

Right of Asylum in Islamic International Law (Siyar) and International Law (United Nations' Universal Declaration of Human Rights): A Comparative Study

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ABSTRACT

The right of Asylum is an indispensable human right given by Shariah and modern refugee laws. Granting Asylum is an imperative concept in today's world as many people are indulged in fear of life because of some social, political, or religious problems and they may leave their own country and ask other states for protection. The security or protection granted by other states in such a situation is called Asylum. This paper finds out the concept of the right of Asylum in Shariah and UDHR, differences and similarities in Siyar and UDHR regarding the right of Asylum, principles governing the right of Asylum, and types and conditions for granting Asylum. In the end, this paper concludes that there are some similarities as well as differences in both but the concept of Islam regarding "Right of Asylum" is vast than a western and modern concept. If they are taken into consideration, it could significantly solve the refugee problems all over the world and especially within the Muslim States.

KEYWORDS: Asylum, *Shariah*, Refugee, UDHR, United Nations, Comparative study.

Introduction

Islam is the only religion which guides humanity in all matters whether related to *Ibadaat* or *Mamulat*. Undoubtedly, this divine religion was revealed to shed light on everything of the universe: religious as well as worldly.¹ This is confirmed by the words of Allah in the Holy Quran:

"...and we have sent down to thee the Book explaining all things, a Guide, a Mercy, and glad tidings to Muslims."²

Every Islamic state must have internal relations (within state) as well as external relations (with other non-Muslim states). The relations with non-Muslim states come under the law of *Siyar*. *Siyar* means the behaviors and

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conducts of Prophet Muhammad, ﷺ at the time of war and peace, and Islamic jurists has been precisely used this term for Islamic International Law.³ The word “*Siyar*” was first used by Ibn Hisham (d.218/833) in his *Al-Sira-al-Nabawiyya*, an abridgement of an earlier work by Ibn Ishāq (d.151/768).⁴ In second century of Islamic period, the word *Siyar* was used in two ways, one by *chroniclers* in their description to mean life and biography, and secondly jurists used it to mean the conduct of state in its relationships with other states.⁵ Simply *Siyar* is the first and foremost extensive treatment of international relations.⁶

International law represents by *United Nations’ UDHR* (1948) also used this word “Asylum” and gave this right to the refugees asking for it. Article 14 of UDHR is all about the right of Asylum.

The thorough study of *Siyar* and UDHR elucidates that the right of Asylum is given by both but the main problem is implementation of this right in modern world, as in today’s world no state allows to any individual to grant Asylum without the state authority. Whereas the concept of Asylum in the law of *Siyar* is quite different. Muslim might give protection of life to non-Muslim and non-Muslim to Muslim in an Islamic government. West always criticized Islam being intolerant and parochial religion and misrepresents it by different means. The major reason to conduct this research is to bring the real picture of Islam in front of the world and to clarify that Islam is the first religion in the history that has protected the rights of humanity and the rights of refugees in its true sense.

Literal and Technical meaning of Asylum

The right of asylum is a quite old concept even historians finds its origin back to the time of eastern Mediterranean especially the Egyptians, Greeks and Phoenicians. According to historians in pre-Arab times the Kaaba was the first place of Asylum and whosoever detect danger of life entered in the sanctums like *Kaaba*, and felt himself in full protection of life.⁷

Literal meaning of Asylum is sanctuary, shelter, re-treat and refuge,⁸ In Arabic language the word Asylum is translated as (مَلْجَا) Malja, (بِنْمَارِسْتَان) Bemaristan and (مُسْتَشْفَا) Mustashfa.⁹ In Encyclopedia of Religion and Ethics Asylum technically defined as “*a place of shelter and protection from which a refugee is not acceptable to be forcibly removed*”.¹⁰ It also means “*the relations of Muslim states with non- Muslim states*”.¹¹

From all the above meanings of Asylum it is stated that Asylum generally means a refuge offered by a state, it also means sanctuary, shelter, or a place from which a person cannot be vigorously removed. A person who asked for Asylum is known as the Refugee. Refugee means a person who has been forced to leave his own country because of some social, religious or political reasons.¹²

Right of Asylum in the Law of Siyar (Islamic Law of war and peace)

Islam being a balance religion regulates all type of relations with other states weather it is related to war, peace or trade. We have already discussed *Siyar* in detail. Al Ghunaimi defines *Siyar* as

“The sum total of rules and practices which Islam ordains or tolerates in international relations”.¹³

