

CITIZENSHIP ISSUES FACED BY PAKISTAN'S PAKHTUNS COMMUNITY DUE TO THE PRESENCE OF REFUGEES FROM AFGHANISTAN: A LEGAL PERSPECTIVE

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Abstract

This article clarifies the ambiguities related to the citizenship/nationality of the Pakhtun community in Pakistan from the historical and legal perspective. Since the arrival of refugees from Afghanistan who are predominantly Pakhtuns, the Pakhtun nationals/citizens of Pakistan are fighting on two fronts simultaneously: one to accommodate and facilitate the vulnerable refugees who have lost almost everything at their motherland; and second to fights for equality in the country which is guaranteed under the Constitution of Pakistan. The article explain from the historical and legal context, the relationship of the Pakhtuns with their fellow Afghans, who have taken refuge in their land and with Pakistan in who's jurisdiction their territory falls due to which they are their citizens by default.

Keywords: Refugees, Afghanistan, Citizenship, Pakhtuns, Law, Pakistan

Introduction

Citizenship or nationality has been called upon to be everything to every individual in the world such as identity, social welfare, recognition, political and civil rights, the consciousness and common good of the community.¹ The term citizenship and nationality are frequently used synonymously and that a number of laws at domestic level use only the former concept. Due to the presence of Afghan refugees, there are certain

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¹ Liebich, A., 'Citizenship in its International Dimension', in A. Liebich & D. Warner with J. Dragovic (eds.), *Citizenship East and West*. (London: Kegan Paul International, 1995): 27

ambiguities related to Pakhtuns' citizenship/nationality in Pakistan, as majority of these refugees are also Pakhtuns. As it is a common practice among the Pakhtuns of the Khyber Pakhtunkhwa and Balochistan provinces, who are the nationals of Pakistan to write the word "Afghan" in the column relating to national (Qaum) as they are of Afghan origin. If one looks back into the history, the territory constituting Pakistan as well as India, Bangladesh, Afghanistan etc.; were parts of the Mughal Empire. After the British occupation of the Sub-Continent, some parts of Afghanistan were annexed into the British-India by the then British rulers and a boundary line known as Durand Line was drawn in between the British India and Afghanistan. Those Afghans who came within the territory of the British-India became their citizens by default. After the independence of Pakistan in 1947, all those people living in the territorial jurisdiction of the country became their citizens by default.

Until 1970's there was no issue related to the nationality of Pakhtuns in Pakistan but when the then Soviet Union attacked Afghanistan in 1979, due to which too many Afghans as a refugee came to Pakistan, then the confusion about the local Pakhtuns came to surface. This displaced Afghan population began to leave their native land during internal political disorders in 1970s. The subsequent occupation by the Soviet forces in December 1979 resulted in the world largest refugee crisis. Huge number of Afghan refugees crossed the Pak-Afghan border and settled in different parts of Pakistan, especially in Khyber Pakhtunkhwa and within few months, they started their business and become a visible entity of the area. These refugees deeply affected the culture, society, business, and law and order of Khyber Pakhtunkhwa.² The affluent Afghan refugees become a permanent feature in the province as they purchased properties, possess National Identity Cards, passport, and settled in planned residential areas. In the tribal area, they have established ties with strong tribes through inter marriages and tribal links.

The Afghan refugees also spread in settled areas and brought with them upheaval in social and economic life of the province, and affected every aspect of life. The most instrumental causes of the smooth and rapid settlement of these refugees in the provinces are linguistic, cultural, and historical ties that existed between the population of the provinces and Afghans before migration. These similarities in terms of culture, language, and religion have facilitated the interaction between them, and have undermined the efforts to regularize the activities of these refugees in Khyber Pakhtunkhwa and Balochistan.³ The Afghan refugees merged into

² Taha, and Aamir, History Culture and Cross-Border Migration: Impact of Afghan Refugees on Socio-Economic Environment of Peshawar. *International Journal of Independent Research and Studies* 1(4), (2012): 175. Retrieved from: SSRN: <https://ssrn.com/abstract=2164925>.

