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Assess Frederick Schauer's Attempt in 'Was Austin Right After All?' to Revive John Austin's Command Theory and Defend it Against H.L.A. Hart's Many Criticisms. How Successful is Schauer's Attempt?

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Abstract

Since it is expounded, John Austin's command theory of law has been subject to debate and criticism of thinkers affiliated to both Naturalist and Positivist traditions. Among positivists, HLA Hart, being his most ardent critic, has scrutinized various aspects of his theory. Hart pointed out that Austin while placing an exaggerated emphasis on the role of sanctions in securing compliance with law, has obscured the difference between 'being obliged' and 'being under an obligation'. Fredrick Schauer in "Was Austin Right Afterall?" has attempted to revive Austin's theory against Hart's criticism. He, inter alia, argues that Austin's account of law is descriptive and therefore closer to reality as compared to Hart's who puts forward rather a conceptual account of law. From an analytical standpoint, this essay seeks to refute Schauer's claim. It maintains that Schauer's analysis of Hart's theory and criticism is tainted with misconceptions and therefore, he has failed in his attempt to revive Austin's theory.

Keywords: Hart, Austin, common theory, sanctions, jurisprudence

Introduction

This essay will assess Schauer's attempt in 'Was Austin Right After All?' to revive Austin's command theory and defend it against Hart's criticisms. It will explain Austin's original theory, explore Hart's critique, then examine Schauer's defence and determine its success.

Schauer's criticisms can be reduced primarily to an attack on the methodological basis of Hart's jurisprudence, rather than a denial of his conceptual analysis. His argument is more concerned with the value and proper objects of the jurisprudential exercise. This attack on Hart's methodology and the lack of significance Hart allegedly placed on coercion can be seen as drastically overstated: coercion played a significant role in Hart's theory, and the evidence is equivocal at best to show

that it plays the crucial role in explaining why people obey the law in practice that Schauer ascribes to it. As such, Schauer fails to revive Austin's command theory.

Command Theory

Austin was keen to show that what is legal is separate from what is morally right or practically prudent (Austin, 1995, p.158), but he was also concerned with distinguishing law and legal obligations from other similar rules and systems (1995, p.5). To do this, Austin characterised the law as commands from a sovereign backed by the threat of sanction in the case of non-compliance (1995, p.6). The threat of sanction produces a habit of obeying the law in the law's subjects, and a habit of treating law as a reason for action. The element of sanction and the nature of the commander as a sovereign, in Austin's mind, distinguishes law from mere requests and other threats (1995, p.21). The law is binding on its subjects because it has the power to punish those who disobey. This explanation of the obligatory force of law is reductionist (Marmor, 2012, p.5; Bunnin and Tsui-James, 2003, p.411): for Austin, the existence of a legal obligation is a factual question of whether citizens and officials feel obliged to obey the law as a result of the threatened sanction.

On its face, Austin's theory makes two separate claims. The first is about the concept of law: what a person means when they say something is a 'law' is that it is a threat backed by the sanction of a sovereign. The second is about the nature of legal obligations: that the law's normative force stems from the subject's anticipation of and desire to avoid a sanction (George, 1999, p.297).

Hart's Criticisms

Hart had several criticisms of Austin's theory. Firstly, the characterisation of law as a command backed by a threat of sanction fails to account for the full spectrum of laws. Most notably, it fails to account for power-conferring laws, such as laws prescribing the consequences and form of entering into a contract (Hart, 1994, p.28). To characterise the law as based purely on the imposition of duties, is unduly criminal law-centric: entire areas of law such as contract, wills and trusts are based on power- conferring laws rather than duty-imposing ones.

While it may be possible to recast power-conferring rules as duty-imposing ones, such as by characterising nullity as a form of sanction or characterising power-conferring rules as incomplete rules which form part of a duty-imposing rule (Bayles, 2013, p.24), this misses the point of power-conferring rules (Schauer, 2010, p.5; Hart, 1994, p.41). Non-duty-imposing rules of law are generally intended to enhance and expand the choices available to the citizen, facilitating

behaviour which would not otherwise be possible, not restrict behaviour in the way that duty-imposing rules do. In addition, sanctions can be detached from a rule and leave that rule intelligible, while a 'nullity cannot likewise be detached and leave an intelligible rule that the threat of nullity supports' (Benditt, 1978, p.142).

Secondly, Hart criticised Austin's characterisation of the sovereign and its necessary role in Austin's theory. Austin's sovereign habitually obeys and is bound by nothing and no one, which sits uneasily with the nature of sovereignty in the real world. Modern legal sovereigns tend to be created and bound by the law like any other citizen or official, and often sovereignty is separated between different bodies which act to check and bind each other (Belliotti, 1994, p.46). The theory has sat particularly poorly with international lawyers, as the logical conclusion of international law's lack of a sovereign under Austin's thesis is that it is not law at all (Cali, 2015, p.54; Fitzmaurice, 1956).

Thirdly, Hart thought that Austin's treatment of the nature of legal obligations failed to distinguish between being obliged to do something and having an obligation to do it. Obligations arise in the context of social practices and do not necessarily invoke the concept of sanction. Hart argued that Austin effectively characterised the primary subject of the law as the 'bad' individual: those inclined not to obey the law without the threat of sanction. This, he thought, ignores the fact that many of the law's subjects are inclined to obey the law regardless of sanction. These are people who have committed to the 'internal point of view' and see the law as imposing obligations even in the absence of sanction (Hart, 1994, p.40). This, Hart argued, is especially true of the judge, who "takes legal rules as his guide and the breach of a rule as his reason and justification for punishing the offender" (p. 11).

Hart therefore labels the primary subject of the law 'the puzzled man', who wishes to obey the law and merely seeks guidance as to what it is (1994, p.40). To the puzzled man, law is a reason for action, and obedience is not merely habitual. As later positivists put it, the law is entitled to impose a sanction *because* it imposes a normative obligation: it does not impose a normative obligation because it provides a sanction, as Austin believed (Goodhart, 1953, p.17).

Hart's deconstruction of Austin's theory is widely considered conclusive (Green, 2002, p.517; MacCormick, 1973, p.101). Hart explained that the legal obligations are grounded in social rules (rather than habits) which have both an internal and an external aspect (Hart, 1994, p.51-61).

Schauer's Critique and Defence

Creating a first-order theory of law involves making several methodological commitments. One must set out the goal which one's theory aims to achieve, and the criteria by which it can be said that it has successfully achieved this goal. Marmor and Sarch argue that there are four broad methodological approaches which tend to be adopted when expounding a theory of law (2015).

The first is conceptual analysis, by which the theorist tries to synthesise common intuitions on the concept of law or legal obligations to discover the necessary and/or sufficient conditions of the concept. A conceptual account will be successful if it produces intuitive results in a non-ad-hoc manner (Shapiro, 2011, p.16-18). The second approach seeks to describe the law as it manifests in the real world. The third is a prescriptive approach which aims to explain which notion of law is most desirable. The fourth combines the second and third approach to offer a constructive interpretation of real-world legal practice.

Underpinning Schaeuer's critique of Hart are two points about Hart's methodology. Hart tries to achieve two methodological goals: a descriptive and a conceptual account of law. It might be argued that Hart was merely giving a conceptual account, but Schauer points out, this is inconsistent with his criticism of Austin and Kelsen for failing to describe the reality of law (1994, p.78), such as when he argued that many subjects of the law are not recalcitrant bad men, but merely puzzled men.

Schauer's first point is that the conceptual analysis of law is a project with less value than many positivists, including Hart, have supposed. His second point is that Hart fails in his attempt to give a descriptive account of law, and that Austin's account was much closer to reality. As will be seen, the two points are interlinked, and are part of a broader argument that if the concept of law has little bearing on the real world, it is not obviously a worthwhile project to pursue.

Schauer does not deny that sanctions are not a necessary conceptual condition of law, or that there are individuals who obey the law purely because it is law (Schauer, 2015, p.4). Schauer's primary argument is that the internal point of view and the normative aspects of law are not as important to understanding law's nature as Hart makes out, and that Hart was wrong to deem sanctions and coercion as unimportant (2010, p.2). Schauer admits that Austin greatly undervalued the role of non-coercive elements of the law, he argues that this was no greater a distortion of the nature of law than Hart's marginalisation of its coercive elements (p.2).

Modern law, Schauer argues, is highly coercive due to increased regulation of the way in which people order their private affairs, even in areas which consist of power- conferring rules. Schauer

gives the example of tax laws, consumer regulations, and employment rights law (p.7). Where regulation has occurred, the citizen who does not order his private affairs according to the law risks sanction (p.8).

Schauer notes that sanctions are a universal part of every system of law and 'the phenomena of law as it is overwhelmingly experienced is coercive' (2015, p.30). By placing coercion and sanction as the centre of his account of law, Austin gave a more empirically accurate account of the law than Hart. Though Austin's account fails due to its inability to account for power-conferring rules, Schauer argues that Austin should be read as giving a descriptive account of a central element of the nature of law as it exists in practice. (2010, p.14).

Schauer criticises Hart's focus on the puzzled man to the exclusion of the bad man. Hart makes an empirical claim that many of the law's subjects are puzzled men, which he does not back up with evidence. Schauer points out, it makes far less sense to focus on the puzzled man if the bad man is in the majority. Hart's rule of recognition, and the other mere conventions relied on by positivist as the source of the obligation 'sit uneasily with any notion of obligation' (Green, 1996, 1697). This means that there is no obvious reason for law to provide citizens with reasons to act, and no obvious reason to suppose that the puzzled man is in the majority. Schauer argues that Hart's empirical claim that there is a linguistic difference between being obliged and having an obligation is also suspect. Schauer argues that dictionary evidence and the dicta of the American courts provides strong evidence that being obliged and having an obligation are interchangeable notions (2010, p.13).

Raz (2005) argues that even if there is only a single puzzled man, a proper theory of law needs to be able to explain his attitude, as it indicates that coercion is not an essential feature of legal obligations. Schauer argues that if it does so, it no longer has any claim to be a satisfactory descriptive account of actual legal systems, nor to be an account of what is essential or 'genuinely important about the phenomena of law' (p.11). This is because determining which features of the law are important or essential involves judgements that are informed by empirical assessments based on the real world.

Such a theory can only claim to be an account of the concept of law: a set of criteria by which to distinguish hypothetical legal systems from hypothetical non-legal systems. It concerns itself with the question of whether a hypothetical completely non- coercive system would be legal in nature. Schauer doubts that such a theory has any real value, since its salient features are largely divorced

from the salient features of the typical legal system. Far more valuable is a theory that aims to describe what is non-logically present in the paradigm case of law in practice.

Shauer reconceptualises, and thus attempts to revive, Austin's theory of law: Austin should be understood as arguing that the presence of sanctions offers the most empirically satisfying method of distinguishing legal obligations from other sorts of obligations, even if it is conceptually possible to conceive of a sanction-free duty. The role of coercion in Schauer's mind, as Freeman and Mindus put it, "might be considered analogous to the role of electric energy in surgery" (2012, p.103).

Analysis

The first thing to note from the above is that Schauer admits that Austin's account fails as a purely conceptual account of law: he merely questions the value of a project which focuses on universal properties to the exclusion of common, but non-essential properties. As such, command theory still cannot be defended from a conceptual standpoint. Their value to purely conceptual analyses of law. However, Schauer has a strong point to make that if a concept does not align with practised reality, it should not dominate jurisprudential methodology in the way that Schauer claims that it has since Hart.

However, it has been disputed that the conceptual analysis of Hart has marginalised coercion in the way which Schauer describes. Green demonstrates that Hart's analysis is replete with 'positive theses about the role of coercion in law', some which even '*over*-emphasize the role of coercion in law' (2016, p.171). For example, Hart states that coercive sanctions are vital in legal systems to assure that those who would comply even in the absence of sanctions are not taken advantage of by those who would not (1994, p.198), and is part of the 'serious social pressure' to conform which Hart characterises as partially constitutive of duty-imposing norms.

Green speculates that Schauer's belief that post-Hart jurisprudence marginalises coercion might be based on Hart's belief that primary function of law is 'guiding and evaluating conduct', thus making the 'normal function of sanctions in a legal system…ancillary' (2016, p.172). As she points out, however, the fact that Hart characterises this 'ancillary' function as 'vital' makes this a poor basis on which to believe that modern jurisprudence ignores the role of coercion.

Nevertheless, even if Schauer has a strong argument for the need to re-evaluate the best methodology for the jurisprudential exercise, this is not enough to revive Austin on its own. To evaluate whether Schauer's defence of Austin succeeds, therefore, one must examine his empirical

claims and criticisms of Hart with care, to assess whether Austin's command theory is a good descriptive account of law.

The first problem arises with Schauer's claim that it is unwise to focus on the puzzled man when he may well be in the minority compared to the bad man. There is empirical evidence that people's motivations for obeying the law is, by and large, because it is the law, and not because they fear sanctions. An empirical study done by Tyler indicated that people are inclined to obey the law even where they are not backed by sanctions (Tyler, 2006), which provides strong evidence that Hart's concept of the 'internal point of view' is a better descriptive account of legal obligations than Austin's command thesis.

Schauer later argued that this study did not prove that it was the legal status of the rule that motivated people to obey it (as opposed to some coincidence of morality or self-interest) (2015, p.60). While this is true, the fact that Tyler's study showed that the threat of sanction was very much secondary means that more proof is needed that Austin's command theory is empirically superior to Hart's. There is very little evidence that specifically does so.

Schauer puts forward a study which showed that subjects expressed preferences for following rules when asked in the abstract, but typically chose to break the rule in favour of a morally good outcome if given specific concrete example (2015, p.64; Saks and Spellman, 2016, p.296). However, this study concerned a non-legal rule, and can be contrasted with a similar study which showed that even when given concrete examples, choosing to break a rule to achieve a morally good outcome was judged more harshly the more law-like characteristics the rule had (Schweitzer, Sylvester, and Saks, 2007). It would appear then, that Schauer's claim that coercion is the most empirically essential or common feature of the law (and that it is therefore more deserving of jurisprudential and descriptive attention) is suspect: there is evidence that legal rules are commonly considered to have obligatory force purely by virtue of being legal in character.

It appears especially unwise to ignore the role of non-coercive obligation in determining the actions of officials of the system. Accounts of what motivate judges when applying and developing the law tend to characterise judges as wanting to be a 'good judge', not because there is any sanction attached to not being so, but because of role differentiated morality, a belief that law maximises group interest and other sanction-independent reasons (Dagan, pp.74-77). Schauer himself admits in his most recent work that most legal officials internalise legal rules for sanction-independent reasons (2015, p.81).

Conclusions

In conclusion, Schauer's defence of Austin's command theory fails for three reasons. Firstly, it is primarily concerned with arguing that a purely conceptual methodology is not a valuable enterprise for jurisprudence to engage in, as it leads to a concept of law which is divorced from reality. It does not refute the conceptual attacks which Hart made of Austin's theory, leaving Austin still incapable of conceptually explaining or accounting for the existence of power-conferring rules. Secondly, his claim that Hart's jurisprudence does not give proper recognition to the role of coercion is false: as Green demonstrates, coercion is a vital part of Hart's theory, and is given the proper acknowledgement it deserves. Thirdly, the evidence is at best equivocal as to whether sanctions are a more influential reason as to why people obey the law in practice over a mere perception that law should be obeyed purely because it is law. Schauer therefore fails to support the claim that a valuable theory of law would place, as Austin did, coercion at the very centre.

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Heterogeneity in Cyber Warfare and Need of Legitimizing Cyber Defense: A Case for Introduction of Developed and Transnational Cyber Laws in Pakistan

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Abstract

Technological innovations in cyberspace have outpaced legal development in the same area. The use of botnets is a prime example, where technologically poor and dependent states such as Pakistan are under an incessant clutch of malware, while the victims are not even aware. The international dome is the best place to begin the discussion, as it has developed its approach with the passage of time. The current approach in the international arena assists in understanding how the transnational element should be addressed. The domestic law of Pakistan, currently applied can be considered and its vague interpretation and inefficiency are discussed. In the light of these discussions, the writing proposes some aspects which can be used and utilized in the future, as they guide how to balance between transnational aspects, and fundamental privacy rights can be brought.

Keywords: Botnets, Cyber law, Cybersecurity, Cyberattack, Cyberspace, International Law, Malware, Pakistan, Transnational Laws.

Introduction

Technological advancement has made a huge impact on the development of domestic and international law. The twenty-first century is full of innovations, technology, and information technology. It goes without saying that the speed of technological development has led to changes in laws, social norms, and approaches towards them. It is right that the speed with which technological advancements are being made is far more than the speed with which the laws are developing. The laws are in mayhem and there is often hesitation as to the application of any law, apart from it being the right one. Cyberspace laws are not a new term but an area with more cracks than closures. In a continuously developing area of cyberspace, the development of law is either absent or is so haphazard, arbitrary, or debatable that it appears as if the system is lawless or wild-west.

This writing intends to highlight the heterogeneity and intricacy caused by technological advancement and the meagerness of laws in the field of technology law. Moreover, it also intends to shed light on the absence of effective and transnational law in Pakistan. This writing uses the

idea and concept of botnets to exemplify the lacuna in Pakistan's domestic law, as well as international law. It also takes guidance and references from the US of America's jurisprudence in this area for better understanding.