Refuge and Right of Asylum dates back to the most remote antiquity. It was initially inspired by religious faith and known as religious Asylum. In old civilizations like Babylon, Mesopotamia, Phoenician people indulge in any kind of fear asked for religious Asylum. In Islam Right of Asylum is linked with Generosity and kindness. The hospitality, kindness and generosity were the main traits of Arabs, which make them civilized people of desert. They always welcomed their guests and strangers with open heart even to those who were persecuted at their own state. In present world the Arab and Muslim countries follows that rules of granting Asylum which was practiced in pre-Islamic era. Two major incidents in history of Islam one of “the emigration to *Abyssinia*” and the second one is “*Hijrah*” should also be noted. By noticing these two major incidents it can be stated that Islam was borne and developed in a climate of hostility and persecution. Like Western world Arab world also issued legal instruments for the rights of refugees and right of Asylum. Some of them are Arab Charter on Human Rights, The Cairo Declaration on the Protection of Refugees and Displaced Persons in the Arab World, and the Arab Convention on Refugees. These major instruments of history were issued in the 1990.¹⁴

Consequently, it can be said that granting of Right of Asylum is very old concept. Other than Islam different old religions also practiced Asylum, they granted Asylum to those peoples who asked for it. Later in pre- Islamic era people comes from different areas in *Haram* near *Kaaba*, it was the safest place where people felt secure and whenever any person asked for refuge the leaders of that areas gave him Asylum. With the emergence of Islam, the concept became more comprehensive and inclusive.

Aman and Dhimma: Two concepts of Asylum in Pre-Islamic Era

At the time of war Muslim states (*Dar-ul-Islam*) provides a temporary Asylum to non-Muslims, idolaters or strangers in their territory, this concept of granting Asylum is known as *Aman* (Safeguard). Certainly, *Aman* is one of the beautiful forms of Arab hospitality admired by many English writers too.¹⁵ Another concept in Islam regarding Asylum is *Dhimma* which means the permanent place of Asylum or protection for the people of Book in the *Dar-ul-Islam*. The person grants Asylum or protection in the territory is known as *Dhimmi*. The historical foundations found on *Dhimma* are the pact of Holy Prophet ﷺ with the Jews of Madinah and the Christians of Najran¹⁶.

The *Zimmi* pays the *Jizya* to the state and Islamic state protects him by all means.¹⁷

Right of Asylum under Shariah (Quran and Hadith)

To elaborate the concept of right of Asylum Quran used different words. The Holy Quran states:

“If one amongst the pagans ask thee for asylum. Grant it to him. So that he may hear the Word of Allah; and then escort him to where he can be secure that is because they are men without knowledge”.¹⁸

According to a classical sunni interpretation *Tafsir Al Jalalayn* if any non-Muslim idolaters requests to Muslim state for refuge or Asylum against being killed, then grant him Asylum, so that he might hear the words of *Allah* (Quran) and maybe he accepted Islam because they are the people who do not know about the religion of *Allah* before.¹⁹

In Holy Quran the word “Migration”, “Shelter”, “Refuge (*Malja*)” is also used in different verses to connate the same concept.

There are number of *Ahadith* of Holy Prophet’s ﷺ on this regard. The study of the history of Islam and Study of the Life of Holy Prophet ﷺ tells that Islam and Holy Prophet ﷺ much emphasized on Non-Muslims rights. According to Islamic history Asylum is not confined to sacred sites, but it can be granted in homes as well. Asylum should be granted without any discrimination. This is a *hadith* of Holy Prophet ﷺ related to Asylum:

Narrated 'Abdullah bin 'Amr: The Prophet said, "Whoever killed a person having a treaty with the Muslims, shall not smell the smell of Paradise though its smell is perceived from a distance of forty years."²⁰

Conditions of Granting Asylum in Shariah

Islam has described certain conditions in order to grant Asylum to Muslims and non-Muslims. Few of them are as follows; the person should be present in the land of Islam, there should be a motive for Asylum and non-conflict of asylum with *Shari'ah* rules.²¹ *Shari'ah* also presents rules of the right of asylum as enshrined in the Holy Quran: In *Surah al Hashr* Allah Almighty gives five basic rules on the right of Asylum: The rules derived from this *Ayah* are that the Asylum-seeker should be welcomed, show affection, well treated, should not be expelled or denied admission.²²

Salient Principles Governing the Right of Asylum

A. Principle of non-refoulement

Islam never permits that an Asylum-seeker to be returned to that place where there is fear of life and Islam was first to established the principles of non-refoulement of those who committed any political crime.²³ Giving back a refugee to the state where is risk of life is not allowed in Islam at all. In History, incident of migration to *Habsha* is an example.

