provided under Section 4 of the Pakistan

Citizenship Act 1951 that a child born in Pakistan, be it an Afghan Refugee, the federal government shall grant nationality. However, the Peshawar High Court in the case of *Saeed Abdi Mehmud* held that the children of Afghan refugee cannot be granted nationality on the basis of his birth right.

- Article 15 of UNDHR further prohibits the arbitrary refusal of application for grant of nationality. According to the established principles of law, 'arbitrary refusal' means to refuse a right without affording the person a chance of clarification. According to the Pakistan Citizenship Rules 1952, an application for grant of nationality is dealt by the Ministry of Interior; whereas the application can be refused without assigning a reason to the applicant.
- Article 34 of the Geneva Convention 1951 provides that the states shall take effective steps for the assimilation and naturalization of refugees. The Afghan refugees have been living in Pakistan since decades. The failure of government to comply with such obligation is supported with two facts: firstly despite the largest recipient of Afghan refugee, Pakistan has not ratified the Refugee Convention putting the future of these refugees in limbo. Secondly, the Afghan refugees are being handled under Foreigners Act. The Foreigners Act was promulgated to punish the culprits who illegally cross the border. However, the case of refugee is entirely different as they are compelled to flee their country due to persistent fear of persecution. In nutshell, the government has not assimilated or naturalized any Afghan refugees since 1980 as per available record of UNHCR.
- Article 12 of the Geneva Convention 1951 further provides that the decision on the application for grant of nationality shall be made subject to judicial examination. Under the Citizenship Rule, the power to deal and decide the application for grant of nationality is vested with the Executive i.e. Ministry of Interior. Since 'separation of power' is the part of our constitution, the judiciary in Pakistan has often been

reluctant to interfere in the domain of executive and to hold the decision of executive illegal howsoever the discretion has been exercised blindly.

- Article 6(4) of European Convention on Nationality has recognized the special status of children with regard to grant of nationality. Although Pakistan is not a member of European Union, the principle certainly provides guidelines in cases of nationality. By 'special status' the instrument means that certain requirements for grant of nationality should be eased keeping in view the special circumstances of children. However, no such provision exists in the nationality law of Pakistan. The NADRA authorities refuse to issue a birth certificate unless the CNICs in respect of both parents are not produced. In addition, the government run hospitals also refuse to issue birth certificate in respect of Afghan refugee's children.
- Article 26 of United Nation Covenant on Political and Civil Right obligates the states to guarantee the equal treatment of all applicants for grant of nationality and to prohibit any discrimination on the basis of color, language or origin. According to the Citizenship Rules of Pakistan the children born only in the 19 listed countries are eligible to apply for the grant of nationality. Afghanistan is not included in those 19 countries. Hence, making a list of countries is a prima facie breach of Article 26. In addition, it is also provided in Article 26 of UNCPCR that there shall no discrimination on the basis of origin. Interestingly, it is provided in the citizenship rules that a child born in UK or in any 19 listed countries can apply for the grant of nationality; whereas the child of an afghan refugee is not entitled to apply for grant of nationality. Hence, it seems that there is a very sheer violation of Article 26 of Covenant.

Interview of Respondents:

The views of various students were obtained in order to analyze their opinion. The sample was selected from 02x major cities of Pakistan: Quetta and Islamabad. There were two reasons for selection of these two cities: firstly, the students of Quetta city are well aware of the issues pertaining to nationality of Afghan refugees; and secondly, the respondents from Quetta and Islamabad were willing and given their written consent to publish their opinion. The interview was conducted through an interview questionnaire[83].

The questionnaire consists of two parts: the Municipal Law of Pakistan on grant of nationality; and the obligation of International Law regarding the grant of nationality. The opinion has been measured on "likert scale''. The first part of the questionnaire contains six questions concerning the municipal or local law of Pakistan on grant of nationality. The second part of the questionnaire, on the other hand, consists of five questions relating to the obligations / guidelines of international law. Although the interview questionnaire has been appended in Appendix I, the findings of the interviews may be studied as under:

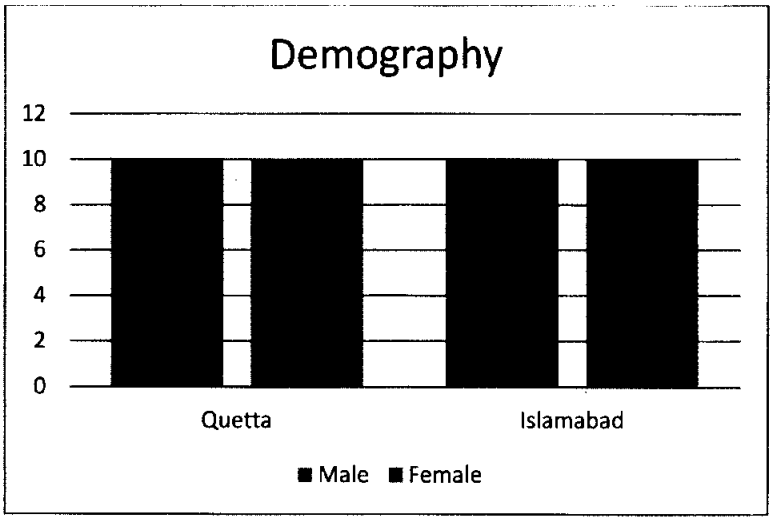
i. Demography:

In order to ensure balanced view and to remove any biases based on gender or origin, the sample was selected randomly keeping in view four major parameters: firstly, whether the participants are willing to participate in the poll; secondly, whether the participants have the basic knowledge of law and rules, hence, preference was given to law students; thirdly, to ensure the equal participation of both genders 20 male participants and 20 female participants were chosen; and lastly the sample was selected from the cities where the issue of Afghan refugee is more prominent. Overall, there were 40 participants who participated in the poll voluntarily. The 20 participants were from Quetta; whereas 20 other participants were from Islamabad. Among the 40 participants 20, participants were male and the other 20

[83] Attached as Appendix I.

participants were female. In addition, all the participants were graduated and some of them had the experience of working with Afghan refugees with NGOs.