When the term 'botnet' is used in Pakistan, almost no lawyer is mindful of what this means or indicates. However, when the impact of botnets is observed in Pakistan, be it reported or unreported, there is no doubt that the use of botnets and malware is common. The main reason is the ignorance of the population. Most of the population is illiterate, or unaware of the safe use of the internet. A link shared by a botnet infects all devices or malware them, without the knowledge of the user. A click to a free meal results in the cell being malware. Without the knowledge or will of the user, the device is conscripted, and used as a tool and weapon by the 'botmaster'. When the audience and victims are unaware of what they have been subject to, there is going to be no legislation and precautionary actions. State personnel are also majorly unaware of the concepts and technological features that are used and employed by botmasters. The botmaster directs the devices to further their own *malafide* actions. The devices are used for hacking, spamming, and committing financial scams, to name a few. The botmasters are not necessarily well-known and can be anyone with technical knowledge and proficiency in this technology field of cyberspace. The botmasters can operate distantly, that is why the operator can act extra-territorially. This leads to two important questions i.e., what should be the responsibility of the state in retribution to cyber-threats and cyber-attacks. Secondly, what do international law, state practice, and experience of developed states say about it? With reference to the earlier question, an argument is raised that domestic laws should be enacted to safeguard the interests of the citizens. However, even if this argument is taken at its face value, and accepted that domestic law needs to be placed, the transnational or extra-territorial effect of such matters are most likely not enforceable under domestic law. Domestic laws including penal laws may be a good option, but it requires in-depth analysis, which this writer will attempt in the succeeding portion. On the other hand, it cannot go without saying that some technologically advanced states do have the power, intent, and motive behind using cyber-attacks and cyberspace as a mode of furthering their espionage, surveillance, and data collecting interests. This is one of the subsidiary reasons why international law has to be referred to in this writing, to substantiate the arguments and submissions. For example, the USA is often alleged to be involved in the use of cyberspace. This is also an allegation levied on the Five Eyes. Briefly, the Five Eyes is an intelligence alliance under the UKUSA Agreement, of

which the UK, USA, Canada, New Zealand, and Australia are parties. Thus, it can be said that cyberspace is not something that is open for use or misuse by individuals or outlawed or banned organizations, but it is equally open for states to be employed for furthering their own vital and intentional interests. The case for the inadequacy of domestic law has some weight, which is because of the transnational or extra-territorial limitation of domestic legislation. If this matter has to be addressed, the states have to either become a party to a binding treaty, convention, or pact, which will further its interest or as an alternative, establish the state practice of customary international law in its favor. The international arena has its own inherent limitations regarding enforcement mechanisms. Furthermore, there is a unique element to consider in such a debate i.e., despite the situation where there are states versus states in cyber warfare or cyberspace, there is also an equivalent chance of violation of the privacy of cyber-human rights of individuals[1]. For example, privacy laws, breach of confidential data, use of devices without consent, etc. The reason such rights are involved is that they found their basis in the pre-cyberspace era. This is a novel area and hard to research on and formulate a coherent description and analysis, however, the USA, through its Department of Defense, has been a great source to research on anti-botnet technicalities. Interestingly, this has a link with surveillance attempts used by the USA. Hence, it may give good hindsight to the titled discussion. In the light of these factors, and after discussing the international, technical and domestic aspects, this article will conclude as to whether there is a need to have a specific enforceable cyber law, as opposed to vague, absurd, theoretical, unenforceable, impractical, legally barred legislations? At the same time, in the larger interests of public, and in analogy with the concept of self-defense under UN Charter and customary international law, there is a need for all states, to have such laws which authorize the state to engage in activities and enforcement mechanism that are founded on the principle of *bonafide* or good faith doctrine. Such laws are better enforceable through those states that can be termed as 'cyber-capable states'. The phrase bona fide, in my opinion, is itself very subjective and vague under international law. However, it is also to be kept in mind that the procedural norms and scheme are necessary for carrying out the technological solutions as per the substantive values under domestic and international law. In this line, it is worth mentioning that the development of international law and practical importance of the laws is more efficient through adoption of concepts of *ergaomnes* or

[1] Cyber Espionage and International Human Rights Law, CYBER ESPIONAGE AND INTERNATIONAL LAW (2019).

communal recognized state duties to unsettle cybercriminals and expanded cooperation between nations in botnet disruption. It is similar to the war against terrorism, which is a matter falling under universal jurisdiction.

In other words, cyberspace is full of legitimate and criminal actions; however, it remains in oblivion as what counts as legal and what is illegal. This uncertainty led to the asymmetrical development of law and conduct in the international arena. Moreover, the illegal actions by botmasters or individuals can only be controlled if the state that is affected by the actions has the indispensable capability. In the same vein, it also requires the legitimization of actions made by law enforcement agencies, which would otherwise be illegal. For example, surveillance of traffic, data alteration, and interferences, recording, and monitoring of private data is an area where state actions can be considered to be qualifications on the rights of individuals under international human rights as well as domestic law. This writing has made special reference to botnets because they are a unique and highly complex classification under Cyberspace law and technology. Ingredients to produce botnets are merely small finances and good IT skills. They are also operable from distance by any client, operator, individual, and organization, or even state. Botnets can also target their objects and implement them with precision and detail. The damage, scope of the damage, target, specific or general are all options available to the botmaster.

Operation Through 'Botnets'

'Botnets' can be considered as a money-spinning tool for the commission of cybercrimes, through upsetting businesses, governments, and even customers.[2] They are devices that are distantly operated by botmasters, without knowledge of the owners of those devices. The operation through botnets is centered upon the control of the computer or other devices. This is done through 'bot binaries'. These are servers or devices of botmasters that distribute the malware to botnets and devices. This results in two points i.e., limiting the bot binaries and botmaster's location; and spread and amplification of infection.

How can an ordinary individual understand what botnet is, or how do they target? Among some common examples is phishing, spamming, links to use the malicious website, remote scanning, etc. When the 'bot binary' infects the device, it penetrates and alters its system in such a way that the ordinary functioning of the device is not affected. The importance of such penetration is that

[2] *Tackling Crime in Our Digital Age: Establishing a European Cybercrime Centre*, COM (2012) 140 (Dec.. 15, 2021), *available at* https://eur-lex.europa.eu/ LexUriServ/LexUriServ.do?uri=COM:2012:0140:FIN:EN:PDF [https://perma.cc/6L8Y-28AS]).

the owners are kept unaware and attempts to remove the virus are not made by owners. In addition to it, the botnets have a 'domain flux' wherein it constantly changes its domain, so that the botnet's network is inaccessible[3]. Some use has been made of techniques to fingerprint or identify these botnets and binaries. These techniques are mostly focused upon the analysis of traffic data.[4] Once the botnet binary infects the device and connects to its server, the IP address may be changed, as per the whims of the botmaster, because he can send updated binaries to the botnets and send commands or orders remotely.[5]

For example, distributed denial of service attack (DDoS), appropriation of privately-owned systems for cryptocurrency mining, phishing, spam emails are some of the cyberattacks.[6] Here, botnets contact the target server in a huge amount that exceeds the server's data processing capacity that results in a crash or non-operational of the server.[7] It is important to discuss why these attacks are made? The reason may vary from mere harassment to revenge, and includes an intention to highlight an issue, fraud at a huge scale[8], honeypot-aware botnets, advertising fraud, camera data theft, and extortion to cite a few.[9] The extent of harm can be outspread, for example, DDoS attack can cause a monetary loss in millions of dollars, to thousands of companies, corporations, and institutions.[10] It can also be repetitive and the scope of damages may even extend

[3] Bin Yu et al., Semi-Supervised Time Series Modeling for Real-Time Flux Domain Detection on Passive DNS Traffic*, in* MACHINE LEARNING AND DATA MINING IN PATTERN RECOGNITION 258 (Petra Perner ed., 2014).

[4] Amine Boukhtouta et al., *Towards Fingerprinting Malicious Traffic*, 19 PROCEDIA COMPUTER SCI. 548 (2013).

[5] Xuan Dau Hoang & Quynh Chi Nguyen, *Botnet Detection Based on Machine Learning Techniques Using DNS Query Data*, 10 FUTURE INTERNET 43 (2018).

[6]Conner Forrest, *Nasty Botnet Uses WannaCry Exploit to Mine Cryptocurrency from Your Servers,* TECHREPUBLIC (Feb. 1, 2018), https://www.techrepublic.com/article/nasty-botnet-uses-wannacry-exploit-to-mine-cryptocurrency-from-your-servers/ [https://perma.cc/GY4U-QZCG].

[7] Brian Krebs, *The Democratization of Censorship*, KREBS ON SECURITY (Sept. 16, 2016), https://krebsonsecurity.com/2016/09/the-democratization-of-censorship/ [https://perma.cc/85LX-F3SW].

[8] David Pan, *Hackers Launch Widespread Botnet Attack on Crypto Wallets Using Cheap Russian Malware*, COINDESK (Oct. 4, 2019), https://www.coindesk.com/hackers-launch-widespread-botnet-attack-on-crypto-wallets-using-cheap-russian-malware [https://perma.cc/ E8LA-YX9K].

[9] Elie Burzstein, *Inside the Infamous Mirai IoT Botnet: A Retrospective Analysis*, CLOUDFLARE BLOG (Dec. 14, 2017), https://blog.cloudflare.com/inside-mirai-the-infamous-iot-botnet-a-retrospective-analysis/ [https://perma.cc/5S9N-CZLW].

[10] Charlie Osborne, *The Average DDoS Attack Cost for Businesses Rises to Over $2.5 Million*, ZDNET (May 2, 2017), https://www.zdnet.com/article/the-average-ddos-attack-cost-for-businesses-rises-to-over-2-5m/ **[**https://perma.cc/R66Y-FK3G].

to loss of income, or loss of data of financial customers, in addition to the loss of reputation[11]. The email-spams are something which we are facing most commonly. We all have spam emails in our accounts, why is this so? They contain malware and can infect the devices[12]. Recent cases of botnets include data theft as well. There are botnets that steal or target the details and credentials related to finances such as credit card information[13]. Similarly, there may be other botnets that may target and operate. This is capable of even inflicting the Electronic Voting Machines (EVMs) and rig elections[14]. The state, its establishment as well as criminals can potentially use it for their political purposes.

In order to discuss the potential of electronic voting machines and other devices getting infected by it, reference can be made to the infamous Mirai botnet[15], which infected the internet of things ("IoT") and smart technologies[16]. When did the reader last time update or change its password? Or when did the reader work on the security settings of the devices?[17] These inactions lead to potential vulnerabilities of the devices to cyberattacks and botnets. The Mirai botnets were created by teenagers and young lads, this is evidence of how easy it is to set up a botnet scheme, and conduct cyber activities.[18] This example also strengthens the proposition that a botnet or device made for recreational or targeted harassment may become a reason for a widespread criminal act of internet abuse by various botmasters[19]. It is also possible that these botnets are varied, and then

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[11] John Leyden, *OMG, That's Downright Wicked: Botnet Authors Twist Corpse of Mirai into New Threats*, THE REGISTER (June 1, 2018), https://www.theregister.co.uk/2018/06/01/mirai_respun_in_new_botnets/ [https://perma.cc/DGY7-36WA].

[12] For example Cutwail botnet is email-spam botnet that has capacity to send billions of emails per day.

[13] For example ZeuS botnet is a financial breach botnet with criminal record.

[14] Cyber espionage, cyber surveillance, foreign electoral interference and international law, STATE SPONSORED CYBER SURVEILLANCE 29–92 (2021).

[15] Garrett M. Graff, *The Mirai Botnet Architects Are Now Fighting Crime with the FBI*, WIRED (Sept. 18, 2010), https://www.wired.com/story/mirai-botnet-creators-fbi-sentencing/ [https://perma.cc/K24Y-2KC8].

[16] Xiaolu Zhang et al., *IoT Botnet Forensics: A Comprehensive Digital Forensic Case Study on Mirai Botnet Servers*, 32 Forensic Science International: Digital Investigation , 300926 (2020)

[17] Zack Whittaker, *Fear the Reaper? Experts Reassess the Botnet's Size and Firepower*, ZDNET: ZERO DAY (Oct. 30, 2017), https://www.zdnet.com/article/reaper-botnet-experts-reassess-size-and-firepower/ [https://perma.cc/KY86-E44C].

[18] Press Release, U.S. Dep't of Justice, Hackers' Cooperation with FBI Leads to Substantial Assistance in Other Complex Cybercrime Investigations (Sept. 18, 2018), https://www.justice.gov/usao-ak/pr/hackers-cooperation-fbi-leads-substantial-assistance-other-complex-cybercrime [https://perma.cc/QXZ7-QESE].

[19] Bradley Barth, *FYI, the OMG Mirai Botnet Variant Turns IoT Devices into Proxy Servers*, SC MAGAZINE (Feb. 22, 2018), https://www.scmagazine.com/home/security-news/iot/fyi-the-omg-mirai-botnet-variant-turns-iot-devices-into-proxy-servers/ [https://perma.cc/ZPM2-J3TW].

the updated and upgraded botnets start to invade.[20] The scheme of attack and objects may have no nexus between them[21]. This is the reason that specialization in cyber technology and the command on the method of cyber-tool are more important than pondering about the creator of the botnet. The complexity and command of the cyber-attacker or botmaster can be determined from the fact that if he or she intends, the DDoS signals may be kept below the breaking point of the targeted server. This will result in apparent no damage, and this technique can be used during cyber-defense. In such a situation, the cyber-defense analyst may keep the DDoS signals at the limit of the breaking point of the server, and in this way, the damage can be mitigated or even eliminated at all. This cyber defense mechanism can be achieved through the utilization of information security regulations, strong network structure, and obstacles in penetration of systems including black-holing DNS servers under influence of botmasters.[22] The state of California has its own cybersecurity law with regards to IoTs and botnets, which is evidence that states may at their own level, take actions to mitigate the harm of botnets.[23]

Understanding Cyber Space and Botnet Mitigation Laws in US

This section of the writing deals with the transnational and international effects of botnets. Under traditional law, the concept of territorial sovereignty had a literal interpretation; however, the introduction of technology and cyberspace gave a new dimension. For example, traditional warfare included ground, air, and water, which later on extended to space, and now, it includes cyberspace. With the inclusion of cyber-space, the traditional or classical concept has lost its significance.

The tools and methods devised above, are helpful in identifying the place or location of botmasters that can be identified within the territory or beyond the territorial jurisdiction.[24] The origin of the attacks can be beyond jurisdiction. It is also possible that millions of devices from multiple states can cumulatively target a specific server. This is also an issue that has been faced numerous times at the international level. On the other hand, the state, the website, or the servers of which are

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[20] Dan Goodin, *Assessing the Threat the Reaper Botnet Poses to the Internet—What We Know Now,* ARS TECHNICA (Oct. 27, 2017), https://arstechnica.com/information-technology/2017/10/assessing-the-threat-the-reaper-botnet-poses-to-the-internet-what-we-know-now [https://perma.cc/9W5X-JMGE].

[21] David Holmes, *The Mirai Botnet is Attacking Again. . .*, DARK READING (Feb. 15, 2018), https://www.darkreading.com/partner-perspectives/f5/the-mirai-botnet-is-attacking-again/a/d-id/1331031 [https://perma.cc/V9VD-6T7A].

[22] Anjali B. Kaimal, Aravind Unnikrishnan & Leena Vishnu Namboothiri, *Blackholing vs. Sinkholing: A Comparative Analysis*, 8 INT'L J. INNOVATIVE TECH. & EXPLORING ENG'G 15, 15–16 (2019).

[23] Lucas Kello, *Cyber Defence*, OXFORD SCHOLARSHIP ONLINE (2018).

[24] QUARTERLY THREAT LANDSCAPE REPORT, FORTINET 1, 17 (2018).

targeted, have no obvious investigation right. For example, there is no agreement, MoU, contract, or understanding between Pakistan and any other nation, which is available in any official gazette, at the federal as well as provincial level, that entitles Pakistan to investigate such attacks. On the other hand, if the state is aware of any potential attack or intends to interfere with a DDoS or any botnet activity, it needs to have a transnational law or international agreement that allows such explicit interference and intervention.[25] The rationale behind this is that intervention is done through interception of communication of DDoS, third parties, and Command and Control Centre of binary botnets. In order to identify, and interfere, trans-border actions may be required. This requires information sharing, cooperation, and legal assistance in investigation and trial.[26] Proposing a narrow interpretation of territorial sovereignty or strict application of the limitations on extraterritorial enforcement action, would not help the case. In this regard, there is a practical need to allow cyber-capable nations to intervene and invoke information-sharing agreements with nations. For example, in the USA, Congress passed the C.L.O.U.D. Act in 2018. Under this Act, the United States-based internet service providers are required to provide data on the request of USA law enforcement agencies, even if that data is stored extra-territorially.[27]

When the extra-territorial issue is read along with international cooperation and mutual legal assistance rules, it appears that a treaty mechanism is a good option. However, it is important to point out that this treaty mechanism is slow and deliberate. For example, if a state intends to pass a request for cooperation and assistance to another state, the duration may even extend up to months or even years.[28] The CLOUD Act 2018[29] amended the Stored Communications Act 1986[30] to reduce such a period in the US of America. However, like other principles, it has its own limitations. This is not what international states in general. An example of the CLOUD Act is evidence of state practice; however, the international law is not well developed in this area, because international law requires a balance between protection of privacy law and adherence to the

[25] Alan Charles Raul et al., *New York Enacts Stricter Data Cybersecurity Laws*, DATA MATTERS (Aug. 5, 2019), https://datamatters.sidley.com/new-york-enacts-stricter-data-cybersecurity-laws/ [https://perma.cc/XR8C-RK5F].

[26] For better understanding, in Microsoft Corp. v. United States (*In re* Warrant to Search a Certain E-Mail Account Controlled & Maintained by Microsoft Corp.), 829 F.3d 197, 221 (2d Cir. 2016) (treaty-governed process for information sharing related to extraterritorial evidence in criminal process was discussed).

[27] Kristin Houser, *Everything You Need to Know About the CLOUD Act*, FUTURISM (Mar. 26, 2018), https://futurism.com/everything-need-know-cloud-act [https://perma.cc/Y4H3-8F5E].

[28] Richard A. Clark et al., THE NSA REPORT: LIBERTY AND SECURITY IN A CHANGING WORLD 171 (2014).

[29] Clarifying Lawful Overseas Use of Data Act, 18 U.S.C. § 2703 (2019).