B. Principle of the prohibition of imposing penalties on a refugee who illegally enters into or are present on the state territory

It is universally recognized that visa is a must to enter any state, without visa there is no permission by any territory to enter however according to some Muslim jurists these are some categories of persons who were exempted from the requirement of Visa,²⁴ Including an ambassador or an in comer to listen to the Quran shall be secured by *Shariah*, unlike a trader who shall not be secured until he becomes a believer, if a person is habitually safe, Imam shafi'i says, if a non-Muslim found in an Islamic territory on an open space and unarmed and says that he is came as a messenger, he should be admitted and left unharmed.²⁵

C. Principle of non-discrimination

According to Islam, Asylum is granted to whoever solicits it, regardless of religion, race, color or fortune. This is based on the fact that Islam protects human rights for all humans without any kind of discrimination. Therefore, Article 9 of the Universal Islamic Declaration on Human Rights (1981) provides,

“Every persecuted or tyrannized person shall have the right to seek refuge and asylum. This right shall be guaranteed for each human being, regardless of race, religion, color or gender.”

D. Principle of the Humanitarian Character of the Right of Asylum

Since the right of Asylum warrants that a person at risk of persecution is granted *aman*, its humanitarian character is intrinsic and can never be missed. Islam and international law are in agreement on the humanitarian character of the right to asylum.²⁶

Types of Asylum in Islamic Shari'ah

There are three types of asylum: **religious, territorial and diplomatic** and these three classifieds in further types.

Religious asylum has two forms: Asylum for the purpose of hearing the Words of Allah and Asylum to al-*Haram* means if any person coming outside from Muslim state, Asylum to al *Haram* is considered as the religious Asylum, as Holy Prophet ﷺ said at the time of last sermon.²⁷ Territorial Asylum was also known at pre- Islamic era. So *shariah* does neither our looked nor disregard territorial Asylum. In this type of Asylum, it may be granted by individual, so in Islam, an individual may grant refuge. This is supported by this consideration: Islam gives everyone the right to grant *aman* based on the *hadith* of Prophet Mohammad ﷺ, “*Muslims are equal in blood; the lowest-ranking among them can give aman and observe zimma (aman) given by other Muslims and they are united against others.*” The Islam has golden principles in this regard. Islam grants territorial

Asylum in its own territory to the person who converted to Islam. And the third type of Asylum in *shariah* is Diplomatic asylum which is allowed in Islam e.g. “In 360 (AH) (976 AD), a Byzantine rebel named Ward, who was scheming to seize power, was defeated by the Byzantine army and subsequently took refuge to the ‘Abbasid State. Many envoys and emissaries, particularly on the part of the Byzantines, were exchanged regarding the extradition of the said refugee. The ‘Abbasids finally agreed to the Byzantines’ request for extradition only after conducting negotiations and consultations on means of ensuring the safety, good treatment and redress of the rebel leader and his followers. In the meantime, Ward stayed with the ‘Abbasids for five years, during which he was accorded good treatment and care”.²⁸

Thus, Law of *Siyar* provides certain conditions in order to grant asylum. *Shariah* also elaborates the principles and the types of Asylum in a very comprehensive manner. Quran and Sunnah are replete with the injunctions of right of Asylum and also there are many historical events where the right of Asylum was practiced by the Muslims. The above study proves that Islam gives the right of Asylum to every individual who ask for it or who is under any fear and persecution. Now the question arises whether the right of Asylum is granted by contemporary international law and if yes, is it as comprehensive as given by Islam?

Right of Asylum in United Nations’ Universal Declaration of Human Rights (UDHR)

International law means the rules and the regulations governing the relationships between different countries, though recently, the scope of international law has been redefined to include relations between states and individuals, and relations between international organizations. Among these organizations one of important world organization is United Nations’.

Franklin Delano Roosevelt was the first person who used the expression “United Nations” for Allied nations who were engaged in war against the axis power of Germany.²⁹The key objective of United Nations’ was to protect human rights without any discrimination.³⁰ The originators of the United Nations swore to make the world a more secure spot. The most essential of the aforementioned archives was undoubtedly 1948 Universal Declaration of Human Rights (UDHR).³¹It can be said that in twentieth century the emergence of United Nations was the one of the major works done by the west. The United Nations made different agreements with different organizations but the most important was the United Nations Charter which was made by UN itself.