Male	**Female**	**Male**	**Female**
10	**10**	**10**	**10**

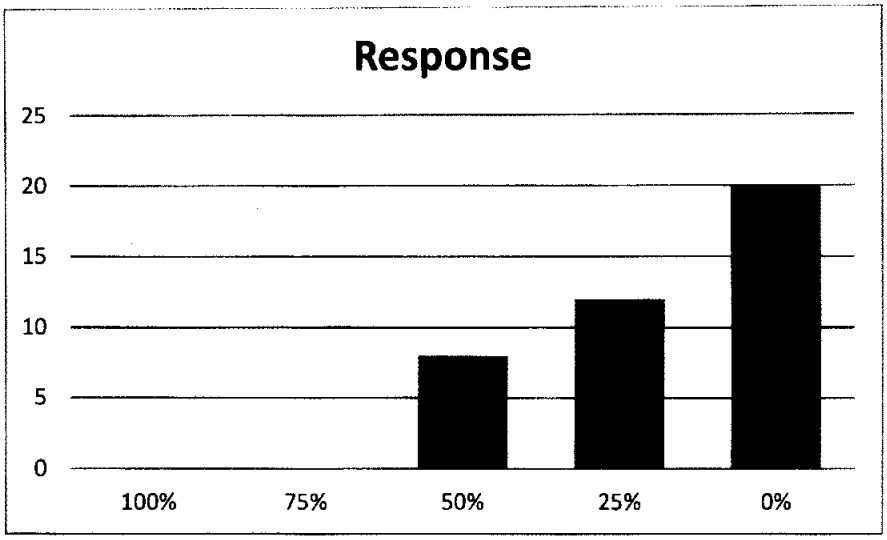


ii. Explanation of Answers:

a. The Citizenship Act of Pakistan 1951:

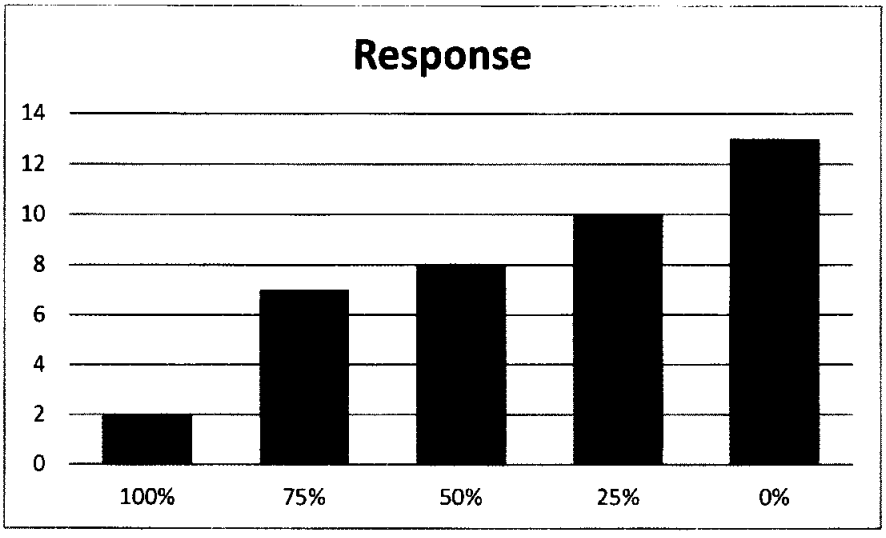
1. *Whether the Federal Government fulfills its obligation under section 4 of Citizenship Act 1951 with regard to Afghan Refugees:*

The participants were informed that the Federal Government of Pakistan under Section 4 of the Citizenship Act 1951 is obliged to grant nationality to a person born in Pakistan. Hence, they were inquired as how much satisfactory they find the role of federal government with regard to such obligation when dealing with the cases of Afghan children born in Pakistan. Among the participants no one found the role of Federal Government 100% satisfactory; whereas majority of participants (20 out of 40) ranked the performance of federal government 0% (very poor). Only 12 participants found the role of federal government 25% satisfactory.