[30] Stored Communications Act, 18 U.S.C. §§ 2701–2712.

doctrine of sovereignty. Notwithstanding the above, it is also unclear how does legislation such as the CLOUD Act, or any other, in these lines, capable of securing the internet. In other words, the CLOUD Act was specific legislation, and botnets are not specific to CLOUD, hence the scope of application of such legislation provides some guidance but not a holistically brilliant scheme. It is also pertinent to state that the world is no more unipolar, and the US is not the only technologically advanced state. So, if the US can have such a law, there may be Chinese, Russian, Malaysian, Indian, or similar other states that have the capability and may challenge the authority of the US legal system in the future. Hence, it can be concluded that national law is one important aspect but needs to be in line and in consonance with international law. In absence of such law, guidance can be sought from treaties in the international arena and soft laws available.[31] In a single phrase, it is about assistance by the international community through the adoption of such norms, procedures, and laws that are helpful in technological advancement and acknowledge the technological capability of nations and authorize their interference.

States have been relatively new in responding to the threats of botnets and malware. The old players have been the corporations and private sector organizations, who developed the anti-botnet or botnet mitigation techniques. In the US, there is a public-private partnership, wherein the State has made the private corporations responsible to conduct actions on its behalf and protect its assets against cyberattacks, in an efficient way. However, the most important aspect in this regard is the transnational nature of cyberattacks. This includes the use of botnets and servers in the extraterritorial area i.e., cyberspace fails to adhere to the classical concept of territorial jurisdiction. The transnational aspect invites the application of international law, which is very uncertain to date.

Under international law, the concept of state consent and practice adopted by them is important. On the other hand, it is also important to understand that the approach of any state depends upon its economic, social, and technological interests.[32] If the cyber-interventions and cyber-attacks are to be restrained by a state which fails to counter cyberattacks, botnets, and associated malware, the states will propose the application of vague or inefficient laws, interpretations, and rights to constrain such interventions. On the other hand, if a state is technologically advanced and able to

[31] Matthew Waxman, *International Law and Deterring Cyber-Attacks*, LAWFARE (Mar. 22, 2017), https://www.lawfareblog.com/international-law-and-deterring-cyber-attacks [https://perma.cc/8VFX-QURM].

[32] Joseph S. Nye Jr., *Deterrence and Dissuasion in Cyberspace*, INT'L SEC., Winter 2016/17, at 44.

counter the cyberattacks and interferences, it will focus upon the scope of the cyberattacks, and actions made in cyber defense. The presence of such extremes has led to legal and non-legal documents that are aimed at streamlining the cyber-related utilities and legitimation of cyber defense mechanisms.[33]

Under the basic international law, states joined minds and are generally of the view that responsive enforcement mechanisms are to be formulated and legitimized to criminalize the cyberattacks and infringements of privacy rights. This also led to an approach of international cooperation through data and information sharing, so that the enforcement of cyber defense actions be open and disclosed[34].

Before embarking upon the current scheme, a brief analysis of the evolution and case for the legitimization of the anti-botnet intervention can be presented. As soon as cyberspace was open for operation by criminals and foreign entities as a warfare method, the concept of sovereignty expanded to it.[35] As already provided, the initial or original attempts to defend the cyber defense were by the private entities as by the government, as they were the primary target of such activities. In other words, it was a private activity that later on got so expanded that it formed an extension to the world on public international law[36]. Practical discussion and research pointed out that the history has been that people who were dealing or had to link with a specific industry used the insider knowledge and then used that knowledge for its detriment. This was why such criminal activity was dealt with by the private sector rather than by the government sector.[37]

In the second phase of development or evolution, reference can be made to seminal attempt of UCSB[38] to take on a botnet, and mitigate its actions[39]. They took over the botnet but in doing so they acted as governmental individuals as well as criminals. This impression is partly because of no direct concept of legalized cyber defense. The actions were primarily legal in my opinion, as they were aiming to get hold of the botnet and minimize the harm, and secure the data along with

[33] Lucas Kello, *Cyber Defence*, OXFORD SCHOLARSHIP ONLINE (2018).

[34] Information Sharing in Cyber Defence Exercises, PROCEEDINGS OF THE 19TH EUROPEAN CONFERENCE ON CYBER WARFARE (2020).

[35] Darrel C. Menthe, *Jurisdiction in Cyberspace: A Theory of International Spaces*, 4 MICH. TELECOMM. & TECH. L. REV. 69 (1998).

[36] Patrick W. Franzese, *Sovereignty in Cyberspace: Can it Exist?*, 64 A. F. L. REV. 1 (2009).

[37] Kristen Eichensehr, *The Cyber-Law of Nations*, 102 GEO. L.J. 317, 322 (2015).

[38] University of California at Santa Barbara.

[39] Torpig botnet.

taking remedial actions. The counter to this assertion was that when they got hold of the botnet, they were going to be subject to criminal law. They can be an open target for criminals, cybercriminals as well as internet service providers, who may take adverse actions against them. In other words, they were not legally supported. They were involved in an activity that did not give them governmental support, backing, logistics, etc. for example, they were themselves in violation of privacy laws, including the Wiretap Act [40] and traffic data laws as provided under the PATRIOT Act.[41] It goes without saying that such data has sensitive material including PIN code, bank account credentials, and credit card numbers which is also a violation of banking and computer fraud laws[42]. Similarly, Marcus Hutchins' attempt to counter MalwareTech (that caused WannaCry)[43] by attacking private sector organizations through denying access to networks unless they paid a ransom in bitcoin; adopted the blackhole technique.[44] However, he was prosecuted by F.B.I. the good actors, or heroes in this arena are still criminals unless the law legitimized cyber-defense actions[45]. This also led to a parallel approach by multinationals, wherein they demanded governmental authorization before taking down any botnet. For example, Microsoft has a thread of cases in these lines. It won its claim against Waledac botnet in federal court for violation of IP law.[46] A similar fate was achieved in its claim against ZeuS for IP violation.[47] This is a prime example of how the shift is taking place to allow corporations to sue on behalf of the government.

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[40] 18 U.S.C. § 2511 (2012) (amended 2018).

[41] 18 U.S.C § 3121(a) (2012) (amended 2018).

[42] Paul Ohm, Douglas Sicker & Dick Grunwald, *Legal Issues Surrounding Monitoring During Network Research* (Oct. 24–26, 2007) (SIGCOMM Invited Paper), *available at* http://conferences.sigcomm.org/imc/ 2007/papers/imc152.pdf [https://perma.cc/G9TY-EZFA].

[43] Lily Hay Newman, *How an Accidental 'Kill Switch' Slowed Friday's Massive Ransomware Attack*, WIRED: SECURITY (May 13, 2017), https://www.wired.com/2017/ 05/accidental-kill-switch-slowed-fridays-massive-ransomware-attack/ [https://perma.cc/ AMX4-K25G].

[44] Andy Greenberg, *Hacker Who Stopped WannaCry Charged with Writing Banking Malware*, WIRED (Aug. 3, 2017), https://www.wired.com/story/wannacry-malwaretech-arrest [https://perma.cc/F8C3-ZW94].

[45] Laurie Pieters-James, *Does your Cyber Security make you WannaCry?*, 5 Journal of Forensic Sciences & Criminal Investigation (2017)

[46] Nick Wingfield & Ben Worthen, *Microsoft Battles Cyber Criminals*, WALL STREET J. (Feb. 26, 2010), https://www.wsj.com/articles/SB10001424052748704240004575086523786147014 [https://perma.cc/A2S4-YYUV]; Complaint at 34–39, Microsoft Corp. v. John Doe, No. 1:10-cv-00156 (E.D. Va. Feb. 22, 2010).

[47] Order for Permanent Injunction, Microsoft Corp. v. John Doe, No. 12-cv-01335 (E.D.N.Y. Dec. 5, 2012); Jeffrey Meisner, *Microsoft and Financial Services Industry Leaders Target Cybercriminal Operations from Zeus Botnets*, MICROSOFT: OFFICIAL MICROSOFT BLOG (Mar. 25, 2012), https://blogs.microsoft.com/blog/2012/03/25/microsoft-and-financial-services-industry-leaders-target-cybercriminal-operations-from-zeus-botnets/ [https://perma.cc/TBF5-83J2]; Kim Zetter, *Microsoft Seizes Zeus Servers in Anti-Botnet Rampage*, WIRED (Mar. 3, 2012), https://www.wired.com/2012/03/microsoft-botnet-takedown/ **[**https://perma.cc/KWU2-Y5R3].

But this also evidences a lacuna, perhaps a very huge one i.e., the court proceedings are expensive, time-consuming, and less beneficial as damages accrue in seconds[48].

Lastly, the current regime is adopted from the inception of the extra-territorial nature of botnets attacks. This needed the government's input and role to legitimize it in the international arena. It is also because of the reason not everyone can afford the remedies available to Microsoft. Meanwhile when the private entities are using cyber defense for profit-making, then it is inevitable that they will not find a permanent solution otherwise, they will be out of their jobs. For example, if an antivirus is made for all viruses, then how will the production entity make its profit? This is the reason that the current scheme requires domestic legislation, domestic enforcement, international legislation, and international enforcement in this area. In the US, there is *H.A.C.C.S. Solution* for the legitimization of cyber defense actions[49]. It is an initiative by the U.S. Department of Defense. It is a state-enabled four-step procedure. The first step is locating botnet-conscripted networks. The second is fingerprinting them. Once this is done, the vulnerabilities known in the botnet will be used to insert Artificial Intelligence (AI) agents in it, also known as 'n-day'. This does the remedial and other actions as required. In my expression, it is more like hacking the hacker. Lastly, the neutralization process is implemented. It involves interference with systems and their data, which is potentially harmful to other neutral systems. So, this method can be used to allow cyber-capable states to engage in such activities even on the international stage. Hence, it is also an indication that governments need to take control of the cyber-defense arena. Moreover, this is why public international law can include this matter.

Enforcement Issues

The practical issues outweigh the theoretical and jurisprudential talks. The theory is vague, absurd, and irrelevant if it is unable to evidence itself through practice. Similarly, even if the laws are valid, their enforceability is important for the efficiency of laws. In the current discussion, it is also pivotal, as the cyberspace arena has a large scope of discussion on the enforceability of laws. In other words, even if we have the laws, at domestic as well as the international arena, their enforceability remains doubtful. The more efficient system will be more easily enforceable and vice versa.

[48] Cybersecurity Litigation, CYBERSECURITY LAW 57–122 (2019).

[49] Harnessing Autonomy for Countering Cyber-adversary Systems.

The lack of enforceability, or inefficient enforceability will be a tool and a pro for the criminals. But, does this mean that there is a need to have a sophisticated expert team of heroes who professionally provide cyber-defense, while being under the funds, and management of the government. The investment of public funds for the purpose of cyber security and cyber-defense is in need of time. As already provided that the government needs to take the laws, and its enforcement into its own hands, the reason is also founded in the argument that in the previous century, the criminals were a handful and the private entities could hire cyber-defense, but now, the tool of utilizing cyberspace is available to millions. The subjects of the attack are also ordinary citizens, and hence the responsibility to protect was best suited to the government.

The jurisdiction problem lies at the heart of the enforceability debate in transnational cyberspace laws. There are several questions in this field. For example, which law will apply, who will implement it, against whom it can be implemented, what can be done under such laws, and who will do what against whom under such laws. As territorial jurisdiction is a concept that cannot be applied in its traditional sense, the other modes of jurisdiction can be invoked, such as personal (if the culprit's nationality is known), effect, passive effect, prescriptive, adjudicative, and enforcement[50]. It is the last one that needs consideration under this heading as it discusses the state's power to prescribe and regulate activity over persons. It is also pertinent to mention here that Budapest Convention does attempt to harmonize domestic laws on cyberspace to bring clarity in enforcement authority. On the other hand, the adjudicative jurisdiction deals with personal or national jurisdiction as it deals with the empowerment of the court to apply state's law to a person within its enforcement jurisdiction. At the basic level, the state can only exercise its laws within its territory, however, in transitional affairs, this is limited, only to the cases where the permissive rule is allowed (reference is made to Lotus case[51] decided by the Permanent Court of International Justice or PCIJ). This is in line with the principles of territorial sovereignty and the doctrine of non-intervention. Under international law, consent is vital, as there is no sovereign with all states as its subjects. This is why Austin never considered international law as really a law. However, Austin's lectures were his own perspective of law, and need no detailed analysis here. But consent is required, as states cannot be compelled, at least theoretically, under international law, to act or

[50] Restatement (Fourth) of Foreign Relations Law of the United States § 401 (Am. Law Inst. 2018) [hereinafter Restatement].

[51] S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

refrain from action. Coming back to the topic, the concept of enforceability is crucial, and the concept of jurisdiction has been given more weight and broad interpretation than ever done. From the principles of the Lotus case, it can be concluded that international law's enforcement principles in the cyberspace arena will be that the jurisdiction lies with all those states whose victims and assets are involved. Moreover, the vast expansion of enforcement and jurisdiction concepts can equally mean that cyber defense is an ergaomnes duty. Such an inference will mean that it will be analogous to terrorism. Although it is arguably justifiable that cyber-terrorism is equivalent to terrorism, it will include funding terrorist groups, or aiding them in their illegal actions.

The doctrine of sovereignty has been duly discussed so that the preceding and subsequent discussion does not fall on its back on major principles under international law. It is also due to the fact that the concept of territory in cyberspace is very unique and different from our traditional concept of sovereignty. Hence, from the above and preceding discussions, it can be concluded that although states may criminalize certain actions, they may not do so extra-territorially, unless permitted by international law (effects-based jurisdiction). So, the Lotus case helps us to establish that in order to make permission to such effect, there must be states negotiated mutual assistance treaties that establish new norms of conduct in cyberspace. In my view, Steigall[52] was right to point out that issues such as counter-terrorism in ungoverned spaces such as cyber law are better dealt with when outside actors including states having capabilities, are allowed to intervene in affairs in which weaker or incapable states are unable to do so. I would only like to add the element of bonafide on part of the intervening state[53]. This is one good way to increase or promote global security. In this model, capable states will bear the burden to not only secure their own domains and territory but also to minimize trans-border harm. The key to the success of such a model will always be information sharing.[54]

Although reference has been made to the Lotus case, it seems highly unlikely that this principle can be applied in its strict form the technical reasons prevail, for example, the matter of jurisdiction on data or digital packets, and those data packets that are sent from trans-border, or even the ones

[52] Dan E. Stigall, *Counterterrorism, Ungoverned Spaces, and the Role of International Law*, SAIS REV. INT'L AFF., Winter–Spring 2016, at 47, 51.

[53] Id., at 47, 51.

[54] Information Sharing in Cyber Defence Exercises, PROCEEDINGS OF THE 19TH EUROPEAN CONFERENCE ON CYBER WARFARE (2020).

sent from trans-border but without knowledge of the owner of the device[55]. This matter may complicate even further as the data packets may be in millions and maybe from various sovereign states, and the identity of the botmaster can be hidden through layers of VPNs or proxies[56].

Breaking into the International Cyberspace Law

In the beginning, it can be stated, despite possible criticism of it being a sweeping statement, that international law forbids state-controlled botnet crimes and intentional omission to act against culprits. However, such a statement can be supported, at least to some extent, by the Council of Europe's Committee on Cybercrimes' guidance notes[57], and Budapest Convention[58]. From the latter, the criminal law is aimed to be harmonized in a way that there is a positive duty to act on the international community regarding botnets while acknowledging that some nations are better equipped than others. Hence, creating a sense of reciprocal obligations on individual states to contain transnational threats emerging from within their borders to prevent infringement of peace and safety of other states[59].

As already pointed out and concluded, the domestic laws are incapable of efficiently controlling transnational harm, it is still important to use them[60]. Even if this argument is criticized, there is still life in it when dualist states are concerned. They cannot implement an international treaty without enabling it through an Act or domesticating legislation. However, some guidance can be taken in this regard from the NATO and ENISA report[61], which stands for the proposition that

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[55] Kim Zetter, *Bredolab Bot Herder Gets 4 Years for 30 Million Infections*, WIRED (May 23, 2012), https://www.wired.com/2012/05/bredolab-botmaster-sentenced/ [https://perma.cc/GU59-EXZG].

[56] Christopher Groskopf & Sarah Slobin, *Where Your Data Flows on the Internet Matters, and You Have No Control Over It*, QUARTZ: MAP OF THE INTERNET (Oct. 5, 2016), https://qz.com/741166/where-your-data-flows-on-the-internet-matters-and-you-have-no-control-over-it/ [https://perma.cc/K3ZF-6EYS].

[57] COUNCIL OF EUR., CYBERCRIME CONVENTION COMM., T-CY GUIDANCE NOTE #2: PROVISIONS OF THE BUDAPEST CONVENTION COVERING BOTNETS (2013), https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016802e7094 [https://perma.cc/M6W4-9VR8] and COUNCIL OF EUR., CYBERCRIME CONVENTION COMM., T-CY GUIDANCE NOTE #5: DDOS ATTACKS (2013), https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016802e9c49 [https://perma.cc/TPT2-AQ35]; COUNCIL OF EUR., CYBERCRIME CONVENTION COMM., CRIMINAL JUSTICE ACCESS TO ELECTRONIC EVIDENCE IN THE CLOUD: RECOMMENDATIONS FOR CONSIDERATION BY THE T-CY 47 (2016).

[58] Budapest Convention on Cybercrime.

[59] Scott J. Shackelford, *An Introduction to the Law of Cyber War and Peace*, MANAGING CYBER ATTACKS IN INTERNATIONAL LAW, BUSINESS, AND RELATIONS 263–311.

[60] Steve Gold, *Cyberdefence moves to the top of the Council of Europe/NATO agenda*, 5 INFOSECURITY 6 (2008).

[61] It is 2012 report by North American Treaty Organization ("N.A.T.O.") Cooperative Cyber Defence Centre of Excellence and the European Network and Information Security Agency ("E.N.I.S.A.").

competing legal regimes will complicate the study of botnets and cyber defense actions[62]. So, at this stage, we have two implications i.e., one is legal and the other is practical. Legal issues arise because of differences in domestic laws, violation of privacy and surveillance laws, violation of human rights, failure of international cooperation, information sharing, and weak international customary rules. The practical issues revolve around the capabilities of states, advancement in technology, trans-border complexities, and potential harm to private property and devices[63]. Lacking domestic law is also apparent from the argument that it fails to differentiate between good-faith researchers and bad faith criminals.