So, the constituent instrument of UN is its charter (UNCH).³²This was signed on 26 June, in San Francisco, and came into force on 24 October 1945. There are 19 chapters along with 111 different articles in the United Nations charter.³³The United Nations charter is the treaty or a constitution;

this was controversial issue in early days of the UN. But many people are agreed that the UN charter is a living instrument.³⁴

After signing of UN charter another living instrument in the history of west is the UDHR the Universal Declaration of Human Rights which was presented in national assembly of UN in 10 December 1948.

United Nations' Universal Declaration of Human Rights (UDHR)

UDHR is one of the most vital documents in history. It includes social, civil, cultural, economic and political rights.³⁵ The UDHR was the starting point of innovator origination of human rights.³⁶In this living document peace, harmony, justice, and liberty in the world are discussed. The main purpose of UDHR is to protect human rights, to promote peace, social progress and develop the friendly relationship between the different nations. The rights covered by the UDHR are: Civil and Political Right, Economic, Social and Cultural Right.³⁷ The declaration is consisted on preamble and 30 articles setting forth for all the humans in the world without any discrimination.³⁸According to Honble Mr. Justice Ranganath Mishra, formally chief justice of India and chairman, N.H.C.R., the UDHR is a standard code of human rights for the whole homosapien race appropriate to the entire worldwide is what humanity has been striving for over hundreds of years. It is very important document, the entire world is treated as a family member, and the rights are inalienable and are considered as foundation of liberty, justice and harmony.³⁹

Right of Asylum Granted in Universal Declaration of Human Rights

According to contemporary international law if there is fear of life the person can seek Asylum in other countries. The Asylum may be political, religious and scientific in nature.⁴⁰According to Article 14 of UDHR:

- “1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.
2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations”.⁴¹

There is big debate on article 14 of the UDHR which is about right of Asylum some scholars and researchers are totally against and some are in favor of this article. Humphery a scholar had included in his two different articles about Asylum and refugees that an Asylum seeker cannot be expelled from any state until the court take any decision about the Asylum seeker. Koretsky, the USSR delegate want to know why the only political refugees had been pointed in territorial Asylum declaration, instead the right of Asylum should be extended to religious, scientific as well as political

grounds. Harry another scholar suggested that the wording of the article 14 should be changed from right to seek Asylum to being granted it. Furthermore, the representative of the international refugee organization Paul Weiss says that he thought the article's 14 wording is very imperfect. In the customary comprehension of international law, the right of Asylum is not a single right; it is rather a right of states. States, in their watchfulness, may give shelter to those they decide to Asylum; they don't consequently bind a wrong against whatever available state. Article 14 of the UDHR was painstakingly worded to abstain from aggravating that regulation or the idea of the sovereign right of control over the passage of outsiders that it reflects.⁴²

The three faces of the right of Asylum given in UDHR

1: The right of a state to grant asylum means that every sovereign state has the right to grant or deny Asylum in its state boundaries. In international law the right of Asylum is not the individual right but the state.

2: The right of an individual to seek asylum this is the second aspect of right of Asylum; this is the right of an individual to leave his country of residence in pursuit of Asylum. The basis of this right is the principle that a state may not claim to 'own' its nationals or residents.

3: The right of an individual to be granted Asylum the third component of right of Asylum is the right of an individual to be granted Asylum. Article 14(1) of the Universal Declaration of Human Rights announces the right of a single person "*to seek and to enjoy in other countries Asylum from persecution.*" Scholars said that it means the right to look for Asylum, not a right to appropriate it.' Professor Lauterpacht slammed the dialect of Article 14(1) for giving the single a right to look for Asylum without indicating whose obligation it is to give impact to that right.

Principle Governing to Right of Asylum

International law like Islamic International law also explained certain principles in order to exercise right of Asylum. These are as follows:

A. Principle of non-refoulement

As a means of protection, non-refoulement is broader than Asylum. For example the state prevented to returning back the person who grant Asylum to that state where is fear of life or any type of torture.⁴³ There is big debate on the non-refoulement that whether this is the customary international law or peremptory norm.⁴⁴ In international law like declaration on territorial Asylum as well as the Bangkok principles 1966⁴⁵ stated that the principle of non-refoulement is neither absolute nor universal.⁴⁶ It now appears to be acknowledged that the principle of non-refoulement is part of standard worldwide law and is a principal lead of refugee law.⁴⁷

B. B-Principle of non-discrimination

In international law the principle of non-discrimination is another issue. Article 2 of the UDHR explains that: “*everyone is entitled to all the rights and freedom set forth in this declaration*”. Every state should take some necessary actions relating to the non-discrimination of refugee status, and that no refugee or asylum seeker is prejudice in his or her search for refuge.⁴⁸ The principle of non-discrimination applies in all dealings of refugees and Asylum-seeker.⁴⁹

Types of Asylum in International law

There are two types of Asylum in international law territorial and extra-territorial (Diplomatic) Asylum.