³ Haris Gazdar, *Overview of Thematic Papers: Determinants and Drivers of Poverty Reduction in Rural Pakistan*, (Islamabad: Asian Development Bank, October 2005).

political and economic spheres of society.⁴ Although millions of Afghan refugees have returned to Afghanistan since 2002, but still millions of them have yet to return, and among 3 million refugees who reside in Pakistan, 82 percent refugees have no immediate plans of return.⁵ Since the last four decades Pakistan has remained host of the world's largest refugee population.

This research article will therefore investigate this confusion from legal as well as historical perspective along with possible solutions.

Historical Perspective

Historically Pakhtuns are known by numerous connected names. 'Afghan', denoting in juridical sense a national of Afghanistan, is interchangeable with 'Pakhtun'. Many Pakhtuns living in the north-western part of Pakistan are very much aware of their ethnicity but still mentioning their identity as 'Afghan' in the official documents; a practice that began in the raj.⁶ Elaborate genealogies have been woven around Qais Abdul Rashid, who is assumed to be the primal ancestor of all Pakhtuns. Pakhtun genealogies originated in seventeenth-century Mughal courts and were written by court scribe Naematullah. These genealogies eventually found their way to British colonial ethnographies and are sometimes mentioned in modern books on the region. Their only relevance today is that they sketch a very rough chart of the relationship of different tribes to each other, or different lineages within tribes. Under the prevailing classifications, Pakhtuns are further classified into these four main tribal groupings: the Sarbani, Bhattani, Ghurghust and Karlani. The first three were considered to be the sons of Qais, while the fourth, Karlani, was an adopted son. The Sarbanis are divided into two branches: the Sharkbun and the Kharshbun. The most significant tribes of this branch today are the Sherani, the Tareen, the Urmer, the Durranis, Khalils, Mohmands, Daudzai, Chamkanis, Yousafzai, Shinwari and Tarkalani. The second branch, the Bhattani, consists of the Bhattanis, Niazis, the Lodhis, Marwats, Babars, Gandapurs and Kundis, and the Ghilzai confederacy. The Ghilzais are one of the largest nomadic populations in the world, known for their seasonal migratory herders called *kuchis*. The Hotak, Sulaiman Khel, Kharoti, Ali Khel, Nasar and Taraki are the main Ghilzai tribes. The Ghurghust branch includes the Kakar, Mando Khel, Musa Khel and Panri tribes, who inhabit districts of

⁴ Khattak, S. G., & Bokhari, S., *Household Food Economy Assessment: Refugee Camp Shamshatoo, NWFP Pakistan*, (Islamabad: Sustainable Development Policy Institute, 2004).

⁵ Taha, and Aamir, History Culture and Cross-Border Migration: Impact of Afghan Refugees on Socio-Economic Environment of Peshawar. *International Journal of Independent Research and Studies* 1(4), (2012): 175. Retrieved from: SSRN: <https://ssrn.com/abstract=2164925>

⁶ Abubakar Siddique, *The Pashtun Question: The Unresolved Key to the Future of Pakistan and Afghanistan*, (C. Hurst & Co., 2014): 11

Balochistan Province in Pakistan. The Safi and Gandun tribes are found in Pakistan's Khyber Pakhtunkhwa Province, the Tribal Areas and in eastern Afghanistan. The fourth major grouping was little known to Mughal scribes. The Karlani preserve aspects of pristine tribal organization, supplemented by intricate traditional laws. Its members live today on both sides of the Afghan-Pakistan border. The Karlani include some of the most famous Pashtun tribes, among them the Afridis, the Khattaks, Mangal, Zadran, Muqbil, Zazi (Jaji), Bangash, Mehsud, Orakzai, Khugiani, Wardak, Turi and Wazirs. This great tribal maze makes the Pashtuns the world's largest tribally organized society.⁷