(a) ICCPR and ECHR

This makes a fair case to discuss international law and its importance in cyber security and botnet mitigation. First, it is important to understand constraints placed by international law, before discussing the permissive and legitimized cyber defense. The constraints, as can be guessed from the previous discussion, are human rights, surveillance laws, and privacy laws. UDHR[64] is a political document but is a declaration of civil, political, social, and cultural rights. The legal document on the same includes ICCPR[65] and ICESCR[66]. The privacy laws are civil rights and are dealt with under the ICCPR. International privacy laws discuss the foreign surveillance and interpretations of provisions of ICCPR. Although some may argue that privacy laws are not directly concerned with botnet mitigation, this writing disagrees and discusses it as a hindrance and constraint on cyber defense. The USA's stance in UNHRC in 2014 was that ICCPR did not have an extra-territorial effect[67]; however, rights under ICCPR and its interpretation are considered to be an ergaomnes duty, which is to be given effect within as well as the outside territory of a signatory state.[68] With respect to the digital age, former Secretary-General of the ESIL[69] viewed,

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[62] Marios Panagiotis Efthymiopoulos, *NATO's Cyber-Defence: A Methodology for Smart Defence*, CYBER-DEVELOPMENT, CYBER-DEMOCRACY AND CYBER-DEFENSE 303–317 (2014).

[63] NATO Cooperative Cyber Defence Centre of Excellence, 2021 13TH INTERNATIONAL CONFERENCE ON CYBER CONFLICT (CYCON) (2021).

[64] Universal Declaration On Human Rights, 1948.

[65] International Covenant on Civil and Political Rights.

[66] International Covenant on Economic, Social and Cultural Rights.

[67] *See* Rep. of the Office of the U.N. High Comm'r for Human Rights, The Right to Privacy in the Digital Age, U.N. Doc. A/HRC/27/37 (June 30, 2014).

[68] Ashley Deeks, *An International Legal Framework for Surveillance*, 55 VA. J. INT'L L. 291, 307 n.49 (2015).

[69] European Society of International Law.

though reluctantly, that ICCPR does apply extra-territorially with respect to digital rights.[70] This reluctance but ultimate acceptance was followed in the U.N. General Assembly's resolution 'The Right to Privacy in the Digital Age'.[71] Hence, interpreting the right to privacy enshrined under Article seventeen of the ICCPR to be available offline as well as online. This is now the official stance of the USA.[72] In the report cited in the preceding footnote of this article, it was also made known that the USA was conducting surveillance while being in violation of the ICCPR. The interpretation of Art. 17 of ICCPR requires assessment of the principle of legality i.e., an act taken in accordance with the state's domestic law. This is no more issue for Pakistan as the same is available in the Constitution of the Islamic Republic of Pakistan, 1973. Secondly, the act in violation of Article 17 shall be justifiable as being non-arbitrary (i.e., proportional and necessary). Nonarbitrary means that the act is necessary to achieve a legitimate aim, proportionate to the aim sought.[73] This is also in line with the jurisprudence of Art. 8 of the European Commission on Human Rights.[74] In *Weber and Saravia v. Germany*[75], the ECtHR[76] held that the State's interference in the privacy of its national can be reasonable if it was proportional to the national security interests. Proportionality has vast jurisprudence and interpretation in International Human Right Laws. For Kaye, it is 'the least intrusive instrument amongst those which might achieve the desired result'[77]. The jurisprudence between the interpretation of the same rights in ICCPR and ECHR shall be the same or in line with each other, to ensure universal standards for human rights. Some cannot be more human than others. The ECtHR, in *Big Brother Watch and Others v. the*

[70] Marko Milanovic, *Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age*, 56 HARV. INT'L L.J. 81, 111 (2015).

[71] G.A. Res. 69/166 (Feb. 10, 2015).

[72] U.N. Human Rights Comm., Concluding Observations on the Fourth Periodic Report of the United States, U.N. Doc. CCPR/C/USA/CO/4, at 2 (Apr. 23, 2014).

[73] Brief for John Doe, a.k.a. Kidane, as Amici Curiae Supporting Plaintiff-Appellant at 13–14, 16–17, Doe v. Ethiopia, 851 F.3d 7 (D.C. Cir. Nov. 23, 2016), (No. 16-7081).

[74] European Convention on Human Rights art. 8, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 221.

[75] Weber and Saravia v. Germany, 2006-XI Eur. Ct. H.R. 1173.

[76] European Court of Human Rights.

[77] U.N. Human Rights Council, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye, 35 U.N. Doc. A/HRC/29/32 (May 22, 2013).

United Kingdom[78], privacy rights test for the propriety of bulk surveillance was considered.[79] It may be of some guidance to cite the nine elements or limbs of the principle of legality of legislation devised by the ECtHR. The limbs are that the statute describes offenses and their nature which may give rise to an interception order; defined categories of people liable to have their communications intercepted; limitation on the duration of interception; procedure for examination, use, and storage of data; precautions for communicating the data to third parties; circumstances under which data must be erased or destroyed; arrangements for supervising the implementation of secret surveillance; notification mechanisms and lastly, remedies under national law. Kaye's 'least invasive' is to assess whether the degree of interference exceeds what the goal requires. Applying this to the proposition of botnets, it needs to be discerned if the anti-botnet actions are non-arbitrary i.e., specific targeted objective or least intrusive instrument[80].

After ascertaining the constraints on the international cyber laws, it is pertinent to discuss what law does cyber law in the international arena demands[81]. It is proposed that the best way forward is to establish procedural norms that cognize the technological shortcomings of surveillance without hampering bonafide attempts by the global community or technologically advanced states. Procedural norms regulate the procedural protections imposed by the state by their intelligence. It does not offer substantive definitions of privacy activities and legitimacy of state interference in privacy. Some procedural norms include legality, limits on reasons to collect data, periodic review of surveillance authorization, limits on retention of data, preference for domestic actions, and neutral oversight bodies.

(b) ***Convention on Cybercrime***

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[78] Big Brother Watch v. U.K., App. No. 58170/13 Eur. Ct. H.R. 2013419-21 (2018), http://hudoc.echr.coe.int/eng?i=001-186048 [https://perma.cc/B92C-TJZM]; *see also* Robert Chesney, *The 'Big Brother Watch' Ruling on U.K. Surveillance Practices: Key Points from an American Perspective*, LAWFARE (Oct. 9, 2018), https://lawfareblog.com/big-brother-watch-ruling-uk-surveillance-practices-key-points-american-perspective [https://perma.cc/ 7SLR-SVTC].

[79] Big Brother Watch, App. No. 58170/13 Eur. Ct. H.R. at 307.

[80] U.N. Human Rights Council, Gen. Cmt. 27, U.N. Doc CCPR/C/21/Rev.1/Add.9, 14 (Nov. 1, 1999) (interpreting Article 12 of the I.C.C.P.R.'s requirement that restrictions on freedom of movement be permissible, necessary, and proportional (i.e., non-arbitrary)).

[81] The Threshold of Cyber Warfare: from Use of Cyber Force to Cyber Armed Attack, CYBER OPERATIONS AND INTERNATIONAL LAW 273–342 (2020).

Perhaps the most important binding and important treaty in the international arena is the Council of Europe's Convention on Cybercrime or the Budapest Convention.[82] This is the latest convention, as it came into force in the 21st Century. It is the creation of the Council of Europe, and not the European Union. Its ultimate aim is to 'harmonize domestic criminal law governing cyberspace within the community of nations and to promote mutual assistance in information sharing and investigative authority'.[83] Currently, more than sixty states are party to it and are required to harmonize substantive and procedural laws in this area. The convention is key to ensuring the enactment of legislation establishing a procedural framework for mutual legal assistance with evidence, extradition, jurisdiction, and preservation of evidence. At one end is the ICCPR, which is a limitation and pro-privacy law, whereas Budapest Convention is the one representing the other end. This international instrument is the best guidance for the international community as well as states like Pakistan for future legislation. Another key feature is the fact that it deals directly with botnet mitigation through a permissive regime of traffic-data sharing for communications between signatories. The importance of this conventions' adherence to privacy laws is apparent from the mechanism it provides. Briefly, it is focused upon viewing traffic data (unopened packets), as they interfere less with privacy interests than viewing the content does.

The international cooperation element is also pivotal to the Budapest Convention. It obligates the states party to it, to provide mutual assistance with respect to the criminal offences 'for which real time collection of traffic data would be available in a similar domestic case'. It is clearly noticeable by now, that the Budapest Convention is procedural in nature. The importance of this approach is that it guides technical experts to design effective and pro-privacy protection gadgets. The transnational issue causes citizens and people to feel insecure and lack of confidence, whereas the scheme devised under the Budapest Convention is important as it boosts confidence as to economic security of people, no one will feel jeopardization of interests.

Notwithstanding the above, the Budapest Convention provides certain online behaviors that are to be classified as criminal in nature. These include offenses against the confidentiality, integrity, and availability of computer data and systems, computer-related offenses, content-related offenses, and criminal copyright infringement. For the purpose of this article and in order to rebut an assertion

[82] Convention on Cybercrime, Nov. 23, 2001, E.T.S No. 185 [hereinafter Budapest Convention]. The Budapest Convention is the only binding source of law on cybercrime in international law.

[83] Jonathan Clough, *A World of Difference: The Budapest Convention on Cybercrime and the Challenges of Harmonisation*, 40 MONASH U. L. REV. 698 (2014).

mentioned above it can be stated that Budapest Convention does not explicitly provide for the botnets. However, this was in contemplation of the draftsmen of the Convention as they have used general and broad terms, which are so abstract that unforeseeable or technologically advanced crimes and tools can be interpreted or read into it.[84] The Council of Europe's Cybercrime Convention Committee's guidance notes has been evidence of this fact.[85] For example in 2013, guidance notes on botnets were published. They referred to botnets as technology and suggested application of the Convention to it.[86] Hence, the Budapest Convention is the finest available model that can be and must be used by states like Pakistan to have laws that are in line with international law, and help in the technological advancement of the state while answering queries relating to transnational cyberattacks and widespread use of botnets and malware devices in Pakistan. It will also provide protection to the privacy of the people of Pakistan. Budapest Convention puts a positive duty on states i.e., establishing a harmonious body of criminal law, as well as describing how this law prohibits a novel criminal enterprise, and lastly, imposing an obligation on signatory states to either enforce the law against known criminals or to permit participating states to exercise objective jurisdiction over them.

Case for Domestic Legislation in Pakistan

When a case is to be presented that cyberattacks are to be curtailed, the reasons are to be provided as well. One of the cases for having cybersecurity, cyber laws, and laws allowing cyber defense is that these laws will protect the privacy of citizens of the Islamic Republic of Pakistan. Another case is that such actions are a violation of the cyberspace and cyber territory of the State. Meanwhile, it is also a threat to the sovereignty as such attacks on the state's data storage means that the state's vital interests and confidential material may be open for auction on dark websites. However, does the Constitution allow such privacy rights to the citizen of the Republic? Even if this is the case, has the right been interpreted to include cyberspace in it. What is the role of ICCPR or international jurisprudence in the Constitution? Lastly, what else necessitates the development of such laws?

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[84] Eur. Consult. Ass., *Explanatory Report to the Convention on Cybercrime*.

[85] In 2012, the Cybercrime Convention Committee ("T-CY") began publishing Guidance notes "aimed at facilitating the effective use and implementation of the Budapest Convention on Cybercrime, also in light of legal, policy and technological developments." Eur. Consult. Ass., *Guidance Notes*, https://www.coe.int/en/web/cybercrime/guidance-notes [https://perma.cc/FC4M-YDC8]. (last visited Jan. 10, 2019).

[86] Cybercrime Convention Committee, *T-Cy Guidance Note #2*.

If the Constitution of the Islamic Republic of Pakistan, 1973 is given a reading, it can be seen that the citizens of the state are provided some fundamental rights. These rights are enshrined under Part II, Chapter I of the Constitution of the Islamic Republic of Pakistan, 1973[87]. These fundamental rights are so important that under Article 8, it is provided that laws that are inconsistent with or in derogation of Fundamental Rights are to be void. It is pertinent to mention Article 8(2), which provides that the state shall not make any law that takes away or abridges the rights conferred under the Constitution[88]. This is a double-edged knife; it can cut from both ends. If it is argued that the law on cyber security protects the privacy and that privacy is a constitutional right, then it can be counterargued that such laws are in fact infringement of privacy. However, the rebuttal of such an argument is apparent from the discussion in this document, which differentiates between infringements of privacy from the surveillance of the data traffic.

In addition to it, even if the laws are in violation of the Constitution, they can be made part of the First Schedule of the Constitution. Article 8(3)(b)(ii) of the Constitution provides that laws specified in the First Schedule are immune from the application of the general prohibition under Article 8 of the Constitution[89].

One unique prospect and attempt can be made to justify cyber defense under Article 9 of the Constitution. It provides for the security of a person. It is a term and provision that has been widely interpreted by the Apex Court of Pakistan[90]. It reads that 'no person shall be deprived of life or liberty save in accordance with law'. The case or argument is that when a DDoS attack and a server is down, is it not an infringement of the liberty of the people? Their access to a certain website, domain, or server forcefully stopped?

Under Article 14 of the Constitution of the Islamic Republic of Pakistan, 1973 it is provided that inviolability of dignity of man is a fundamental right[91]. In plain words, it provides that the dignity of man and privacy of home shall be inviolable. Does the privacy of home extend to the privacy of websites, homepage, internet, and cyberspace? In my opinion, the right does extend and should be extended to cyberspace.

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[87] PAKISTAN CONST. (available at https://na.gov.pk/uploads/documents/1549886415_632.pdf).
[88] id. art. 8 cl. 2.
[89] id. art. 8 cl. 3.
[90] Shehla Zia and others v. WAPDA (PLD 1994 SC 693).
[91] supra note 87, art. 14.

When a Pakistani domain is acquired, it is the asset and property of the owner, and in such circumstances, broad interpretation of fundamental rights attracts Article 23 of the Constitution, wherein it is the fundamental right of every citizen to acquire, hold and dispose of property in any part of Pakistan. The protection of those rights is envisaged under Art. 24 of the Constitution, which provides for protection of the property. When a cyberattack takes place, and appropriates the rights to the domain, or server. The cyberdefence can be legitimized under Article 24 (3) of the Constitution. It provides that if any action is taken which is to prevent danger to life, property or public health, or which has been acquired by any unfair means, or in any manner, contrary to law; or is enemy property or if the law provides its management for a limited period, in the public interest. Hence, if these articles are interpreted, it is plausible that cyber defence is potentially legitimate.

It is pertinent to mention here there is no botnet case in Pakistan, and the matter has not appeared before the Court of law, in Pakistan. However, reference can be made to some case laws where the apex court discussed the concept of privacy in Pakistan. In recent and seminal judgment of Justice *Qazi Faez Isa and others v The President of Pakistan and others*[92], the court stated that *'Surveillance was permitted in the limited area of anti-state or terrorist activities and that too under judicial and executive oversight. Outside such limited area, surveillance was constitutionally prohibited. Intelligence agencies did not enjoy a free hand in conducting surveillance but are subject to strict rules of compliance and oversight by the court.'* The interpretation of Article 14 has been done broadly by the court. It is not an absolute right but a qualified one. In the expression of the court, '*Privacy required that all information about a person was fundamentally his own, only for him to communicate or retain for himself…. Privacy attached to the person and not to the place where it was associated…Intrusion by the State into the sanctum of personal space, other than for a larger public purpose, was violative of the constitutional guarantees… Right to privacy was deeply intertwined with the right to life, right to personal liberty and right to dignity… Illegal and illegitimate surveillance, by both State and private actors, had the impact of intrusion into the private lives of citizens, not only violating their constitutional rights but also intruding on the very personhood, privacy and personal liberty of those surveilled…Surveillance had disparate impact, violating principles of non-discrimination and*

[92] Justice Qazi Faez Isa and others v The President Of Pakistan And Others (PLD 2021 Supreme Court 1).

equality as enshrined in the Constitution…Illegally procured private information amassed by the agencies could be used to manipulate and blackmail people for promoting political agendas; this crippled human security and dismantled democracy, lowering it slowly into an abyss of totalitarianism'. These comments by the court are double edged as the matter goes into turmoil. If these are adhered in their strict sense then the cyberdefence laws may be interpreted as ultra vires to the constitution. The Court joined Article 14 with Article 9, and viewed that it is a constitutional obligation on State authorities to protect the privacy and personal freedom of the citizens '*unless the law expressly authorized them to do otherwise in exceptional circumstances. In the absence of any law to the contrary, the rights to privacy and personal freedom became absolute and stood to protect the privacy and personal freedom of the citizen. No Government institution was to disclose the personal information of any citizen unless the law authorized the institution to do so. In the absence of any specific law, the umbrella of constitutional guarantees would come to cover and protect the citizen'.* This is the way out of the turmoil. The balance has to be struck and cyberdefence actions are to be justified through legislation. The court held that the State functionary could only embark upon the investigation or collection of material about a citizen under (i) the authority of an enabling law, (ii) by a functionary designated under the law; and (iii) only for a justifiable cause or reason. These are the criteria which are established by the apex Court of Pakistan and can be used as guidance tool, while formulating law. Such law has to be assessed that it cannot be misused by the state, malafidely to collect personal information about its citizen, unless there was a just cause and legitimate purpose for doing so. Hence, in absence of the enabling law, and even in presence of the same, the vires and domains of the laws and the implementation of the same has to be robust and efficient. The limitation on the state, can be understood from the 'Marcel principle'[93]. The Marcel Principle encapsulates that '*where information of a personal or confidential nature is obtained or received in the exercise of a legal power or in furtherance of a public duty, the recipient will in general owe a duty to the person from whom it was received or to whom it relates not to use it for other purposes'.* Such principle and this duty are not absolute but qualified as well[94]. When there is some action by the executive, wherein information has been '*obtained under statutory powers the duty of confidence owed on the Marcel principle cannot*

[93] Regina (Ingenious Media Holdings plc) v Revenue and Customs Commissioner ([2016] 1 WLR 4164).
[94] Hamilton v Naviede ([1995] 2 AC 75), per Lord Browne-Wilikinson.

operate so as to prevent the person obtaining the information from disclosing it to those persons to whom the statutory provisions either require or authorise him to make disclosure'.