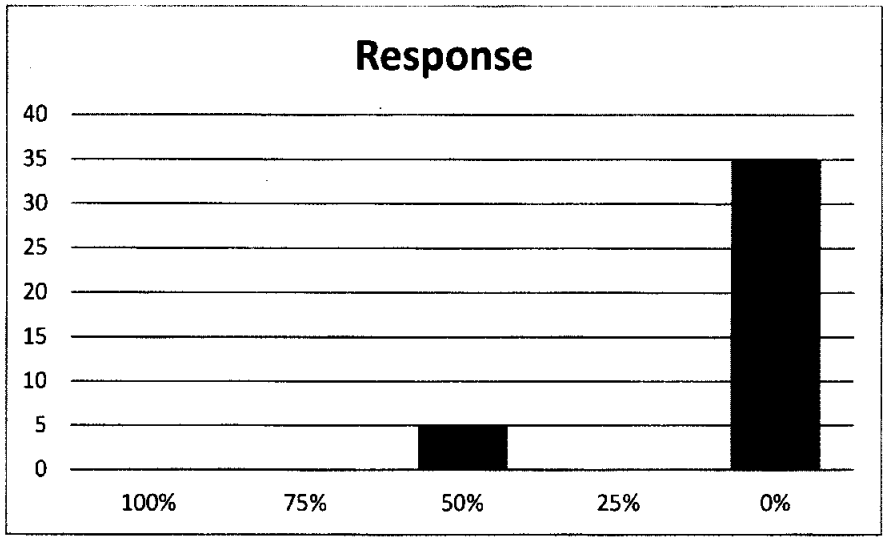
2. *Whether Federal Government fulfills its obligation under Section 5 of the Citizenship Act 1951:*

The participants were further apprised that under Section 5 of the Citizenship Act 1951 it is provided that a person whose parent is a citizen of Pakistan will also be granted nationality. Keeping this in view, how likely it is for an Afghan child to obtain Pakistani nationality if one of his parents is Pakistani. The response was divided. Only 2 participants were of the view that such children are 100% entitled for the grant of nationality; whereas 10 participants were of the view that there is only 25% chances of grant of nationality to such children. The highest number of respondents (13 out of 40) believed that such children are not granted nationality in Pakistan.



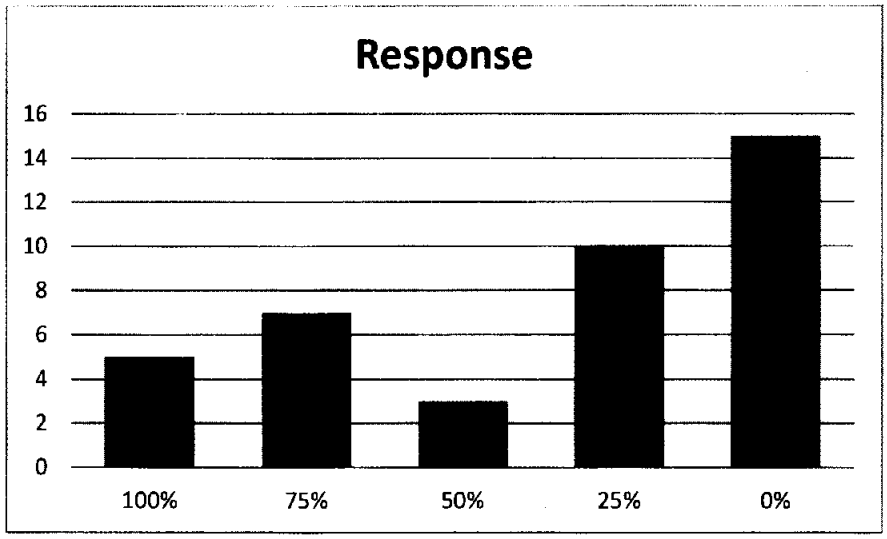
3. *Whether Afghan refugees can be naturalized under Section 9 of Citizenship Act 1951:*

After informing the participants that under Section 9 of the Citizenship Act 1951, the Federal Government, upon an application, may naturalize, they were asked as how likely the Afghan refugees who have been living in Pakistan for two to three decades, can be naturalized. This question was responded with a huge difference. The majority of respondents (35 out of 40) believe that Afghan refugees are not naturalized by the Federal government in sheer violation of Section 9 of the Citizenship Act 1951. There were only 05 respondents who believe that there is 50% chances of Afghan refugees to be naturalized by the Federal Government of Pakistan.



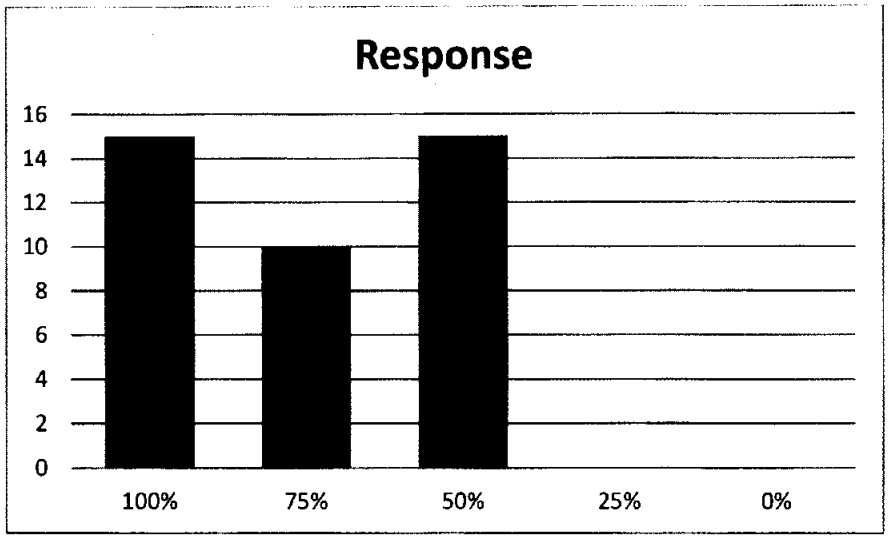
4. *Whether spouses in trans-national marriages are entitled for grant of nationality?*

It is provided in section 10 of the Citizenship Act 1951 that a woman who marries a Pakistani citizen will also be entitled for citizenship of Pakistan. The respondents were requested to comment as how likely the Afghans, who have contracted marriages with Pakistani citizens, will be granted nationality under Section 10 of the Citizenship Act 1951. The least number of respondents were of the view that there are only 50% chances of such Afghan to get nationality; whereas only 05 respondents believed that such Afghan are 100% entitled for the grant of nationality. However, majority of the respondents 15 out of the 40 expressed their disbelief and opined that such Afghan shall not be granted nationality by the federal government.