A. Territorial Asylum

In this regard a declaration named “United Nations Declaration on Territorial Asylum” was presented to general assembly of United Nations’ on 14 December 1967. This declaration recalls different old declarations concerning to the right of Asylum. In this declaration firstly the article 14 of the UDHR is discussed then article 13 paragraph 2 of UDHR is recalled. It is said in this paragraph that “*every person has the right to leave any country including his own and also returns to his country*”. The territorial Asylum should be sub- classified into Political Asylum e.g. for so called defectors, Refugee Asylum who are in fear or persecution in his own country, and General Asylum e.g. a person who fled or leaves his country for economic betterment. But do not the status of immigrants.

B. B-Extra-territorial Asylum

Extra- territorial asylum means the refuge specified by the state to outside its territory. This may be given in its embassy or public vessels etc. Extra-territorial Asylum may take place in the following manner: **I-Asylum in Legations:** This asylum may be granted in these three exceptional cases 1. To an individual, for some time period when he is in danger physically or commit a political crime. 2. When there is a well- establishes and binding long custom and 3. When there is a treaty between the both territorial state and legation concerned.⁵⁰ Asylum granted in legation premises is also known as diplomatic Asylum but it is an exceptional measure and controversial.⁵¹ **II-Asylum in consulates or consular:** All the rules which apply in legations premises can also applicable in Asylum in consulates or consular. **III-Asylum in premises of international institutions:** This type of Asylum does not recognize by the international law and even there is also no rule concerning to grant the Asylum in grounds of international institutions. It may be granted in some cases of danger. **IV-Asylum in Warships:** There are different views of writers on this type of asylum some said that if any crew member commit a crime he cannot grant Asylum in that ship but he should be handed over to local police, on the other hand some writer said, that person cannot be arrested by the local authorities. **V-Asylum in merchant vessels:** Asylum cannot be granted to local offenders in merchant vessels

because the Merchant vessels do not enjoy protection from the restricted authority.⁵²

Finally it could be rightly said that the Islamic system provides different system for protection of refugees than the United Nations' Universal Declaration of Human Rights but the basic value of protection is embedded in both, and the traditional system could be implemented in a modern perspective.⁵³ In contrast to modern refugee law, *Hijrah* offers a broader definition of refugees, and gives individuals, rather than states, the right to determination of asylum.⁵⁴

So, it can be said that right of Asylum given by *Shariah* and the UDHR are not same but there are some differences along with some similarities.

Conclusion

Islam as well as the west attaches much importance to human rights and fundamental freedom of mankind. The in-depth study shows that the concept of "right of Asylum in law of *Siyar*", is much broader than the right of Asylum granted in Article 14 of United Nation's Universal Declaration of Human Rights. Furthermore their basic approach to the issue are bit different as the Right of Asylum given in Islam is divine law which cannot be changed or altered in any situation or by any authority whereas the right of Asylum granted in UDHR can be changed according to the time and situation, because it is manmade law which can be changed with the change of government or administration.

Despite of the fact that there is divergence in their basic approach, but the research has explored certain similarities and few differences between these two. According to *Shariah* the Asylum seeker not only enjoy the basic necessities of life but the people who granted asylum gave even half of their wealth to the refugees, the example of it can be observed from the ground of migration to *Madinah (Hijrat e Madinah)*. The Asylum seeker according to UDHR also enjoys basic necessities but not like the way treated in Islam. According to law of *Siyar* if any Asylum seeker enters in any state for asking refuge no penalties will be forced on account of unlawful entrance into or presence on a state territory. The international law UDHR also has the same theory. Another thing common between law of *Siyar* and United Nations' Universal Declaration of Human Rights related to right of Asylum is that both provides Asylum without any discrimination. In addition to that both laws emphasized on family reunification, but there is difference between their requirements. *Siyar* grant Asylum individually too but in UDHR state has the authority to grant or refuse the Asylum. In Islam the Asylum-seeker is respected even if it is obtained through fraudulent means but in international law UDHR he will not be respected at all if person who have received Asylum is engage in activities which are against to the policies of the United Nations. It is concluded that the right of Asylum in law of *Siyar*

and United Nation's Universal Declaration of Human Rights, without any minor difference, is partially similar.

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