More recently, the Honorable Lahore High Court explained the concept of liberty and privacy[95]. It referred to the definition of privacy provided under the Merriam-Webster Dictionary (Eleventh Edition) and Black's Law Dictionary (Tenth Edition). It defined privacy, inter alia, as freedom from arbitrary or despotic control. It began with the historical development of the concept of privacy, referring to various religious texts including Bible, Holy Qur'an etc. It provided that right to privacy was originally for protection against arbitrary intrusion by the police but it has now developed into a general right of privacy and repose. It is also considered essential for democratic government because it fosters and encourages the moral autonomy of the citizen, as a central requirement of a democracy.

This judgment made reference to UDHR[96], ICCPR[97], Convention on Rights of Child (CRC)[98], International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[99], European Convention on Human Rights[100], American Convention on Human Rights[101], Cairo Declaration on Human Rights in Islam; Arab Charter on Human Rights; African Commission on Human and People's Rights Declaration of Principles on Freedom of Expression in Africa; African Charter on the Rights and Welfare of the Child; Human Rights Declaration of the Association of Southeast Asian Nations; Asia-Pacific Economic Cooperation Privacy Framework; Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data; Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data regarding supervisory authorities and transborder data flows; Council of Europe. Recommendation No. R (99) 5 for the protection of privacy on the Internet; and European Union Data Protection Directive (since replaced by the General Data Protection Regulation, 2018). His lordship provided detailed jurisprudence of UK, US, India and Pakistan regarding right to privacy. It also mentioned that the

[95] Ghulam Mustafa v Judge Family Court and Another (2021 CLC 204 [Lahore (Multan Bench)]).
[96] Art. 12.
[97] Art. 17.
[98] Art. 16.
[99] Art. 14.
[100] Art. 8.
[101] Art. 11.

Global Internet Privacy Campaign postulates that the right to privacy has the following facets: (a) "Information privacy, which involves the establishment of rules governing the collection and handling of personal data such as credit information and medical records; (b) Bodily privacy, which concerns the protection of people's physical selves against invasive procedures such as drug testing and cavity searches; (c) Privacy of communications, which covers the security and privacy of mail, telephones, email and other forms of communication; and (d) Territorial privacy, which concerns the setting of limits on intrusion into the domestic and other environments such as the workplace or public space.

This leads to the end of the penultimate part of the substantive portion of this writing. The Constitutional provisions, and interpretation of the same, are helpful in making a case for introduction of legislation on cyberdefence in Pakistan. The matter will fall within the competence of the Federal Government, and it is less likely that it shall overlap with other enactments. In addition to it, the current laws of PECA, 2016[102] are not well equipped to deal with advanced technologies around the world. Even if the law is considered, albeit arguably, to be fit for use, there are more than enough evidence of inefficiency by officers. Prevention of Electronic Crimes Act, 2016 (PECA) extends to applies to aliens if they are in Pakistan. This is in line with territorial sovereignty of Pakistan. Similarly, it is applicable extra-territorially to any act committed outside Pakistan by any person if the act constitutes an offence under PECA and affects a person, property, information system or data located in Pakistan. This may be arguably in line with the Budapest Convention. However, it needs further deliberation in subsequent analysis. Under section 2 of the Act, ‘act’ includes causing an act to be done by a person either directly or through an automated information system or automated mechanism or self-executing, adaptive or autonomous device and whether having temporary or permanent impact. In this way, bot binaries may be included in it, if the court understands. With regards to state’s assets, or military sites, section 2 defines "critical infrastructure" as critical elements of infrastructure namely assets, facilities, systems, networks or processes the loss or compromise of which could result in, significant impact on national security, national defense, or the functioning of the state. However, major tasks include potential harm to the private and multinational companies. It appears from the perusal of the Act that it includes most of the cybercrimes, however, it has weak cyberdefence provisions.

[102] The Prevention Of Electronic Crimes Act, 2016 (Act No. XL of 2016), available at https://pakistancode.gov.pk/english/UY2FqaJw1-apaUY2Fqa-apaUY2Jvbp8%3D-sg-jjjjjjjjjjjj.

With reference to cyber defence actions, section 32 of PECA provides that service provider needs to retain its traffic data for a minimum period of one year in accordance with sections 5 and 6 of the Electronic Transactions Ordinance, 2002[103]. Other than Cyberdefence actions, the FIA may apply to court under section 33 for the warrant for search or seizure of data device or other articles that has been or may reasonably be required for the purpose of a criminal investigation or criminal proceedings which may be material as evidence. It is pertinent to mention that with reference to the privacy of the people, subsection (2) provides that in such cases where there is apprehension of destruction, alteration or loss of data, information system, data, device or other articles the officer shall immediately bring it into the notice of the Court. However, there is a provision which contradicts with the interpretation of the right to privacy under ICCPR, ECHR as well as Budapest Convention. This is section 34 that deals with disclosure of content data. Section 35(2) provides some protection to privacy by striking balance between the opposing interests. It provides that the actions of the authority shall be with proportionality and shall take all precautions to maintain integrity and secrecy of the information system and data; and not disrupt or interfere with the integrity or running and operation of any information system or data that is not the subject of the offences. In addition to it, it also requires the officer to avoid disruption of the legitimate business operations and information system, program or data not connected with the information system that is not the subject of the offences.

The cyberdefence is not legitimized under the PECA. On the international cooperation, under Chapter VI, section 42 of PECA provides for extending cooperation to any foreign government for the purposes of investigations or proceedings concerning offences related to information systems, electronic communication or data or for the collection of evidence in electronic form relating to an offence or obtaining expeditious preservation and disclosure of data by means of an information system or real-time collection of data associated with specified communications or interception of data. Subsection (5) of section 42 is evidence of the need for harmonization, and an international document for Pakistan that can be used to ensure harmonization of criminal laws in this area in various states. Lastly, Chapter VI provides for preventive measures and this is the only provision for cyberdefence. Under section 49, titled ‘Computer emergency response teams’, the government is empowered to constitute computer emergency response teams to respond to any

[103] Electronic Transactions Ordinance, 2002 (LI of 2002).

threat against or attack on any critical infrastructure information systems or critical infrastructure data, or widespread attack on information systems in Pakistan. However, there is no notification on the same available to the public. Even if there was any, it is solely by the Government. How can private entities engage in it? Is Pakistan a good enough state to be called as cyber capable?

Even in PECA, there is a need to have competent and trained judges, however, practical dilemmas are there. For example, FIA is the competent authority but practically insignificant as to its functions and duties. Similarly, under section 44, judges shall be specially trained on computer sciences, cyber forensics, electronic transactions and data protection. There is no provision that allows citizen protection from acts of government overreach. The cyberdefence and its scope are not adequately addressed by the laws of Pakistan. It has also failed to understand the concept that territory is irrelevant on the internet highways. Installation of malware is a violation of our criminal code; but extraterritorial enforcement without prior notification and consent from the other state is also absent. Moreover, it fails to provide redress to thousands of private owners of the computers whose devices are knowingly hacked by botmasters.

Pakistan needs an update in cyber law because of the absence of laws that empower nations to act against extraterritorial threats, and in light of the transnational nature of botnets, nations must either act outside of the law or against it or they must simply hope that nations hosting criminal actors intervene. Similarly, recently EVM machines are aimed to be used in upcoming elections. However, if they are infected, it will also be a violation of many other fundamental rights. Hence, it may be concluded that such laws are in dire need of reform.

Conclusions and Recommendations

For Pakistan, it has to understand and recognize that it has to, along with other states, assume reciprocal obligations to contain transnational threats emerging from within its borders. Under international law, no state is theoretically bound to do anything which it does not consent to. However, reality is different and we should not expect to live in fantasies. All states are sovereign and they need to consent that they will not do harm to other states, so that in return the other state also refrains or takes steps to ensure that no trans-border harm takes place. Even if it does so, it is to be accepted as a mutual threat, and to be dealt with in accordance with bonafide procedure and assistance. Hence, bargaining for it on equal and reciprocal values. While on the plane of practical reality, it has to be admitted that some are better than others while dealing with such issues. On the other hand, it has to be accepted that privacy laws are not absolute rights. They are qualified

and, in such circumstances, if the content of data is not opened, they are not violated. The reference to Budapest Convention also made it clear that the development of customary international law is going to be in these lines, hence they need to be followed so that in future a better placed system is available at domestic level.

For Pakistan, there is no doubt that there is a positive obligation to ensure anti-botnet actions and mitigate botnet or cyberattacks. This obligation is on the argument of customary international law. This is because such attacks infringe ICCPR's article seventeen[104], that ensure protection of privacy rights, and the Constitution of Islamic Republic of Pakistan, 1973. There may be some criticism of interpretation of fundamental rights as provided under the constitution of Islamic Republic of Pakistan 1973, however, the reasoning in this writing may make a plausible case for broad interpretation. The state's responsibility contains a positive obligation to protect from cyberattack means to take appropriate and effective measures to investigate actions taken by third parties, and hold the responsible liable for it through adoption of deterring measures.

It has to be accepted that the method proposed in this writing has used or proposed adoption of the US model, and model in Europe, but it does not mean that this is the only possible solution. For example, the approach of Russia to cyberspace laws and norms is in opposition to that of the USA.[105] Similarly, Philippines and France have proposed adoption of their own norms in cyberspace. However, in my opinion, the best method and clearer picture is the one present in the Budapest Convention and USA's domestic legal system. They both focus upon information sharing and mutual assistance in investigations. The efficient element in the USA legal system is that it imposes a duty to combat cyberthreats within jurisdiction and allows cyber-capable entities to aid in case of transnational harm. Such a model can be alternatively described as 'if you cannot stop the thief, make him the sheriff'[106]. The technological advancement is way speedy than the development of law, and international as well as domestic law need to pace up. Pakistan is way back in its jurisprudence and understanding. It is full of potential but less efficient in the cyber space arena. If the proposed method and ideology is accepted, and followed, the void in this area

[104] U.N. Human Rights Council, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue, 57, 83, U.N. Doc. A/HRC/23/40 (Apr. 17, 2013).

[105] *The United Nations Doubles its Workload on Cyber Norms, and Not Everyone Is Pleased*, COUNCIL ON FOREIGN RELATIONS DIGITAL AND CYBERSPACE POLICY PROGRAM BLOG (Nov. 15, 2018), https://www.cfr.org/blog/united-nations-doubles-its-workload-cyber-norms-and-not-everyone-pleased [https://perma.cc/UC5R-XM56].

[106] Author's unique perspective of the debate.

may be fulfilled and a positive law will be available for the equipped law enforcement agents. Hence, through the adherence to the proposed system, it is possible to provide people of Pakistan, a secure internet. The Federation of Pakistan, through its Majlis e Shoora (National Assembly and Senate) shall take this as an opportunity to reform the law, and fill the lacunas in it.

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Chowkidara-System-A Missing-Institution

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Abstract

The article unveils the history of 'Chowkidara System'- in the sub-continent starting from Mughal era, and passing through the colonial period the article reflects the need of 'Chowkidara system' in present day Pakistan as the original system seems vanishing. The legislation framed under section 39-A of The Punjab Laws Act, 1872 is the sole law for running the affairs of Chowkidars. The comparison study of 'Chowkidara System' prevailing in India further provides the utility of the system that seems missing in Pakistan. The talk with Chowkidar leader and case study of different citations portray the miserable conditions of Chowkidars who are struggling for their minimum wage, and for the recovery of lost glory of Chowkidars. The private security concept further deteriorated this public institution of security, and it has been suggested that the soaring challenges to the law and order can be overcome if the 'system' is rehabilitated under the command of law enforcement agencies.

Key Words: chowkidar, security, law enforcement, police

Introduction

From the British Raj, we have not only inherited the main pillars of State such as Parliament, Judiciary, bureaucracy which are part and parcel of a state in the modern-day world sans there is no concept of state, but also innumerable other remarkable institutions in the arena of bureaucracy. Army, Police, Revenue, Railway etc. were considered, and still so taken as hallmark of governance for running the affairs of state. In the backdrop of rule of British Raj in the sub-continent, the crown needed a strong hold to rule over the local population through these aforementioned institutions, and for achieving the same, the office of Deputy Commissioner along with revenue and police powers was considered deemed necessary , and for the purpose of providing assistance at the grass root level, the helping hand was extended to these institutions of Police and revenue through the institution of 'Chowkidara' -the lost legacy of British Raj which once considered a powerful institution providing basis to rule over the masses as the Chowkidars were required to keep a vigilant eye on the public at large . They were often termed as 'secret /spy agents' of the

British Raj who were the ears, and eyes through which the Raj could hear and see the affairs of the local population.

Originally speaking in the historical context of the Sub-Continent though 'Chowkidar' had been a part of Mughal Administration (the word 'Chowkidar' being Persian word came into Urdu language) but our subject of 'Chowkidar' is not the one which had been in Mughal era but instead of it reshaping of the institution of 'Chowkidar' comprehensively and finding its remarkable place in the legal system designed by the Raj. As to the origin from where the word 'Chowkidar' derived, and what is a Chowkidar? The word 'Chowkidar 'is derived from the Urdu word Chauki, which essentially means one of the four posts on the periphery of a village that guard it from intruders, and dacoits. The Urdu word chauk' (outpost), and dar '(keeper) together make up the word Chowkidar, which has even made it to the Oxford dictionary. In the distant past, chowkidars were those who sat at the Chaukis on the four corners of a village, and guarded the villagers all night. Originally, they were part of the policing system and they were accorded special status of honorary policing to watch over the small villages as can be seen during the Mughal rule in India.

Content Analysis

The British Raj considering the value of Chowkidar gave legal birth to the 'Chowkidara System' in a new form after having established its rule over India. Tracing the legal history of Chowkidara System in the sub-continent we come across The Punjab Laws Acts, 1872 which was the initial enactment right after abolition of the East India Company by Indian Act, 1858 when the colonial powers decided to rule sub-continent through the Crown. The British Raj started taking control of the sub-continent under the law in order to have complete rule over the Indians by *dejure,* and as per need and requirement to protect the institution of the Crown, and to govern the sub-continent in the name of law new enactments were being introduced by the British Parliament. The establishment of Chowkidara System was the result of newly introduced laws which was established by virtue of Section 39-A of The Punjab Laws Acts, 1872, 'The Punjab Laws' which delineates — '*Power to establish a system of village -watchmen, and municipal Watchmen, and to make rules.'* Accordingly, the system was established and rules were framed and published in the same year of 1872. The preamble of 'The Punjab Laws' provides that in exercise the Power conferred by the Punjab Laws Act, 1872 Section 39-A, Lieutenant Governor with the previous sanction of the Governor General in council made the rules to provide for the establishment of a village watchman to the territories under the administration of the Government of the Punjab.

Under a comprehensive legal system, the Chowkidars were afforded special status particularly on account of their valuable assistance to the local police in order to maintain law and order. The local population was keenly monitored through these Chowkidars. Apart from performing the duty as watch and ward, these Chowkidars played a significant role in detection and control of crimes. The local police were required to maintain all the records of Chowkidars, with full particulars along with their temporary and permanent addresses so as to ensure their availability as and when required.

Perusal of rules framed under Section 39-A of 'The Punjab Laws' portray Chowkidara system as the backbone of Police and Revenue departments. Rule 5 provides that for each village, one or more Chowkidars shall be appointed provided that if any village is too small to make pay of one Chowkidar. The appointment of chowkidar was and is made under Rule 7 which says that, '*the chowkidars will be appointed by the District Magistrate /Assistant Commissioner on the recommendation of village /ward councilor, and head man of the area, after due verification of antecedents by the local police….'* Rule-9 frame in the year 1983 talking about salary of Chowkidars provides that, '*A monthly ratio of Rs. 2/ in the case of village Chowkidar will be levied on each house, and shop /establishment in every village to cover monthly salary of village chowkidar. The Assistant Commissioner / Collector of the Sub-Division will be authorized to levy this rate for this purpose consisting of houses/shops from 100 to 200 will be created in villages in such a way as the Chowkidara rate chargeable from these houses/shops is not less that Rs, 300/- per month.'*

Rule 13 authorizes a Chowkidar to be armed with a Club, with a metallic top bearing distinctive insignia as may be prescribed by the Government. Moreover, each Chowkidar is entitled to get one free license for a non-prohibited bore arm along with a waist belt with suitable insignia prescribed by the Government. It was this special status of almost honorary police man through which the institution of police had strong control at the grass root level, and the crime rate was to the minimum level. The role of Chowkidar in eradication of crimes is well defined in Rule, 17 which provides that, '*every chowkidar shall at once give to the officer in-charge of the Police station within the limits of which his village or beat is situate , information he may obtain respecting the commission of, or intention to commit any of the following offences in his village or beat, that is to say, a) Rioting ; b) Concealment of birth by secret disposal of dead body ; c) causing*

miscarriage ; d) Exposure of a child; e) Mischief by fire; f) Mischief to animals by poisoning ; g) attempt to commit culpable homicide.'

The existing rules 1983 undoubtedly reflect the significance of the institution as helping hand not only to the police department but also to the various other government institutions such as Revenue, Local Government, health, and education etc., however, lack of interest to revise the rules by succeeding governments, and even non-compliance of existing rules has led this institution to erode whereby the ultimate sufferers are the Chowkidars who are struggling hard to protect this 150 years old institution which is still rendering service to the Government in various fields at the cost of receiving as less as Rs.300 per month, and thus leading very miserable and poor life. The minimum wage notification has not been extended to these poor workers of the Government, though many times, it has been pledged with these chowkidars to afford them the reasonable wages as in one of meeting with Chowkidara Union president namely Allah Ditta shed light on the wretchedness of these poor Chowkidars, and the struggle he has led to fight for the rights of these Chowkidars since from 1986 when he was replaced by Siddique Nasir - the founding father of Chowkidara Union in Punjab.