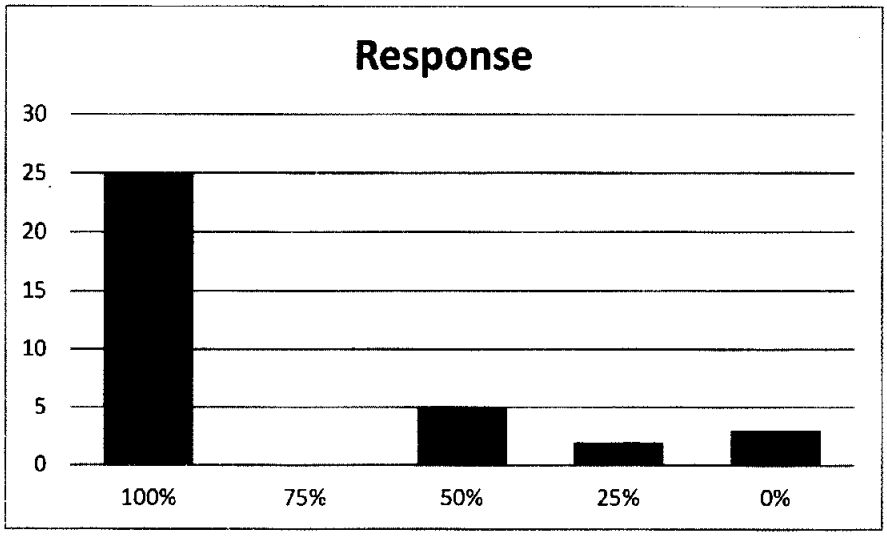
5. *Whether the children born of trans-national marriages are entitled for grant of nationality?*

According to Citizenship Act 1951 if only one of the parents is citizen of Pakistan, such parents can apply for the registration of their child as citizen of Pakistan. In case of Pakistan, there are many Afghans who have already contracted marriages; whereas there are children born from such marriages. The respondents were inquired as how likely such children can be granted nationality if their parents apply for their registration. Surprisingly, 15 respondents out of 40 held that such children are 100% entitled for grant of nationality; whereas 15 other respondents believe that there are only 50% chances of getting nationality for such children. It is important to note that NADRA authorities refuse to register the birth of a child or issue Form "B" unless CNIC of both parents are produced. In such case, the fate of such children still remains in limbo.



6. *Whether Afghan refugees are entitled to be issued certificate of domicile?*

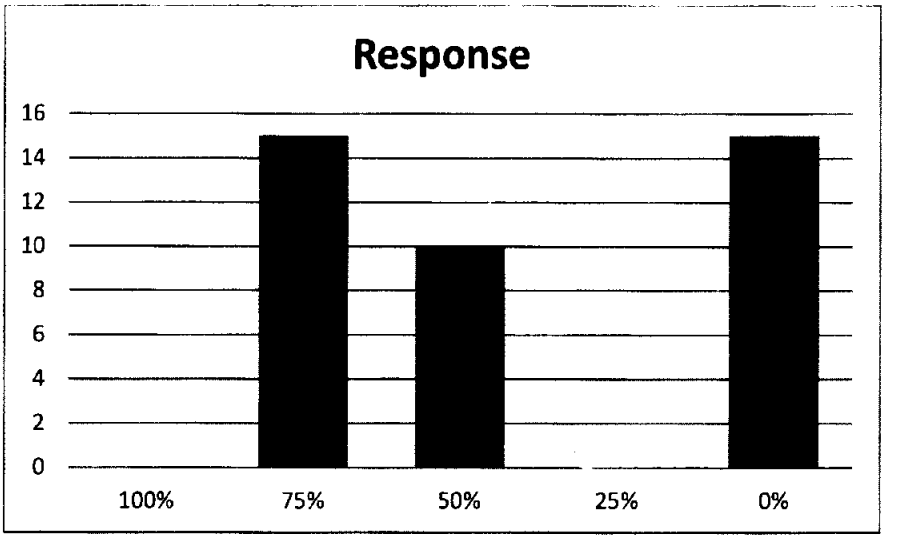
A certificate of domicile, a pre-requisite conditional for naturalization, can be granted under Section 17 of the Citizenship Act 1951 if the person ordinarily resides in Pakistan for a period not less than one year. The Afghan refugees have been living in Pakistan for many decades. The respondents were inquired as how likely such Afghan refugees may be issued certificate of domicile if they apply thereof. Out of 40 respondents 25 respondents supported the stance and believe that they are entitled for the 'certificate of domicile' whereas 3 respondents expressed their disappointment and held that there is no chance of such Afghan refugees to be issued the 'certificate of domicile'.



b. International Law Obligation On Nationality

1. *Whether a child born of Afghan parent is entitled for the nationality of Pakistan:*