The history of Pakhtuns' dominance over Afghanistan as a state began in 1747, when Ahmad Shah Durrani occupied Delhi along with other parts of united India and stretched over his empire as far as to Kashmir, Delhi, Arabian Sea and the little-Tibet. The present shape of Afghanistan's territorial boundaries is the product of century long process of diplomacy and wars formally known as 'Great Game'- a geopolitical competition among Great Britain, Soviet Union and Iran. The period saw three Anglo-Afghan wars, many other violent occurrences with external powers, revolts and struggle for succession within country and the internal incursion of Afghan leader Amir Abdur Rehman Khan.⁸ While accurate current census data is lacking, it can be estimated that Pakhtuns are projected to make up almost Afghanistan's half population and they also constitute largest minority of Pakistan, constituting almost 15–20 per cent of the nation's population. Originally the motherland of Pakhtun's was located in-between the central Afghanistan's Hindu Kush Mountains and the River Indus that bisect Pakistan, although Pakhtun communities are now spread-over a huge area. In northern Afghanistan, the Pakhtun population extends to the Amu Darya (Oxus River) border with Central Asia, where Pakhtun communities have grown substantially over the past century. The southern Pakistani port city of Karachi, on the Arabian Sea, is today home to one of the region's largest urban Pakhtun populations, the result of massive economic migration.⁹ Afghanistan has remained a buffer between the competing interests of Britain and Russia since 1830s until the beginning of the 20th Century. It was during the British-Russian Great Game in the region that led to the creation of Durand Line in 1893, the agreement which demarcated a

⁷ Abubakar Siddique, *The Pashtun Question: The Unresolved Key to the Future of Pakistan and Afghanistan*, (C. Hurst & Co., UK, 2014): 13.

⁸ Barry, M. *Kabul's Long Shadows: Historical Perspectives*, (Princeton: NJ: Lichtenstein Institute on Self-Determination, 2011)

⁹ Abubakar Siddique, *The Pashtun Question: The Unresolved Key to the Future of Pakistan and Afghanistan*, (C. Hurst & Co., UK, 2014).

line between British India, and Afghanistan and now separates Afghanistan and Pakistan.¹⁰

Afghanistan remained independent from super powers influence until the initial stages of cold war. However, when the cold war intensified the Soviet began to increase its influence in Afghanistan and on April 27, 1978, the Soviet Union installed a pro-communist regime in Kabul under the leadership of Nur Muhammad Taraki. The new government attempted to bring drastic liberal reforms in the country, which was not supported by the country social structure.¹¹ In reaction to Taraki reforms, the religious leaders started Jihad against the communist government and civil war began between the forces of Taraki and resistance groups. In December 1979 the Soviet forces invaded Afghanistan with the aim to stabilize the Soviet backed communist regime of Afghanistan. The Red Army invaded the People Democratic Republic of Afghanistan for consolidating its client state where the politico-military situation was deteriorating due to the growing strength of Mujahedeen. In the beginning, the Soviet decided to provide only logistic support to the Afghan forces against the insurgents, but later on the Soviet directly become involved in the most rugged mountainous country of the world, and with the most expert warriors of the world.

Afghan refugees impact on Pakistani Pakhtun Citizens

With the rise of the nation states in the late 18th to late 20th centuries, new ingredients of definition began to surface; ideas of nationality defined by common essentials and the right to live in the nation of birth rather than of ancestry began to overlay or displace the primacy of kinship. Perceiving something of a sea-change in bases of identity in the modern era, historians and social scientists have for some time been grappling with an attempt to define the concept of national identity.¹² However Pakhtun's history for at least the past six centuries has been shaped by war, invasion and endemic local violence. These ordeals have shown that the Pakhtun identity is resilient. While former nemeses such as the Mughals exist today only in history books, the Pakhtuns have survived to constitute a nation in the archetypal sense. But Pakhtuns, as a whole, have never been fully integrated into a single empire, state or political system—though they have formed empires of their own. Afghans have been at war since four decades. The long war has lifted devastating impact on the lives of Afghans. Millions of

¹⁰ Collins, J. *Understanding War in Afghanistan*, (Washington DC: National Defence University Press, 2011): 5-7

¹¹ Grau, L., & Cress, M. *The Soviet Afghan War: How a Superpower Fought and Lost*, (Lawrence, Kansas: University Press of Kansas, 2002): xxii

¹² E.J.Hobsbawm, *Nations and Nationalism since 1780*, (Cambridge: Cambridge University Press, 1990); Benedict Anderson, *Imagined Communities*, (London: Verso, rev. edn., 1991); E.Gellner, *Nations and Nationalism* (Oxford: Blackwell, 1983); John Hutchinson and Anthony Smith (eds), *Nationalism* (Oxford: Oxford University Press, 1994); M.Fulbrook (ed.).