Since 1872, the relevant rules for the appointment, the administration and running the affairs of Chowkidars (village Watchmen), have been amended. In the year 1872, remuneration was fixed Rs. 3 per month. In the year 1960, the remuneration was revised, and fixed at Rs.10, and further, thereafter, in the year 1983, it was revised as Rs. 300/ per month and since then, the remuneration is the same as these rules have not been revised for the last almost 40 years though Rule 11 of the existing Chowkidara Rules specifically, and jealousy protects these chowkidars, and provides that, '*Government may revise the salary of Chowkidar, and the rate of contribution per house/shop as and when necessary.*'

From the nature of work of these Chowkidars, it has been found that these Chowkidars have been rendering service to various other government departments such as Local government, education, health etc., apart from their main work and role in the Revenue, and police departments and in this connection almost each department has equally assigned the duties to them to get the job done. Take the example of Revenue, where revenue collection is a major task to be performed through Chowkidars and this is evident from Rule 12 which prescribes, '*that the chowkidars will be required to keep the record of births, and deaths in his area, and report the same to the union council concerned without any delay, and would also render assistance to the Lambardar in*

collection of land revenue.' Here, to keep the record of births, and deaths is work of such nature which is to be done for the local Government institution. Almost all types of Government campaigns whether it is educational campaign for the general masses in the villages or health campaigns during epidemics etc., are run through these Chowkidars. Rule 18 prescribes this very role by ordaining, that, '*every village head man and chowkidar shall in like manner report the appearance of every epidemic in his village or beat. On the occurrence in his village or beat of a first case of cholera or of sudden death preceded by purging and vomiting , it shall be the duty of the watchmen to report the fact at once to the officer-in-charge of the Police station within the limits of which his village or beat is situate.'* In the recent pandemic of covid-19, these chowkidars have served the best public interests as directed by the Government , but despite all delivering the toils of labor much to the utter astonishment, the rewards of their work has been least honored by the Government.

In my personal experience, in another meeting held with the president (Allah Ditta) of Chowkidara Union - a registered union under The Punjab Industrial Relations, Act, 2010, it was got revealed that the total strength of Chowkidars in the whole Punjab is almost 40 thousand who are receiving Rs. 300/- per month, and struggling for their minimum wage Rs. 20,000/- (Twenty Thousand) per month, as per Government notification which has not been extended to these poor sons of the soil nevertheless, it is their fundamental right under Article 9 of the Constitution of Islamic Republic of Pakistan to receive the sustenance as the means of life - bread and butter are vital for the existence of life, in absence thereof, there is no concept of life. It is only the implementation of the minimum wage notification that can save these chowkidars from being engulfed by hunger, and poverty, but sadly no concrete steps are in sight on the part of the Government.

It is interesting to note that though work is taken by various departments, however, as per rules of business of The Government of Punjab Rules, 2018, the relevant enactment 'The Punjab Laws' is administered by Revenue department vide entry No. II under head of 'Board of Revenue Department', and the same status was there under previous Rules of Business, 2011, and the same has been the case since for the last 150 years. A collective reading of the *Chowkidara* Rules, 1983 along with Rules of business 2018 leaves no room to believe that it is the utmost duty of the Government of Punjab to take care of this one of the oldest institutions, restructuring it as per demands, and needs taking care of downtrodden Chowkidars who have failed to attract the eyes of

high ups of succeeding governments, and thus, in result thereof, are leading miserable life in poverty.

Is it not the discrimination which is otherwise prohibited under Article 25 and 27 of the Constitution of Islamic Republic of Pakistan when these Chowkidars are not afforded the equal protection of law by way of non-applying the minimum wage notification to these subjects of the state wherein the state has guaranteed that all citizens are equal before law, and there shall be no discrimination in service? Is it not the exploitation to hire the services of Chowkidars over Rs? 300/ per month, the exploitation which is condemned under Article 3 of the Constitution when it is ordained that, '*the state shall ensure the elimination of all forms of exploitation and the gradual fulfillment of the fundamental principle, from each according to his ability to each according to his work" the equal protection ensure the application of minimum wage.'* Whether it's not the deprivation from the protection of law provided under Article 4 of the Constitution wherein the rights of the individuals have been protected of every citizen for the time being within Pakistan, and no action detrimental to the life, liberty, body, reputation of any person shall be taken except in accordance with law? Whether these poor chaps are not required to be up-lifted by virtue of Article 37 (a) of the Constitution which ordains that, '*the state shall promote with special care, the educational and economic interests of backward classes or areas…'* Does this not amount to 'forced labor prohibited under Article 11 (2) of the Constitution when minimum wage is not provided to a Chowkidar under a law? The existing wages of Rs.300/ has been fixed by the rule 7 of the existing rules 1983.

One of the most crucial demands raised by these Chowkidars is with regard to their 'status' which has not yet been declared permanent though it has been pledged many times with them by the Government to frame comprehensive rules of their service structure, however, till today no promise has been fulfilled in regard thereto since their appointment under Rule 7 is still considered purely of a temporary nature, and this has been the case since 1872 when the foundation of Chowkidara System was laid down in the sub-continent. They can be removed at any time without serving any notice as their appointment is subject to the sweet will of the Government, and it is owing to this temporary nature of service that these Chowkidars have failed to secure their rights guaranteed under the Constitution, laws, and rules notwithstanding time to time the verdicts rendered by the constitutional courts including the apex court of the country has put much

emphasis that in matters of service discriminately policies cannot be applied, and the denial of minimum wage amounts to violation of Article 9 of the constitution.

For the purpose of case study in this regard where the non-payment of minimum wage has been condemned, and taken to task a reference can be safely be made to PLD 2011 SC 37—Lady Health Workers Case; 2013 SCMR 728 ------ Industrial Home Teachers Case'; 2005 SCMR 100-Ikram Bari Case; PLD 2019 Lahore 253-Subey Khan versus Secretary Labor, Government of The Punjab, and so on. The principles enshrined in these judgments call for the application of the minimum wage notification to all and sundry including these Chowkidars but the same has not been extended to them. Lady health workers had no service structure, and were deprived from the minimum wage, and the Honorable Apex Court termed the same as a violation to Article 9 of the Constitution. In the Industrial Home Teachers Case, only Rs. 1500/ per month was provided to the teachers for the purpose of imparting training to the students, and the apex court directed to raise the salary to a reasonable extent even more than the minimum wage which was 8,000/ per month at that time.

Apart from entertaining the question with regard to the payment of the minimum wage to the contractual employees such as these Chowkidars are the Honorable apex court has equally condemned the clumsy attempt of such nature which break the continuity of service of such employees. The principles enshrined in this regard as not to 'break the continuity' can be found in the landmark judgments reported as 2019 PLC (C.S) 590; 2017 PLC 162 Peshawar; 2021 LHC 92; 2019 SCMR 233; 2019 PLC (C.S) 539 etc. where it has been categorically held that artificial breaks can not be allowed to exist, and intervene the job of the permanent nature. The historical institution of Chowkdara system deserved to be treated in the same line for creating a permanent structure so as to provide opportunity to serve Chowkidars without losing job save in accordance with law.

The interpretation of the Constitution with regard to the fundamental rights and the time to time verdict rendered by the constitutional courts including the apex court of the country on the question of 'minimum wage', and 'temporary appointment' has well protected vulnerable employees yet notwithstanding all the accolades for the landmark judgments the principles laid down by the courts have not impressed the relevant governments to frame policy and rules in order to revise the Chowkidara System in our villages.

Has the Chowkidara system become outdated? Is it obsolete, and needs to be abolished instead of reviving it? A comparative study of this system of Chowkidara - the lost legacy of British Raj has been dealt differently in our neighboring India. There the Parliament enacted The Chowkidara Act, 1954, and, and equally the rules were framed by the respective provinces. The Rules portray how well the Chowkidara system has been protected. Take the example of Haryana Chowkidara Rules, 2013 whereby a chowkidar receives Rs. 7000/ per month; uniform allowance Rs.2500/ per annum; Rs. 1,000/- as Lathi/Battery/ Umbrella allowance Rs. 1000/-.; and Rs.3500/ as bicycle allowance one time.

Under the aforementioned rules, a chowkidar is not only required to prepare a register of birth, and death sending a monthly report to the office of District Magistrate, but also to inform the police station about any type of situation related to law and order situation. He is equally required to assist the police in controlling the crimes such as informing police about theft of electricity, water, trees, animals, machines, and equipment of agriculture. The assistance does not end here but he is also required to assist the police: to clear the blockade of road, and traffic; extinguishing fire in the fields; police control, and emergency response vehicles in case of necessity; during the visit of VIPS, and VVIPS, and would assist the police and District administration in official works. Apart from above, he would carry out the work assigned to him by the District Magistrate from time to time.

The local Government Laws as in the case of The Punjab Local Government Act, 2019 does not make any reference to the 'Chowkidara System' nor determine the terms and conditions of village / municipal 'Chowkidars'. The same was the position in the earlier law i.e. The Punjab Local Government Act, 2019 A writ Petition bearing No.35863/ 2016, Anjuman- e-Chowkidara Versus Government of Punjab etc. was filed for the purpose of minimum wage. The Local Government took the stance differently and stated that they were never ever paid by the Local Government, and they are only concerned for the purpose of regimentation and allocation of beats

In the present hard times, when it has become extremely difficult to maintain law, and order on account of rising population, the dire need was to resurrect this one of the oldest institutions of the sub-continent in order to have better governance as well as to meet the security challenges of the modern world, but the neglect approach has led this institution to erode in one sense as the institution is still there but in the dole drums. It is an established truth that our country in order to counter rising security threats are deeply in need of such a force of agents who live much closer to

the public at large, and who equally could be a substitute to the 'private security guards- nevertheless who are found in mushrooms everywhere in the country. Data shared by the police shows that only in the city of Karachi there are almost 125 security companies that are offering services of some 55000/ private security guards to individuals and organizations according to figures compiled by the All-Pakistan Security Agencies Association. Individuals, organizations, and private establishments of other cities are also not lagging behind to hire the services of private security guards. All this hiring of private security guards has not been helping hand to the state institution of police, rather the rising trends of hiring private security guards have seriously prejudiced the state security operatives who are themselves requiring the people to hire services of private security guards.

Originally, the 'security guard' or 'watchman' or 'Chowkidar' all of the same family performing the duties of security, and watch and ward, however, the term 'Chowkidar 'has been considered and recognized in the public sphere with special reference to the sub-continent during the period of Mughal era. These Chowkidars were not less than the guards who guarded the city of Rome during the Roman empire under the command of state agency i.e., Police. It was these security guards who were later called watchmen in Europe, and we termed them as 'Chowkidars'. However, the term 'chowkidar' was used in the wider term under the state agency operatives comparatively with security guard which often meant for 'private security personnel' not under the control of state agency. The chowkidars working under the direct control of police were meant to perform the duties on behalf of the state for the purpose of watch so as to prevent any unlawful criminal activities.

However, with the advent of private enterprise the states ignored these agents of state, and the issue of security got privatized which gave birth to the Private Security industry in the Europe in result thereof private security agencies started emerging across the world having independent working from state operatives, and its agencies so as to provide security to the ones who can privately afford to do so, and those who are unable to afford are vulnerable. The state with the passage of time became least concerned with the extra security which had been provided through watchmen, and felt at ease to accommodate the private security agencies meant for nobles, and in our social fabric as Feudal, Politicians, Religious Imams, business tycoons in the same manner as provide security has been considered right of Kings and queens, Prince & Princesses ; nobles, and so on, and we can witness force of private guards of highly influential people who are guarded

everywhere they move. Seeing in the backdrop of Afghan wars with reference to Pakistan which received the modern warfare deadly weapons. The religious leaders secured private guards rather than trained their own people for their self-security; this enigma became so evident that at certain times these 'nobles' on the back of their 'security workers' Challenged the writ of the state, and it was quite difficult to have control over them. The 'security workers' of rival factions clashed with one another in result thereof blood shed became the talk of the town during the period of 1980 and 1990, and the state seemed feeble to overcome the security dangers Then, there was no legislation in regard thereto till the year 2000 when the need to regulate the private security was felt at great length, and the legislation to regulate, and control the security companies was promulgated as one witnesses in The Punjab Private Security Companies (Regulation and control) Ordinance, 2002, and we find the rules and regulations and certain prohibitions which were mandatory to maintain the writ of government. The ordinance 2002 has not contemplated the replacement of watchmen appointed under Section 39-A of The Act, 1872 since the ordinance 2002 has not provided the mechanism of the public security as had been there in the Act ibid.

The Punjab Private Security Companies (Regulations and Control) Ordinance, 2002 under which a private security company works after a valid license is issued for the purpose of carrying on, maintaining or engaged in the business of providing security. Section 2 (h) of the Ordinance, 2002 defines 'security guard' as, "any watchman or other person engaged by the licensee for the protection of persons or property or to prevent theft or robbery at the protected places and who possess required training as prescribed by the licensing authority. The Ordinance carries complete code of private security from prohibiting private security companies not to wear certain uniform akin to the security forces under Section 4; to the prohibition of maintenance of a company without a license under Section 5; to the prohibition of cash in transit without a valid no objection certificate under Section 5-A; registration of existing companies under Section 7; and including the penalties in result of contravention to the provisions of this ordinance, failure to comply with the conditions of the license etc. under section 10; conditions for revocation of license under Section 11; conditions precedent for employment of staff by licensee, so on, and on.

Conclusions

Yet all the effort on behalf of state for providing private security has strengthened only the private enterprise, and the people in their private affairs, beyond the scope of the state operators. These security guards are not workers, and agents of state security institutions, and resultantly,

they can not be taken as trustees in comparison with the 'Chowkidars' established under Chowkidara System who were considered as agents of state, though at the same time they were no more a burden on state expense, and their remuneration was paid through the contribution of the public at large as the Chowkidara rules above stated witness the complete mechanism for the purpose of payment of wages of these Chowkidars. The state in the modern warfare is in need of more security personals and is constantly feeling the deficiency of such public force which could be utilized in order to channel and stream line the security operatives deep down among the public at large. Why the state of Pakistan couldn't establish this system of Chowkidara which could be beneficial both for the public and the state institutions is a serious question to be addressed keeping in view the raising challenges being faced day by day? Why the 'private security system' did over-ride the 'public security system'? Why the individual security was considered more important than the public security provided through complete mechanism? Whether it was not in favor of the state to have controlled private security system established under the existing under the Chowkidara system? Who is responsible for not establishing a link of private security with state security so the state could utilize the services in times of need, and in war times?

The difference between private security system, and Chowkidara system is only that the former is alien to be useful for the state security agencies while the latter ensures to be working for the public as well as for the state enterprise, and thus, ultimately beneficial for the state as well. If any mechanism is developed to use the private security system to equally be useful for the state security institutions, the missing institution of Chowkidara system shall be considered to have taken a new form and shape under a new head of 'Private Public Security system' in the modern world to be useful in order to meet the challenges faced by the state, and ushered by the anti-state elements. It is a stark and bitter reality, that on account of facing multiple security challenges, it is becoming extremely difficult for the state to counter the insurgencies in certain areas as in the case of Baluchistan we are witnessing it. It is interesting to see how the tiny establishment of British Raj has ruled over the whole sub-continent with the mighty hand. The secret lies in compact governance from top to bottom, and at the bottom were these chowkidars who were the secret agents of the British Raj. Why could we not formulate such a system in order to maintain law and order, and for the purpose of peace and security in our homeland. Whether still effort can be made to channelize the 'private security' into the 'state security'.

There is in no other high time in the history as prevailing existing circumstances requiring not only to maintain law and order in the country but also counter to every soaring threat that may arrive from anti-state elements, and terrorist organizations who are all deeply engaged to weaken the state. In order to combat the deep-rooted criminals that are open threat to peace and order a Herculean task is required by having close links with the public which can best be performed by the tiny security agents in the form of Chowkidars who have laudable history enriched by the British Raj. It is heartening to see the dismal security situation prevailing in the troubled areas of Baluchistan which on the other hand due to the establishment of Gawader port has got significance across the globe and many international players are busy in the game of hide and seek in order to contain the emerging power of China which is being benefitted maximum on account of Gawader port.

How the 'Chowkidara system' can be developed as security wall in order to meet the upcoming challenges of security can be considered a million dollar question to be answered by those who are at the helm of security affairs, and are associated with peace and security which is in tatters in the backdrop of fifth generation war which is being fought on all fronts which nevertheless has been deeply realized by our security institutions, but the missing element to establish the bond between private security and state security is still missing, and is not in sight. No one can deny from the benefits arising out of bond between the two as the private security operatives if considered and taken as Chowkidars, they can well serve the purpose of state security operatives as historically speaking the mode and manner through which these tiny agents were made part and parcel of police by the British Raj was well accomplished task through which the Raj ruled us peacefully in the troubled waters.

Whether or not we should establish link between private security and state security through Chowkidara System, all depends as to how much we are conscious to combat security threats? If we are ready to take it as serious task of combating security threats. This can best be done by rehabilitating the lost institution of Chowkidara system. If the Raj was successful to maintain peace, law and order through the long arm of law extended through the established Chowkidara system why not us? The need is to 'value' which was considered valuable by the Raj - the Chowkidara system, a missing institution - badly needed in times of turmoil where security lapses are causing irreparable losses in the country. The Chowkidara system if adopted can take into account the matters of national security as an agent of state institutions.