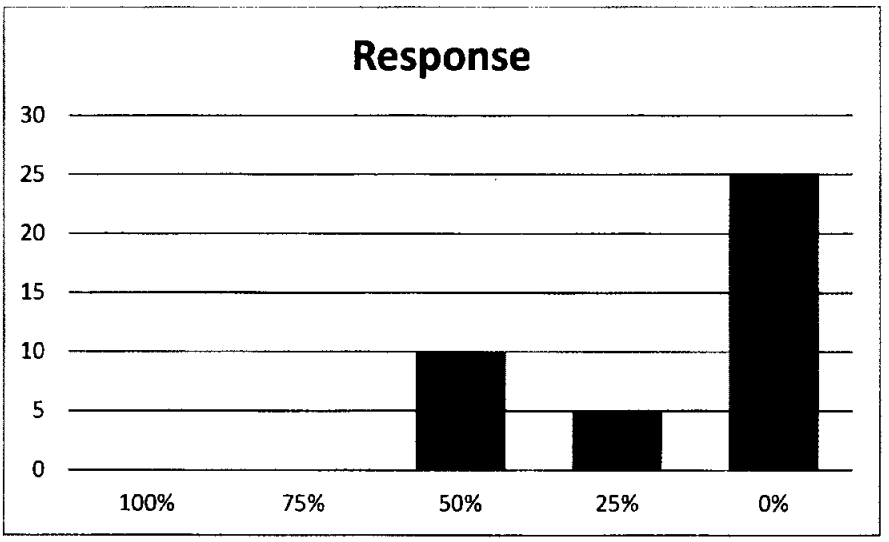
Under Article 15 of United Nation Declaration of Human Rights, everyone is entitled for the grant of nationality. The hypothesis for the paper in hand was that the children of Afghan refugees if not granted nationality they shall become stateless. There was an anti-thesis that such children shall not become stateless as they might be recognized Afghan national by the government of Afghanistan. However, in the case of trans-national marriages where one of the parents is Afghan (especially when mother is Afghan), the constitution of Afghanistan bases its citizenship law of descents on father; as such the children born of Afghan mother in Pakistan shall be deprived of Afghan citizenship. Therefore, the respondents were asked as how likely the Federal Government of Pakistan would abide by such obligation regarding the cases of Afghan children. Out of 40 respondents 15 respondents said that there are 75% chances that such children shall be granted the nationality; whereas another 15 respondents opined that such children are not granted the nationality.



2. *Whether the application for nationality submitted by Afghan refugees is treated fairly by the Federal Government of Pakistan.*

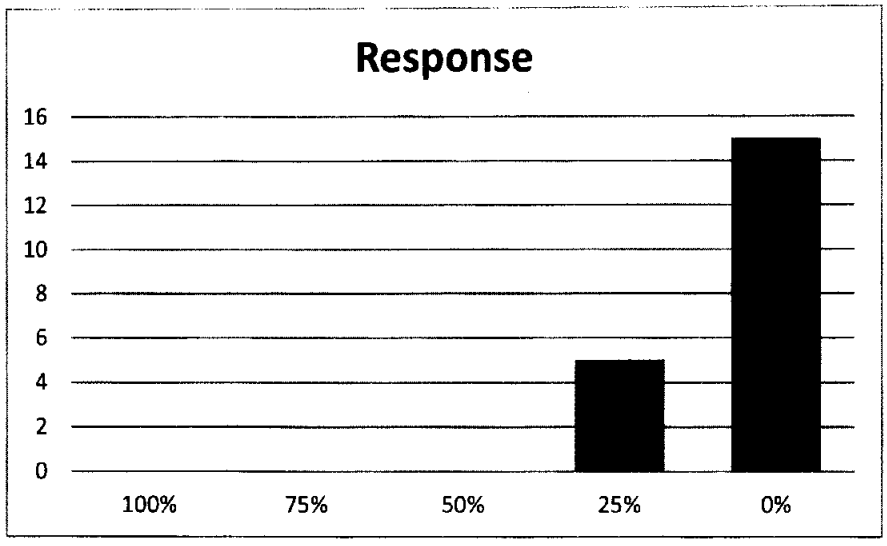
Under the United Nation Declaration on Human Rights, a government is prohibited to refuse the application for nationality of a person arbitrarily. Currently, the all such individuals who seek to obtain the nationality are required to submit their application before

the Ministry of Interior which organization is the competent forum to decide the matter. The respondents were inquired as how fair the process is for the Afghan refugee applicants. The performance of the federal government with regard to fair treatment of application was marked very poor by the majority of the respondents; as 25 out of the 40 respondents said that there is 0% chances for the Afghan applicants to have a fair treatment on their applications. However, there were 10 respondents who believe that there are 50% chances of fair treatment if the applications are made by the Afghan refugees to the Ministry of Interior.