Afghans have been killed, injured, and have been forced to leave their homes. The prolong conflict has destroyed the Afghan social fabric, the state institutions and their country's infrastructure.¹³

As Pakhtuns today live in two distinct neighboring and sometimes hostile states; which have strikingly different political arrangements. The social make-up of Pakhtun communities varies according to whether they are rural or urban, the degree of their inclusion or separation from surrounding societies, their level of embracement of development and modernity, and the amount of the pressure they have experienced during the preceding four decades of turmoil. The mother-tongue of majority of Pakhtuns is Pashto, an Indo-European language. In fast growing urbanized regions and areas with diverse racial populations, bilingualism is common among the Pakhtuns. Embedded in a tribal organization of society, *Pakhtunwali* embrace principles that are common with the larger neighboring civilizations. However, its importance is that it has a set of essential principles of individual and joint behavior that are seen as specific to Pakhtuns.¹⁴ Since the line of separation drawn in 1893 by Sir Mortimer Durand, which makes a boundary in between Pak-Afghan and was accepted by the then king of Afghanistan in a treaty that same year; but there have been no restrictions on the movement of Pakhtuns (Afghans) on both sides of the border, and shouldn't be confused with refugees' crossing into Pakistan. While the population on both sides shares a common ethnic identity, they hardly consider the line to be an international boundary between Afghanistan and Pakistan. Pakhtuns living on both sides of the Durand Line have been moving back and forth across the divide; even living with their family on one side and pursued employment on the other side, often on a seasonal basis.

Keeping in view these facts in mind, one can imagine that the issues related to Afghan refugees in Pakistan are very complicated. The continued Afghan war and disturbance and the porous border between Pakistan and Afghanistan has kept the refugee inflow alive. Pakistan has demonstrated ambivalence and true generousness in its dealings with Afghan refugees. However, the huge size of refugees and their prolong stay have greatly impacted Pakistan's political, economic and social institution. Unfortunately refugee crisis were not resolved even after the end of Soviet war in Afghanistan due to the ensuing civil war and uncertainty. One of the most important aspects which is frequently overlooked by all the stakeholders is that due to the presence of Afghan refugee in the Pakhtun dominated areas, these Pakhtuns of Pakistani origin themselves also confronting a great number of hardships in their daily life, which include among others, the

¹³ Jackson, A. *The Cost of Afghan War: Afghan Experiences of Conflict, 1978 – 2009*. P.3. (Oxfam International, 2009): 3

¹⁴ Abubakar Siddique, *The Pashtun Question: The Unresolved Key to the Future of Pakistan and Afghanistan*, (C. Hurst & Co., UK, 2014): 14

blocking of their identity documents, racism, suspicion and prejudice from the government functionaries. Regardless of their geographical origin, all Pakhtuns are usually describing themselves as 'Afghans' in Pakistan also as mentioned earlier as well. Therefore we should never forget the sacrifices rendered by this community for welfare and prosperity of their motherland.