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Transgender: Dilemmas and Challenges

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Abstract

Transgenders are human beings and ought to be treated as such. The State under consideration i.e., Islamic Republic of Pakistan has often been alleged to fail in providing substantive equality to its nationals especially the susceptible classes like transgenders. This Article analyses the right to equality of transgender in Pakistan from the perspective of the aggrieved community i.e., transgender community, by delving into the legal and policy framework. By studying the Transgender Persons (Protection of Rights) Act, 2018, and the jurisprudence developed by the August Supreme Court of Pakistan, this Article focuses on the framework of substantive equality is still lacking in Pakistan, and there is a dire need to bring the transgender community with the rest of the population through affirmative action by the State. It is suggested in this article that the only positive way of bringing transgender persons as formally and practically equal, is to take positive actions in the social, economic, and political arena, without any discrimination against them and eradicating the obstacles against the above stated motto.

Keywords: Transgender, fundamental rights, education rights, inheritance rights and the Transgender Persons (Protection of Rights) Act, 2018.

Introduction

Gender identity is one of the most fundamental aspects of life which refers to a person's intrinsic sense of being male, female or transgender. To enjoy all human rights, without discrimination based on gender identity is, of course, everyone's right. Everyone has the right to recognition everywhere as a person before the law. Seldom, our society realizes or cares to realize the trauma, agony, and pain which the transgender community undergoes, nor appreciates the intrinsic emotions of the transgender community whose mind and body repudiate their natal sex. Our society often ridicules, humiliates, and abuses the transgender community and in public places like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals, parks, public toilets they are sidelined and treated as untouchables, forgetting the fact that the moral failure lies in the society's unwillingness to contain or embrace different gender identities and expressions, a mindset which we must change. It is high time to change the mindset of the society and to realize that a person of diverse gender identity should also have legal capacity in all aspects of life. It is

to be accepted and realized that the transgender are respectable and exalted citizens of the country like any other sex and gender. They are entitled to all fundamental rights enshrined under the Constitution of Islamic Republic of Pakistan, 1973, including right to education, property and life which includes quality of life and livelihood.

Transgender; What it Actually Connotes

'Trans' is a Latin prefix which means "across or beyond" while 'Gender' shares the same Latin root as genus. Therefore, the term 'Transgender' means "denoting or relating to a person whose sense of personal identity and gender does not correspond with their birth sex". (Haider-Markel, 2014) Transgender also known by different names in different societies in different countries as "Khawaja Sara", "Khadra" "Eunuch", "Khusra", "Hijra", "Jogappa" "Kinnar or Kinner", "Aruvani" "Chhakka", "Aravani", "Moorat" and "Mukhannas".

Oxford Dictionary defines the transgender as designating a person whose sense of personal identity and gender does not correspond to that person's sex at birth, or which does not otherwise conform to conventional notions of sex and gender (Home : Oxford English Dictionary, 2022).

An individual's actual or perceived sex, gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the sex assigned at birth.

Differentiating the Misconception between Gender Identity and Sexual Orientation

In everyday life, the terms 'gender' and 'sex' are used interchangeably. However, it is often important to differentiate both terms. For example, the term 'sex' is used by social scientists to make reference to a person's biological or anatomical identity as male or female. On the other hand, the term 'gender' is used to make reference to the culturally concomitant collective characteristics that used to or are associated with maleness or femaleness of an individual (Home : Oxford English Dictionary, 2022).

Gender identity is of, one being male, female or transgender or transsexual person whereas a person's sex is usually assigned at birth, but a relatively small group of persons may be born with different bodies having both or certain aspects of both male and female physiology. It is possible that on occasion, a genital anatomy problem may ascend in a person whereby his or her native acuity about his or herself, is different from the sex that was assigned to him or her at the time of birth. This includes those people or individuals that are considered to be pre- and post-operative

transsexual persons, persons willingly denying, or not opting for operation (due to intent or circumstances) and persons who cannot undergo successful operation.

Countries, all over the world, including Pakistan, are grappled with the question of attribution of gender to persons who believe that they belong to the opposite sex. Few persons undertake surgical and other procedures to alter their bodies and physical appearance to acquire gender physiognomies of the sex which conform to their perception of gender. This irrefutably leads to legal and social complications since official record of their gender at birth is found to be at variance with the gender identity these individuals acquire, assume or accept afterwards. Here, the term 'gender identity' refers to the in-house or internal feeling of each person about their gender, which may be at variance with the by-birth sex assigned that individual. The gender identity is also inclusive of the personal sense of the individual about his body which may be natural or physically modified through any medical, surgical means and other expressions of gender such as attire, vocals, appearance and manners. Hence, 'gender identity' is a reference to an "individual's self-identification as a man, woman, transgender, or other identified type" whereas 'sexual orientation' denotes "an individual's persistent physical, romantic and/or emotional attraction to another person". Sexual orientation is inclusive of transgender and gender-variant people. The gender variant people may have heavy sexual orientation that may be change pre-or post-gender transmission. Such gender variations include homosexual, bisexual, heterosexual and asexual etc. hence, it may be concluded that the concept of gender identity and sexual orientation are inherently different despite being commonly referred as similar. It is a case to present that a person's self-defined sexual orientation and gender identity is fundamental to that person's personality and is part and parcel of their inalienable rights, dignity as human being and basic freedoms which include freedom to opt or deny any medical procedure to prove their gender.

United Nations and Other Human Rights Bodies/Organizations – On Gender Identity and Sexual Orientation

In this part, the writing considers the role of international bodies and organization that are playing role in discussion and development of human rights specially those of transgender. The focus is thus, on the United Nations that has been active and influential in promoting and protecting rights of these sexual minorities. The Universal Declaration of Human Rights, 1948 (hereinafter referred as UDHR) is a political document, and its Article 6 which was later on made part of the legal document i.e., Article 16 of the International Covenant on Civil and Political Rights 1966

(hereinafter referred as ICCPR) recognizes that "every human being has the inherent right to live and this right shall be protected by law and that no one shall be arbitrarily denied of that right". Everyone shall have a right to recognition, everywhere as a person before the law. Article 17 of the ICCPR states that "*no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation and that everyone has the right to protection of law against such interference or attacks*". International Commission of Jurists and the International Service for Human Rights, on behalf of a coalition of human rights organizations, undertook a project "*to develop a set of international legal principles on the application of international law to human rights violations based on sexual orientation and sexual identity to bring greater clarity and coherence to State's human rights obligations*". The Yogyakarta Principles were formulated, drafted, developed and reformed by a distinguished group of human rights experts, in a meeting held at Gadjah Mada University in Yogyakarta, Indonesia from 6 to 9 Nov., 2006. The Yogyakarta Principles are Yogyakarta Principles on the application of "International Human Rights Law in relation to Sexual Orientation and Gender Identity". These principles address a broad range of human rights standards and their application to issues of sexual orientation gender identity (The Yogyakarta Principles). UN bodies, Regional Human Rights Bodies, National Courts, Government Commissions and the Commissions for Human Rights, Council of Europe, etc. have endorsed the Yogyakarta Principles and have considered them as an important tool for identifying the state's obligations to respect, protect and fulfil human rights of all persons, regardless of their gender identity. Committee on Economic, Social and Cultural Rights (CESCR), a committee formulated under the ICESCR (International Covenant on Economic, Social and Cultural Rights, 1966), in its Report of 2009 discussed and enlightened on gender orientation and gender identity as follows: -

"Sexual orientation and gender identity of 'Other status' as recognized in article 2, paragraph 2, includes sexual orientation. States parties should ensure that a person's sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor's pension rights. In addition, gender identity is recognized as among the prohibited grounds of discrimination, for example, persons who are transgender, transsexual or intersex, often face serious human rights violations, such as harassment in schools or in the workplace."

Transgender Issues

Transgender have among others, the following issues:

Personal Issues

- humiliation, fear, and assumed transphobia and homophobia;
- disclosure and coming out;
- adjusting, adapting, or not adapting the social pressure to conform;
- fear of relationships or loss of relationships; and
- self-imposed limitations on expression or aspirations.
- Self-harm and drug abuse

Policy Issues

- access to education;
- access to social services such as homeless shelters, rape crisis centers, medical clinics;
- abusive treatment by law enforcement personnel;
- hate violence;
- fear of repercussion or reprisal in retaliation for exerting one's ordinary rights, such as speaking out in public;
- denial of employment;
- chronic unemployment or underemployment;
- Public humiliation, derision, ridicule, marginalization and exclusion;
- denial of housing; and
- denial of access to public accommodations such as shops, restaurants, hotels, and public transportation.

Legal Issues

- legal status as a man or a woman;
- marriage;
- divorce;
- adoption and child custody;
- inheritance, wills and trusts;
- immigration status;
- employment discrimination;
- access to public and private health benefits;
- protection from hate violence; and

- identity papers and records (name change, driving license, birth certificate, CNIC, passport, school transcripts, work history).

Medical Issues

- denial of medical care;
- ridicule and mistreatment by health facility providers;
- inability to obtain ongoing, routine medical care;
- inability to obtain or pay for hormone therapy and sex reassignment surgeries; and
- exclusion of transition-related services under Medicaid, Medicare, and private health insurance plan.

Transgender Rights are Human Rights

Basic civil rights protections for transgender people ensure their ability to live and work as productive members of society. Practically, if the cost or results on inclusion of transgender and their exclusion are compared, then it can be concluded that the discrimination against transgender community will inevitably lead to higher detriment than as compared to their inclusion or acceptance in the society. Anti-trans discrimination forces many trans people into a deadly cycle of poverty and unemployment. It prevents them from putting their abilities and skills to constructive uses, and often forces them into illegal activities to survive; however, Ultimately, the most compelling arguments in favor of providing transgendered people with basic legal protections are those rooted in our common humanity. Transgender rights not special rights but are simple human rights. The reason for their hype is that transgenders are denied even basic or fundamental rights. Moreover, the only unique aspect of their rights is that they need or require recognition of the fact that, as human beings, they are entitled to or are deserving of their due respect and dignity, without any discrimination on the basis of their sex, appearance or choices about their personal life (Jamison Green, 2000).

Recognition of Rights of Transgenders Through Judicial Verdicts in the World

In England, in the seminal judgment of Corbett, the Court was presented with the question about determination of gender of an individual (Corbett v. Corbett, 1970). This was case concerning validity of marriage of a transsexual. By birth sex of the accused was male, who later on operated it to be changed as female transsexual. In order to determine the sex of the accused, the honorable court held that the determination was to be done scientifically through three tests i.e., chromosomal, gonadal, and genital tests. It was of the view of the three tests affirm that the

individual is of a certain sex, then it will be determinative proof of the sex. This meant that any operation done on the individual was not determining criteria and it is the sex at birth that matters. This judgment, thus, takes back the right of the transgender to choose its sex. This judgment also ignores the fact that natural development of organs of the opposite sex or by medical or surgical means, sex may be changed. The same test was used in subsequent cases for determination of se of individuals for conviction matters. (R v. Tan, 1983)

As opposed to UK and approach adopted in Corbett, New Zealand has given due heed to the choice of the individual in selecting its sexual orientation. Justice Ellis was of the view, "*once a transsexual individual has undergone surgery, he or she is no longer able to operate in his or her original sex".* (Attorney-General v. Otahuhu Family Court, 1995). The important aspect to note here is that it was acknowledged by the court that there if the law fails to recognize or acknowledge the validity of marriage of transsexual, then there is no social advantage behind such an approach. Hence, the determinative feature in New Zealand is based upon the "adequate test". The test poses the questions as to "whether the person in question has undergone surgical and medical procedures that have effectively given the person the physical conformation of a person of a specified sex".

In neighbors of New Zealand, another common law country, it was discussed that in a case, by Chisholm J., that there is no 'formulaic solution' to the questions of determination of sex of an individual for the purpose of marital or personal law (Re Kevin (Validity of Marriage of Transsexual), 2001). The court recognized that the answer or determination of sex require consideration of relevant matters which include person's life experiences and self-perception. The views of Chisholm J, were accepted by the Full Court of the Federal Family Court in 2003 and it was held that under personal law or marriage statutes, the words 'man' and 'woman' should be given their ordinary, everyday contemporary meaning and that the word 'man' includes a post operative female to male transsexual person. The Full Court also held that there was a biological basis for transsexualism and that there was no reason to exclude the psyche as one of the relevant factors in determining sex and gender.

- *The above referred judgments were revisited in later era. Lockhart, J. in Secretary, Department of Social Security v. 'SRA', and Mathews, J. in R v. Harris & McGuiness, are some of the judgments that reviewed various decisions, including the ones mentioned above, regarding answering question of recognition of gender of a transsexual person who had undertaken a surgical procedure. The approach*

of the courts of New Zealand has been in contrast with that of UK in Corbett v. Corbett (supra) and R v. Tan (supra). In other words, the purely biological test, devised by UK courts was not be followed. In fact, Lockhart. J. in SRA observed that the issue of transgender is not merely medical or genomic but a question which requires attention because of development in surgical and medical techniques, and social attitudes towards transsexuals. This is a matter that falls within the domain of psychology, self-perception, and sociology i.e., how society perceives the individual.

- In a Nepali Judgment of the Supreme Court of Nepal, titled Sunil Babu Pant & Ors. v. Nepal Government[107], the Supreme Court of Nepal held, "*the fundamental rights comprised under Part II of the Constitution are enforceable fundamental human rights guaranteed to the citizens against the State. For this reason, the fundamental rights stipulated in Part III are the rights similarly vested in the third gender people as human beings. The homosexuals and third gender people are also human beings as other men and women are, and they are the citizens of this country as well…. Thus, the people other than 'men' and 'women', including the people of 'third gender' cannot be discriminated. The State should recognize the existence of all natural persons including the people of third gender other than the men and women. And it cannot deprive the people of third gender from enjoying the fundamental rights provided by Part III of the Constitution*."

Different Legislations for Protection of Transgender's Rights in the World

Most of the countries around the globe has enacted laws, legislations that recognize or protect rights of transsexual persons including those who have undergone sex related surgeries. Subsequently, some of those countries including United Kingdom, US, South Africa, Australia, Germany, Argentina, etc. will be discussed, with reference to their laws on transgender and their protection:

- The parliament of the United Kingdom passed the General Recommendation Act, 2004, which was the result of or the aftermath of the decision rendered by the European Court of Human Rights in Strasbourg (ECtHR). The UK is a signatory and member of the Council of Europe

[107] Writ Petition No.917 of 2007 decided on 21st December, 2007.

and it has the European Convention on Human Rights, so the rights enshrined under the ECHR are to be provided to the UK citizen by virtue of Human Rights Act, 1998 (HRA 1998). The ECtHR decision in Christine Goodwin was the basis of a shift in the UK, in recognition of trasngenders including acquired genders. The Act does the same and implements the same. The Act of 2004 provides legal recognition to the acquired gender of a person, and shares consequences of newly acquired gender status on legal rights and liabilities of the same in contexts of marriage, parentage, succession, social security, and pensions etc. in addition to it, the Equality Act, 2010 is an important legislation in UK, which has effected through consolidation, repealing, and replacing nine different anti-discrimination legislations in UK, including the Sex Discrimination Act, 1986. In the Equality Act of 2010 certain characteristics are classified as "protected characteristics", and they are set as benchmark against whom "no one shall be discriminated or treated less favorably on grounds that the person possesses one or more of the 'protected characteristics'". In addition to it, the 2010 Act imposes a positive obligation on the government or public bodies to ensure elimination of all kinds of discrimination, harassment, and victimization. In addition to it, it is pertinent to mention here that gender reassignment has been declared as one of the protected characteristics which include transsexuals i.e., those who are proposing to undergo, is undergoing or has undergone the process of the gender reassignment are protected under the Act.

- In Australia, there are two Acts dealing with the gender identity: one is Sex Discrimination Act, 1984; and second one is Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act, 2013. Act of 2013 amended Sex Discrimination Act, 1984 and defines gender identity as appearance or mannerisms or other gender-related characteristics of a person with or without regard to the person's designated sex at birth.
- In the United States of America, the situation is constitutionally different from other states. The state laws and federal law are to be read together. With regards to states, it is pertinent to mention here that state laws may be inconsistent with each other. On the other hand, the Federal Law i.e., Matthew Shepard and James Byrd. Jr. Hate Crimes Prevention Act, 2009 provides for protection to transgenders, expanded United States Federal Hate-crime Law of 1969 by including offences motivated by actual or perceived gender identity. As far as state laws are concerned, around fifteen States and District of Colombia have anti-discriminatory legislations. Lastly, there are some executive orders prohibiting discrimination.

- The South African legislation titled Alteration of Sex Description and Sex Status Act, 2003, which authorizes transgender persons (including those who have undergone gender reassignment intentionally or naturally), to apply for change in birth and governmental records, through applying to the Director General of the National Department of Home Affairs.
- In 2012, the Argentinian Senate passed a law on gender identity. The 2012 law recognizes the right by all persons to the recognition of their gender identity and their right to development of their person according to it. It also allows individuals to request amendment in their recorded sex and other necessary changes in name, and image. This law is aware of the fact that transgender can be natural or can have done so after surgery. So, the law does not require or impose obligation on the applicant to share information about surgical procedure for genital reassignment etc. It is worth pointing out that as per Article 12 of the law, the definition of dignified treatment is provided which requires respect for the gender identity adopted by the individual, even though the first name is different from the one recorded in their national identity documents. It is the adopted first name that law necessitates for provision of summons, record, filings etc.
- Lastly, as per the German Code that was introduced on 5th November, 2013, parents were allowed to register the sex of the children as 'not specified' in the case of children with intersex variation. As per Section 3 of the German Civil Statutes Act, "if a child can be assigned to neither the female nor the male sex then the child has to be named without a specification".