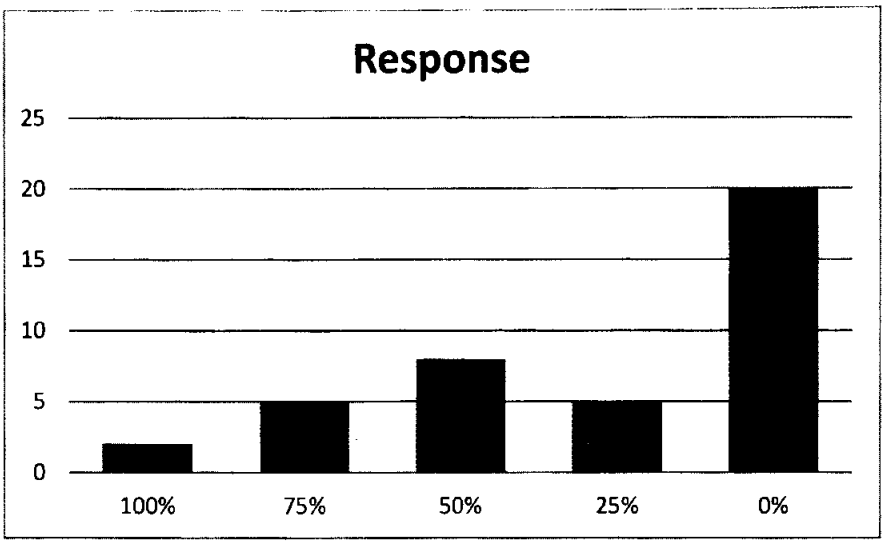
3. *Whether Afghan refugees can be assimilated and naturalized by the Federal Government of Pakistan.*

Under Article 34 of Geneva Convention 1951 a government is obliged for assimilation and naturalization of refugees. It is further provided that the respective governments shall take effective steps for the naturalization of the Afghan refugees. The researcher was interested to explore through the feedback of the respondents as how much the efforts of the federal government of Pakistan corresponds to such International Law obligation while dealing with the cases of Afghan refugees. The response of the participants was very clearly as 35 out of 40 respondents believe that the efforts of our government do not correspond to such obligation of the International Law. There were five respondents who held the efforts of government average.



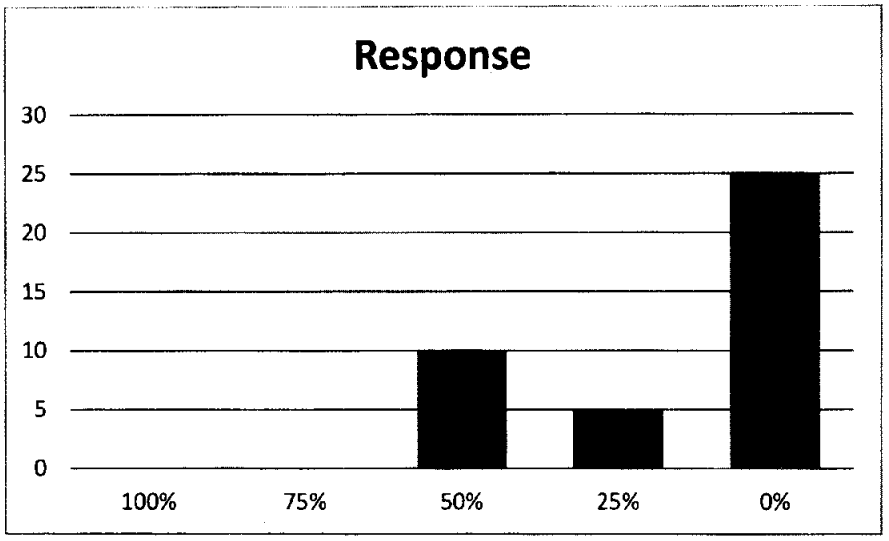
4. *Whether the application made by the Afghan refugees for the grant of nationality is subject to judicial examination?*

Under Article 12 of Geneva Convention 1951 it is provided that the decision on nationality shall be made subject to judicial examination. It has been made mandatory by the International Law to make the process more transparent and remove any kind of biases. The respondents were inquired as how much fairness they attach with the claim that application for the grant of nationality in Pakistan is subject to the judicial examination. Majority of the respondents consisting of 20 out of 40 declared that there is 0% truth in such claim; whereas only 2 respondents believed that the claim of government is 100% true that all such applications are subject to judicial examination. Taking the cases filed for the assertion of their right with regard to nationality, it is safe to conclude that judiciary in Pakistan is very cautious to interfere in all such matters which exclusively fall within the domain of executive. Therefore, there is 0% truth in the claim that application for grant of nationality has been made subject to judicial examination.



5. *Whether the applications made by the Afghan refugees for grant of nationality is treated equally without any discrimination:*

Article 26 of UN Covenant on Political and Civil Right requires the government for equal treatment and prohibition of discrimination on the basis of race, color and language. The respondents were inquired as how likely it is to meet such standard by the government of Pakistan. Out of 40 respondents 25 respondents believed that the attitude of government towards Afghan refugees is highly discriminatory; whereas only 10 respondents held the attitude of government in dealing with the applications of the Afghan refugees satisfactory. However, it is must be pointed out here that Federal Government of Pakistan has prepared a list of 19 countries and all the benefits of International law have been extended to such countries. Afghanistan is not included in these country; as such the Afghan citizen if marries with a Pakistani shall not be entitled for the Pakistan Origin Card; the children born of Afghan parent will not be entitled for the registration; and most important of all the Afghan refugees even if living in Pakistan more than three decades are not entitled for naturalization or issuance of certificate of domicile. These measures clearly illustrate the fact that Pakistan is yet to go far long in order to meet this international standard of fairness.



b. Recommendations:

i. Legislation for grant of nationality to Afghan children born in Pakistan

It was one of the key findings that Afghan children are refused nationality not because of the non-availability of law; rather because of the ambiguities that exist in the law of nationality of Pakistan. In order to remove the ambiguities in the Citizenship Act 1951 and to address the lacunas that persist in the Citizenship rules, the government needs to introduce legislation as promised by the Prime Minister of Pakistan Mr. Imran Khan during his political campaign of 2018 election. The right to nationality being a legal issue warrants no better solution than legal solution.