The Relevant Citizenship Law Position

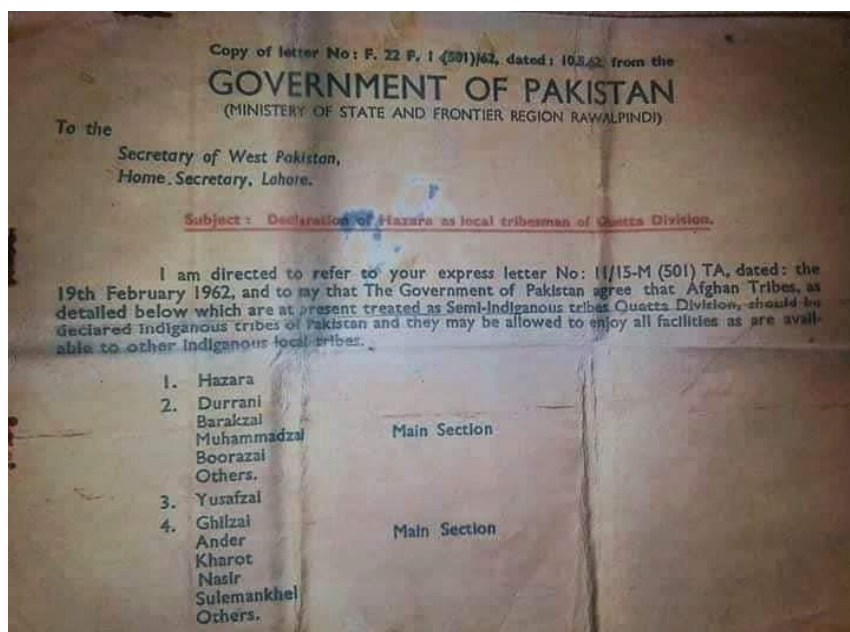
The predominant notions of contemporary citizenship, as articulated in both popular and scholarly discussions, envisage that populations are ordered within nation state borders by rules of citizenship that acclaim 'national belongings' as the justifiable foundation of connection in modern states. Therefore, citizenship of a nation is described by the two fundamental principles: a congruence in-between territorial state and their national community; national belongings as their basis of rights and duties of people as well as their joint identity. Thus, what citizenship of a nationality indicates is a territorially bounded populace with a particular set of rights and duties, eliminating others on the basis of nationality.¹⁵

Pakistan enforced its first citizenship law, the Pakistan Citizenship Act, 1951 ("the Act"), on 13 April 1951. Before its creation in 1947, Pakistan was part of the British-Indian colony. Pakistan inherited several procedural and substantive laws as colonial legacy. Nonetheless, the British-India colony did not have any law on the issue of citizenship. The Act was especially drafted to accommodate diverse group of individuals then residing in Pakistani territory. Section 3 of the Act regulates the citizenship of all segments of population.¹⁶

Nevertheless, it is international law's guiding principle that it is for every state to set up its own rules and decide under its laws who are their nationals. Individual is not only connected through nationality to a state but is also connected through it to international law as well. Based on these principles the Government of Pakistan on the 19th of February 1962 made a declaration vide letter No. 11/15-M (501) TA, regarding Afghan Tribes, who were declared as indigenous tribes of Pakistan and were allowed to enjoy all facilities as are available to other citizens. As discussed above there should be no confusion about the status of Afghan refugees as there is no statutory provision of law expressly deals with the status of citizenship of refugees in general and Afghan refugees in particular in Pakistan, as they have been given only temporary stay here to remain till the normalization of situation in their motherland.

¹⁵David Cesarani and Mary Fulbrook, *Citizenship, Nationality and Migration in Europe*, (Routledge, 1996):18.

¹⁶Faryal Nazir, *Report on Citizenship Law Pakistan*, (Italy: European University Institute Badia Fiesolana, 2016):1



Another area of great concern in majority of the Muslim countries is related to women, where equality of citizenship is often declared in their constitutions, but it is not enforced in practice and Pakistan is no exception. Despite formal declaration of gender equality, women are not yet considered as being equal to men. Women are also very aware that equal social status and rights are a precursor to equal citizenship. They are struggling against this gendered approach of the law. In the 1973 Constitution of the country, male and female citizens are declared equal, however, there is a double standard resulting in the different treatment of men and women. Women struggle to balance the relationships between men and women by stressing the need to respect equal citizenship as outlined in the nation's Constitution. Despite discriminations and difficulties of everyday life in Pakistan, women are becoming more and more aware of the urgency to be considered equal citizens. They are beginning to complain about the violations of their rights at various forums, which then try to attract national attention and discourses. The fact that asserting gender equality and equal citizenship would further strengthen the regime, as women constitutes nearly fifty percent of the nation.¹⁷

Under the Pakistan Citizenship Act of 1951, married women are accorded an unusual treatment, by virtue of which a woman of foreign origin is entitled to the Pakistan's citizenship on the ground of marriage to a man

¹⁷ Linda C. McClain & Joanna L. Grossman, *Gender Equality; Dimensions Of Women's Equal Citizenship*, (New York: Cambridge University Press, 2009): 390-406.

having Pakistani nationality by birth, migration or descent.¹⁸ Such a woman can also assert her right of citizenship even though her husband has died who was otherwise a national of Pakistan or was legally entitled to its nationality. While on the other hand those women having Pakistani nationality and have married foreigner such as Pakhtun women of Pakistani origin having married to Afghan refugees living here for nearly four decades and having children, etc; have been denied this right even though the Constitution of the country guarantees equal status to them and have been held just by the courts of country also as mentioned in a famous case below as well.