ii. The Citizenship rules have to be made amenable with the International practices and guidelines

In the previous chapters, the law of nationality of Pakistan was examined on the touchstone of International practices and the International Law obligations. It was revealed that there are provisions, in the nationality law of Pakistan, which are incongruent with the International Law standard. Being a responsible state, the government has to review its law of nationality

and brings certain amendment so that it could be made amenable with the changing needs of time.

iii. Implementation of the Court orders in cases of nationality

The International law requires the government to make the decision on nationality subject to the judicial examination. It was discussed in the preceding chapters that certain individuals invoked the Writ Jurisdiction of High Court and prayed for the grant of nationality on the basis of birth right as enunciated in the Pakistan Citizenship Act 1951. The High Court held that nationality by virtue of birth right has been recognized in the nationality law of our country. Hence, the federal government was directed to process such applications in accordance with the law. This decision of the court has to be implemented by the government and the other applicants have to be guided properly.

iv. Granting nationality to spouses in trans-national marriages

Trans – national marriage is common problem of refugee world- wide. However, this is more prominent in Pakistan due to shared cultural values and religious bonding. According to the data available with the UNHCR, there are hundreds of families from both sides of the border that have solemnized marriage. Pakistan's law of nationality does not consider the Afghan spouse as Pakistani; rather they are issued only Pakistan Origin Card (POC) which does not confer the rights and benefits of a citizen to holder of such card. Beside this, the process to obtain POC is again made very difficult. Hence, there are number of spouses and their children who have not registered themselves with NADRA. As such they are without proper identification and nationality which is again sheer violation of the International law.

v. Recognize the right of jus – Soli in respect of Afghan children born in Pakistan

The birth right of Afghan children who were born in Pakistan has to be recognized by the government in light of Section 4 of the Pakistan Citizenship Act 1951. In case such children are not granted nationality, it could lead towards statelessness which is considered an offence under International Law. It is especially relevant in cases of those Afghan children whose mothers have contracted marriage in Pakistan with a Pakistani citizen. For, the government of Afghanistan bases its nationality on descent from father side; hence, those Afghan children whose fathers are not Afghani rather Pakistani; they shall not be entitled for grant of nationality in Afghanistan. Hence, if they are refused nationality in Pakistan, their situation will lead towards statelessness.

c. Conclusion:

To conclude, it must be reiterated that International Law recognizes the 'special status' of children with regard to grant of nationality. The data retrieved from the data base of UNHCR, reveals that the fate of thousands of Afghan children in Pakistan is still in limbo; as their parents migrated from Afghanistan to Pakistan and they were born in Pakistan. However, they are refused nationality by the government on the ground that their parents are not Pakistani. Although Section 4 of the Pakistan Citizenship Act 1951 is very clear and it is stipulated that an individual born in Pakistan can claim nationality, yet the benefit of the provision has not been extended to Afghan children born in Pakistan so far. There are three major grounds for their refusal of nationality: firstly, their parents are not Pakistani. According to the NADRA authorities, in order to register the birth of a child, the CNIC of both parents are mandatory to be produced. Since Afghan children's parents do not have CNIC their birth is not registered; as such they shall not be eligible for issuance of CNIC in future. The second ground of refusal given by the government is the status of such Afghan refugees. The government still doubts the status of Afghan refugee and they are being termed as 'financial migrants'; as such it is argued that they are not entitled for the refugee

protection. The third and the most pressing ground is the discretion/ power vested in the Ministry of Interior. It is very intriguing to note that the government has already prepared a list of 19 countries and the benefits of POC have extended only to those 19 listed countries. Since Afghanistan is not included in the list of 19 countries, they are not extended any benefit of POC. The Supreme Court of Pakistan had the opportunity to deliberate over the issue whether a rule can be made in contravention with the Act or otherwise. The Court very categorically held that a rule made contrary to the Act will be null and void. It is very important to note that there are certain provisions of Citizenship Rules that are contrary with Pakistan Citizenship Act 1951. For example, Section 4 of the Pakistan Citizenship Act recognizes the right to nationality by birth; however, the rules which are made in furtherance of the Pakistan Citizenship Act do not extend the benefits of this right to Afghan children born in Pakistan. The most perplexing legal issue with regard to issuance of CNIC to Afghan children surfaced when a petitioner brought a writ against the NADRA and requested for issuance of CNIC on the basis of birth right. The Peshawar High Court dismissed the petition and held that the parents of the petitioner are not Pakistani; as such the petitioner is not entitled for grant of nationality. In other words, the Court construed that in order to be entitled for grant of nationality two conditions must be fulfilled: (a) the applicant must have been born in Pakistan; and (b) their parents must also be Pakistani. However, another case for grant of nationality on the basis of birth right, the Islamabad High Court dissented and held that in order to get nationality one of the above conditions is required to be fulfilled. In order to remove such ambiguities, the government has to take effective measures through positive legislation and decide the fate of numerous Afghan children who were born in Pakistan.

APPENDIXES

a. Questionnaire

Date:

1. Name:
2. Gender:
3. Qualification:
4. Province:

Section A: **<u>The Citizenship Act of Pakistan 1951</u>**

Question No. 1: The Federal Government of Pakistan under Section 4 of the Citizenship Act 1951 is obliged to grant nationality to a person born in Pakistan. How far the government adheres to such obligation?