In one of the famous cases titled *Sharifan vs. Federation of Pakistan*, the constitutionality of Section 10 of the Act, was under consideration.¹⁹ The petitioner being a woman having Pakistan's nationality and married to an Indian national claimed the citizenship for husband which was refused. However, Section 10 of the Citizenship Act only permits a woman of foreign origin to attain the country's citizenship on the ground of marriage if their husband is of Pakistani origin. On the other hand there is no corresponding provision of law which entitles a man of foreign origin marrying a woman of Pakistani origin to obtain nationality on marital bases. In this case, the petitioner argued that women should be given equal treatment in Pakistan and a man of foreign origin marrying a woman having Pakistan's nationality should be permitted to obtain Pakistan's nationality on the ground of marriage. The court unfortunately rejected the petitioner's claim with reasons that such protections can only be granted to women marrying men of Pakistani origin by keeping in view the women's position under Private International Law. The court rejected the plea of equality clause as guaranteed under the 1971 Constitution (Art. 25).

Still gender inequality in citizenship laws in Pakistan is a relevant issue, though the 1973 Constitution of the Islamic Republic of Pakistan guarantees equal status to all citizens before the law irrespective of their gender as mentioned above. All those women of Pakistani nationality who have married to foreigners such as Afghan refugees etc; have been denied the citizenship of Pakistan, which was taken by the Federal Shariat Court in its suo moto jurisdiction and declared that it is against the Constitution which guarantees equal status to all the citizens and also against the spirit of Islam. The federal government appealed against it in the Supreme Court of Pakistan and still pending before it since 2007.

Conclusion

It can be concluded that citizenship/nationality entitles an individual to a variety of specific rights and duties; such as rights to property, political

¹⁸ Government of Pakistan, *Section 10, the Pakistan Citizenship Act*, (1951).

¹⁹ *Sharifan vs. Federation of Pakistan, The All Pakistan Legal Decisions (PLD)*, (Lahore : Punjab Educational Press, 1998): 59

representation and participation, residence, assorted benefits and, usually associated responsibilities to the public at large. Citizenship has wider, affective connotations too: the sense of belonging to a broader community, expressed in symbols and values, and the often quite vehement emotional identification which may be associated with that wider community of belonging. Conversely, exclusion from citizenship may be associated with experiences ranging from the relatively passive lack of entitlement to vote through infinitely more problematic and unpleasant aspects of life as ‘aliens’ in a not always hospitable host country. In its most frequently cited passage as to the meaning of nationality, the ICJ held that: ‘[N]ationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the existence of reciprocal rights and duties.’²⁰

Pakhtuns who make a sizable portion of the country’s population and who are the indigenous people of the land as declared in above notification as well should not be denied or confused their citizenship of the country on the pretext of Afghan refugees. They have already made too many sacrifices for the nation and progressively working for the development of Pakistan. Pakhtuns are always at the forefront whenever there is a need for the security and prosperity of the country. It is the Pakhtun community who has suffered too many hardships in the form of terrorism, security, scarcity of employment opportunities, housing problems, Kalashnikov and narcotic culture and now the citizenship related issues due to the presence of these Afghan refugees in their areas.

Instead of focusing on their problems and hardships which this community has suffered due to the arrival of these refugees from Afghanistan since 1979, the government authorities are further aggravating their problems. It is the responsibility of the governmental authorities to keep their house in order by maintaining all the relevant record of these refugees in their custody in order to avoid such confusions in future which can create problems for their own Pakhtun community. Government should formulate a comprehensive policy related to these refugees.

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²⁰ European Convention on Nationality, Council of Europe, 6 November 1997, ETS 166, which defines ‘nationality’ as ‘the legal bond between a person and a State that does not indicate the person’s ethnic origin’ (Art. 2).

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