○	○	○	○	○
100%	75%	50%	25%	0%

Question No. 2: Section 5 of the Citizenship Act 1951 provides that a person whose parent is a citizen of Pakistan will also be granted nationality. How far the statement is true in respect of children whose one parent is citizen of Pakistan?

○	○	○	○	○

100%	75%	50%	25%	0%

Question No. 3: Under Section 9 of the Citizenship Act 1951 the Federal Government, upon an application, may naturalize a person who has been granted certificate of naturalization?

○	○	○	○	○
100%	75%	50%	25%	0%

Question No. 4: Section 10 of the Citizenship Act 1951 provides that a woman who marries a Pakistani citizen will also be entitled for citizenship of Pakistan. How far the statement is true with regard to Afghan women who have married Pakistani citizen?

○	○	○	○	○
100%	75%	50%	25%	0%

Question No. 5: According to Citizenship Act 1951 if only one of the parents is citizen of Pakistan, such parents can apply for the registration of their child as citizen of Pakistan. How far the rule is applied to deal with the cases of Afghan children born from Trans-national marriages?

○	○	○	○	○
100%	75%	50%	25%	0%

Question No. 6: Certificate of domicile, a pre-requisite conditional for naturalization, can be granted under Section 17 of the Citizenship Act 1951 if the person ordinarily resides in Pakistan for a period not less than one year. How far the afghan refugees are entitled for such benefit?

○	○	○	○	○
100%	75%	50%	25%	0%

Section B: **<u>International Law Obligation regarding Nationality</u>**

Question No. 1: Article 15 of United Nation Declaration of Human Rights entitles everyone for grant of nationality. Can afghan refugees enjoy such right in Pakistan?

○	○	○	○	○
100%	75%	50%	25%	0%

Question No. 2: Under the United Nation Declaration on Human Rights a government is prohibited to refuse the application for nationality of a person arbitrarily. How far the government institutions in Pakistan adhere to such norms while dealing with the application of Afghan refugees for nationality?

○	○	○	○	○
100%	75%	50%	25%	0%

Question No. 3: Under Article 34 of Geneva Convention 1951 a government is obliged for assimilation and naturalization of refugees. How far the government of Pakistan has taken serious steps for naturalization of afghan refugees?

○	○	○	○	○
100%	75%	50%	25%	0%

Question No. 4: Under Article 12 of Geneva Convention 1951 the decision on nationality shall be made subject to judicial examination. How far the rule is practiced in Pakistan?

○	○	○	○	○
100%	75%	50%	25%	0%

Question No. 5: Article 26 of UN Covenant on Political and Civil Right requires the government for equal treatment and prohibition of discrimination on the basis of race, color and language. How far Afghan refugees are treated equally with other migrants/refugees?

○	○	○	○	○
100%	75%	50%	25%	0%

b. List of Respondents:

S#	Name	Gender	Age	City
01	Ms. Farzana	Female	35	Quetta
02	Ms. Maleeka	Female	29	Quetta
03	Ms. Roqia	Female	25	Quetta
04	Ms. Zahida	Female	24	Quetta
05	Ms. Shehr Banu	Female	30	Quetta
06	Ms. Nousheen	Female	33	Quetta
06	Ms. Qurat ul Ain	Female	30	Quetta
07	Ms. Najeeba	Female	29	Quetta
08	Ms. Sahar Mirza	Female	28	Quetta
09	Ms. Zainab	Female	30	Quetta
10	Ms. Sadaf Batool	Female	25	Quetta
11	Mr. Ghulam Rasool	Male	35	Quetta
12	Mr. Abdul Manan	Male	40	Quetta
13	Mr. Taimor Shah Kakar	Male	35	Quetta
14	Mr. Noor Zaib Kasi	Male	35	Quetta
15.	Mr. Bilal Sasoli	Male	33	Quetta
16.	Mr. Najeeb Ullah	Male	30	Quetta
17.	Mr. Ali Raza	Male	29	Quetta
18.	Mr. Bismillah	Male	34	Quetta
19.	Mr. Sajjad Hussain	Male	33	Quetta
20.	Mr. Hussain Ali	Male	45	Quetta
21.	Ms. Khalida Mansoor	Female	26	Islamabad
22.	Ms. Maryam Murtaza	Female	28	Islamabad
23.	Ms. Urooj	Female	24	Islamabad
24.	Ms. Maham Khawar	Female	25	Islamabad
25.	Ms. Noshaba	Female	30	Islamabad
26.	Ms. Khatira	Female	32	Islamabad
27.	Ms. Fouzia	Female	33	Islamabad
28.	Ms. Shabana	Female	28	Islamabad
29.	Ms. Feroza	Female	30	Islamabad
30.	Ms. Rida Jamal	Female	33	Islamabad
31.	Mr. Asad Baloch	Male	29	Islamabad
32.	Mr. Zulqarnain	Male	28	Islamabad
33.	Mr. Abdullah	Male	30	Islamabad
34.	Mr. Abid Toori	Male	45	Islamabad
35.	Mr. Jawad Ullah Shah	Male	40	Islamabad
36.	Mr. M. Waseem	Male	38	Islamabad
37.	Mr. Ghulam Hussain	Male	45	Islamabad
38.	Mr. M. Mazhar	Male	40	Islamabad
39.	Hafiz M. Amir	Male	33	Islamabad
40.	Mr. Tanveer Hussain	Male	35	Islamabad

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