Historical Background

In Pakistan, transgender community is facing many problems because of the intolerant behavior of the society. That community is still striving hard to get its respectable place among other genders. Intolerant society has its unique historical background and is not a matter of a single day or incident. In British Colonial rule, the Criminal Tribes Act, 1871 (the Act) was enacted to declare eunuchs (transgenders), a criminal tribe. Preamble of the Act provides that 'it is expedient to provide for the registration, surveillance and control of certain criminals and eunuchs (transgenders)'; the Act provided for the registration, surveillance and control of certain criminal tribes and eunuchs and penalized eunuchs, who were registered, and appeared to be dressed or ornamented like a woman, in a street or place, as well as those who danced or played music in a public place. Such persons are also arrested without warrant and sentenced to imprisonment up to two years or fine or both. Under the Act, the Government had to register the names and residence

of all eunuchs residing in that area as well as properties, who were reasonably suspected of kidnapping or castrating children, or of committing offences under section 377 of the Indian Penal Code, 1860, or of abetting the commission of any of the said offences. Under the Act, the act of keeping anybody under sixteen years in the charge of a registered eunuch was an offence punished with imprisonment up to two years or fine and the Act also denuded the registered eunuchs of their civil rights by prohibiting them from acting as guardians to minors, from making a gift deed or a will, or from adopt son. The Act was not only to attack the dignity of transgenders community, degrading them socially but also to eventually force them to adopt begging and other questionable professions. After British Colonial rule, the Act was repealed in Aug.1949; however, the damage done to transgenders remained irreparable. Transgenders lost social respect and various stereotypes have been built to humiliate the transgenders community.

Finally in Year 2009, the august Supreme Court of Pakistan took up the matter in its original jurisdiction in Civil Petition No.43 of 2009 and directions were passed from time to time to recognize the dignity of transgenders and declaring them third gender entitled for equal protection under Article 25 of the Constitution of the Islamic Republic of Pakistan. The Supreme Court of Pakistan in a case decided as follows: - 'Needless to observe that eunuchs in their rights are citizens of this country and subject to the Constitution of the Islamic Republic of Pakistan, 1973, their rights, obligations including right to life and dignity are equally protected (Dr. Muhammad Aslam Khaki and another v. Senior Superintendent of Police (Operation), Rawalpindi and others, 2013). Thus, no discrimination, for any reason, is possible against them as far as their rights and obligations are concerned. The Government functionaries both at federal and provincial levels are bound to provide them protection of life and property and secure their dignity as well, as is done in case of other citizens.' The apex Court further noted that transgenders have been neglected on account of gender disorders in their bodies. They have been denied the right of inheritance as they neither sons nor daughters who could inherit under Islamic Law and sometime even families intentionally disinherit transgender children. To eliminate this gender based ill-treated discrimination against transgender august Supreme Court in a case directed Provincial and Federal Governments to protect transgenders identification, right to inherit property, right to education and right to life which in employment and quality of life.

In 2017, almost eight years after this judgment, Senator Babar Awan presented the Transgender Persons (Protection of Rights) Bill in parliament. The tabling of the bill started a process that

included many different actors who worked sometimes together, and at other times at odds with one another, to bring the final version of the bill to fruition. This journey highlights in many ways how coalitional work can help bring meaningful legislative change (Pakistan: Transgender Persons (Protection of Rights) Act, 2018). Finally, the law Transgender Persons (Protection of Rights) Act, 2018 was enacted.

Analysis of the Transgender Persons (Protection Of Rights) Act, 2018

The Transgender Persons (Protection of Rights) Act, 2018 focuses upon the inheritance rights of the transgender. In doing so, the law provides that self-identification of gender is important. The 2018 Act entitles a transgender man to the same share of inheritance that cis-gender men are entitled to receive under Islamic law, and transgender women to the share of cis-gender women (which is half the men's share). This legislation has one basic issue. It applies to transgender but without considering their religion or succession laws. For example, the transgender of Hindu religion, Christian religion or Sikh religion may not be acceptable to the inheritance shared devised under the 2018 Act. Such issues may be better dealt with under their personal law. It is suggested that better reforms could have been made if the amendments were made in the personnel or succession laws of the relevant religion or nationals. The Act further lays down the right to education for the transgender persons. There is a practical issue in the same. The law's phrasing, interpretation and practical effects are yet to be known. The Act states there shall be no discrimination against transgender persons in acquiring admission in any public or private institutions, 'subject to the fulfilment of the prescribed requirements'. What does 'fulfilment of the prescribed requirements' mean? Is it to be given its ordinary meaning? In doing so, an inference can be drawn that if the transgender children fulfil the admission criteria of the educational institutions, they shall be given admission and not to be discriminated on the basis of children or its parents' sexual orientation. This provision, however, blatantly disregards the structural inequalities that are a huge hurdle for the transgender persons. Notwithstanding the above, the practical implications or the taboo mindset may practically impede the access to school of such individuals and their families.

When it comes to practical reality, transgender children leave their homes at a young age. This is because they are compelled by their families to act in a different sexuality. This is also because of the reason that families of transgender persons do not accept or want to accept that their children are transgender. They do not consider it as a natural phenomenon but consider it as a psychological

issue and try to regulate their behavior into a form of normative masculinity. This difference leads to the tethered development of the child. Their behavior and manner challenge the mental growth of the child and they often complain about violence at home and at school. This eventually leads to their dropout from institutions. They seek refuge from home and world, and are usually given by gurus. Gurus are not educationists but are only guardians they find in the unacceptable society which is not open to or susceptible to these children's entering the modern civil society. So, even if they are to be given equal access to education, and they take an open merit exam, there is less chance that they will be successful in securing competitive marks. In a case, while interpreting the right to equality, the Supreme Court held that any restriction based on sex was 'only permissible as a protective measure of women and children,' but it could not be used as a tool to protect undeserving men to the prejudgment and exclusion of their female counterparts as it amounted to gross violation of constitutional mandate (Shirin Munir v Government of Punjab, 1989).

It is important to refer to Article 25 of the Constitution, which provides for equality of citizen. The equality of citizens does not require the equality for two genders or sexualities. Rather, it is for all sexualities. Hence, it includes and applies to transgender community. Article 25 of the Constitution leads to an important point, does equality require to be equality in law, or equality in practice? Is it more like the rule of law in books or rule of law in practice? For law, the scope of these rights is confined to books and legislations. In practice, it is more than mere legislation, but there is a need to inculcate tolerance and societal patience to allow such transgender in the system. In doing so, and training moral of the society, the government is under a positive duty. The transgender can be considered as a backward class which need protection under constitution as well, under its principle and policy. Under the Constitution of Islamic Republic of Pakistan, 1973, Article 25A requires the Government to provide education. This right to education is an obligation on the state to take steps to provide free and compulsory education to children of a certain age. The children may be a boy or a girl or even a transgender. It is important for discussion because on practical terms, the transgender persons are not able to get basic necessary education. Their lack of basic and essential education and lack of schools for them is one of the chief reasons. The transgenders feel insecure in current boy's and girl's schools. They feel different from them, and they are seen to be alien or queer. On this basis, if the government has to ensure their basic education, they should establish special institutions for them. On the other hand, if lack of funding is one excuse, there is a possibility to use the school already working, to have second time or evening classes for

them. Even otherwise, if this is also impractical for them, which is less likely to be the case, the current school policy may be altered in a way that is inclusive of such issues of transgender education. Hence this is the way that most of the transgender that are out of school for their uniqueness can be reduced and many of them can be invited to school and educated. This is an increase in human resources for Pakistan as well. Practically, State has been considering transgender persons to be at an equal footing with the rest of the citizens, but this is wrong and against the realities. There are flaws in legislative drafting of the titled Act of 2018. It has multiple contradictions as far as usage of pronouns is concerned. The Act of 2018 occasionally uses the pronoun 'his' for transgender persons, instead of the accepted pronoun 'they.' This glaring issue has been applied when the law referred to the transgender's right to vote, employment, access to public places, and property. Furthermore, there is another issue, the Act states that "any word which has not been defined in the definition clause of the Act shall have the same meaning as assigned to it in the Code of Criminal Procedure, 1898 or the Pakistan Penal Code, 1860". So how does PPC and CrPC define such genders? Pakistan Penal Code stipulates that 'he' include male and female. So, this, again fails to include transgender in it. The only way out, under current issue is that the court and the executive authorities have to utilize purposive and broad approach in statutory interpretation. The definition of transgender and the laws made for it, hardly consider intersex individuals i.e., individuals having a mixture of male and female genital features or congenital ambiguities. There is also lack of strict penal provisions under the Act. The only penal provision concerns compulsion of transgender persons to beg. Although the Honorable Supreme Court of Pakistan has initiated the idea that the governmental bodies have to take steps to eliminate discrimination against transgender persons and causing any interference in actions which are pursuant to the directives of the superior court. If the government fails to do so, or the impact or effect of such actions of the governmental bodies is that it impedes the access to fundamental rights of transgender individuals, then it will be contempt of court which is a punishable offence. Pakistani transgender community has been a prey of violent crimes driven by the inherent discriminatory attitude against them. Rationally, the discussion concerning the other rights of the transgender community in Pakistan should be ensuing to ensuring their fundamental and most significant right to life.

Pakistan necessities to trail this type of legislature will not only harvest the care of multiple fragments of the society but also provide the transgender community with a sense of fortification.

Supreme Court of Pakistan declared transgender persons to be equal citizens of Pakistan, hence, the State must make further active effort to provide transgender community the proper benefits of this status. In essence of this, the proviso clause of section 21 of the Act which states that no order shall be made in furtherance of removing any difficulty which arises in implementation of these provisions after the expiration of a period of two years from the date of the commencement of the Act is also in need of amendment as a mere period of two years is not enough to tackle all the issues that the transgender community is facing.

Conclusions and Recommendations

In the light of the above, following suggestions can be presented. However, it is to be stated out rightly that the law alone cannot do much unless the societal norms and approach of the society towards transgender is not changed. It is not the transgender that solely need education and training, but also the society as a whole, which needs training and enlightenment. Hence, the summaries of suggestions are as follow: *First*, the society's attitude and mindset of the society needs to be changed and the onus of doing so should be on the state. It can do so through campaigning and making awareness ads to enlighten people that transgenders are as human, and as Pakistani as others are. They are not to be considered as taboo or a curse but an element or evidence of diversity. The achievements and skills of the transgenders are to be highlighted and accepted; *Second*, the transgenders are to be given due representation in the Parliament, cabinet and other areas of public representation. They should have quotas in the government services; *Third*, they should be given due coverage and respect so that they are not made a weapon by international media to show that Pakistan is a failed state as far as protection of such minorities is concerned; *Fourth*, they shall be given due important as respectable and dignified citizens of Pakistan; Actions, including legislations and executive actions are to be undertaken to assure provision of all fundamental rights to the transgender; *Fifth*, academics and literature should be given instructions that their academic writings, dramas, stage plays, media events show transgender as respectable people with soft heart; *Sixth*, transgender who are thrown by their families are unaware of their original families and parents. Public functionaries and policy makers should either help them in identifying their original families or allow them to use their names in a way that they are not tortured as illegitimate by the society; *Seventh*, awareness campaigns regarding the historic experiences and contributions of the transgender community may be made; *Eighth*, reports on the problems faced by them, and the rights guaranteed to them under the

Constitution and the 2018 Act ought to be made; *Ninth*, take steps to treat them as socially and educationally backward classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments; *Tenth*, operate separate medical centers specially related to the sexual health issues be made; take proper measures to provide sanitation facilities such as toilets, and separate hospital wards to them; *Eleventh*, framing various social welfare schemes for their betterment; *Twelfth*, take steps to create public awareness so that transgenders will feel that they are also part and parcel of the social life and be not treated as untouchables; *Thirteenth*, take measures to regain their respect and place in the society which once they enjoyed in our cultural and social life; *Fourteenth*, open the existing Social Welfare Schemes for needy transgenders and create specific welfare schemes to address the basic needs of transgenders including housing and employment needs; *Fifteenth*, further legislation should be passed concerning the inheritance rights of the transgender persons who do not ascribe to the Islamic faith; *Sixteenth*, hate crimes against the transgender community should be strictly dealt with and special provisions should be added to the law to that effect; and *Seventeenth*, State should make special institutions to provide education to the transgender community.

Hence, in the light of the above suggestions, it can be concluded that the writing has sufficiently addressed the social, legal and medical issues related to the transgender in Pakistan. The available law in Pakistan, jurisprudence in Pakistan and in other jurisdictions is also given due heeding. The suggestions presented are very vital and important if the State of Pakistan intends to cash on or bank upon the human resources which the transgender community may bring to the national exchequer. They can be used to represent culture, history and even diversity in Pakistan. The attempts are being made, and 21st Century has been a new beginning for promotion of transgender rights. Their fundamental rights are aimed to be protected. They are considered as equal citizen of the Islamic republic their inheritance is also given importance. In my humble opinion, even if the constitutional rights are ensured in next Five to ten years, it is going to be a great achievement because more rights are not even available to other individuals. In a developing country like Pakistan, their rights are important. They ought not to be discriminating against. It is worth mentioning that they cannot be given equality and should not be called as even to other genders and binary sex. This is because they have been denied basic rights for so long that now equating them with others will put them at severe back foot. Hence, first the state has to bring them together and equal to other sexes. It can be done by positive actions only such as quotas for transgender

persons. Recently, in Sindh, transgender persons were allowed to join the police force as regular duty officers.

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Thistles Never Beget Pickles: Is Legal Education in Pakistan Toeing the Right Direction?

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Abstract

Pakistan Bar Council Rules 2015 standing on the shoulders of the honorable Supreme Court of Pakistan finally got implemented in letter and spirit. The inflow of aspirant lawyers was curtailed assumingly, on the principle of demand and supply by making the passage to the profession narrower and longer (only100 students for 5 years/university). The step is to deal with one side of the problem i.e., overcrowding of the professional stream. The other and more important aspect of the problem is the declining standards of legal education. The steps taken to improve this aspect also invited further exploratory research. The research mainly seats in social constructivism where ontology-epistemology difference is minimum. The methodology is hermeneutic dialectical which contemplates the active role of the researcher in observing and comparing one phenomenon in various systems to suggest a solution. The method used is content analysis. The phenomenon of legal education is analyzed and compared in currently available models of legal education in Pakistan. In this context, the comparison is made between LL. B. 5-years semester (5LL. B (S)) program with 5 years annual (5LL. B (A)) program. The findings are two-sided, one is that these

two programs do not synchronize regarding the content of the programs, the content added in the semester program to groom the student's experiential learning through research; while advocacy skills are absent in the annual-based program. Second is that such content, though has been added in the semester program, lacks an assortment of any standardized skillset required to be developed in the aspirants. In addition, no quantifiable assessment standards have been required or provided to assess the skillset acquired by the law students. The suggested remedy is to assort the skillset first and then develop tools to standardize their assessment. It could be done by developing a teaching methodology having a connection between the pedagogy (means) and the skillset (ends) to uplift the standards of legal education. The required skillset could be developed on an experiential/clinical model available in neighboring and advanced countries.
Key Words: Pakistan Bar Council Rules 2015, means and ends, Lawyer's skillset, Pedagogy of Law, Experiential/Clinical legal education.

Introduction

Up till the end of the last century, the policy debate regarding legal education in Pakistan kept bobbing over two issues, the duration of LL. B course and the medium of instructions. Over these two areas, many times decisions were taken, and policies revised. Course duration kept changing between two and three years. Likewise, the medium of instruction was juggled between English and vernacular. As far as the methodology, a lot has been supported and said by local academics and foreign professors but no substantial pedagogical progress could be attained.

As the section of the Bar on legal education in the US and Law society in the UK, Pakistan Bar Council (PBC) looks after legal education in Pakistan. Through its Act PBC entrusts the responsibility of legal education to its legal education committee and the provincial committees. Customarily, the role of all these committees remained to oversee the availability of the physical infrastructure and facilities arranged by legal education institutions to run law programs. Rarely do these committees involve themselves in the pedagogical and methodological designs of legal education. The Bench has been playing a supervisory role in keeping standards of legal education by being part of the statutory bodies of the universities and Superior Courts supervise the standards (mostly physical facilities) at universities affiliated law colleges, steering through the affiliating universities.

With the turn of the new century, the Bench strengthened the hands of PBC to direct academia for enhancing standards of legal education. An exemplary judgment by Jilani J. held in 2007, that among many problems bringing the standard of legal education to a decline, mushrooming of low standard law colleges was the most important one, and to deal with the issue, Pakistan Bar Council was the authority. The Court further held that the rules made by the PBC are to be read in the rules of the universities, imparting legal education. In case of any conflict, the rules of PBC would get primacy. Another development was that the court also included law academics in bringing improvement in legal education standards. A five-member committee was constituted, comprising distinguished law academics. The committee was required to submit a report proposing academic reforms in the existing legal education system and based on these suggestions, PBC was to set standards of legal education and to inspect law colleges to confirm that these standards were being implemented. Below is given the content analysis of the said judgment.

Analysis of PLD 2007 SC 394

Court orders forbidding actions unconditionally	**Expected outcomes**	**Court orders forbidding actions conditionally**
○ One of its primary functions (of PBC) …is 'to promote legal education and prescribed standards of such education in consultation with the universities in Pakistan and the Provincial Bar Councils'. (Section 13(j)). It has been empowered to make rules to carry out its functions which include rules to provide for, "the standards of legal education to be observed by the universities in Pakistan and the	**PBC to prescribe** standards of legal education in consultation with universities. **PBC to inspect** institutions, (to see whether standards are being followed) per judgment.	The rules do not envisage any concept of provisional affiliation. However, if any enactment, rules or regulation made thereunder provide for provisional affiliation, the same shall not extend beyond the period of one year and thereafter the said college shall stop admitting students for a law degree.

inspection of universities for that purpose". ○ The Affiliation of Law Colleges Rules framed by the Pakistan Bar Council and any rule added or amended from time to time by it are essential to ensure that the law schools/colleges impart uniform quality legal education. ○ The rules framed by the Pakistan Bar Council shall be read into the rules framed by any Pakistani university and in case of conflict former rules shall have primacy. ○ With a view to improve and update the syllabus prescribed for a professional degree in law, we are persuaded to appoint a 5 Member Committee…. to examine the existing courses of law prescribed by the universities for obtaining the professional degree and to suggest suitable proposals, inter alias, in the light of the observations made	**Uniform quality** of legal education to be maintained by all institutions. **Primacy of Bar council rules** over the university rules. **Five-member committee to submit report** after revising existing courses and making suggestions for new ones.	

by this Court. The Committee shall submit its report within six months to the Pakistan Law Commission for consideration. o A copy of this judgment shall be sent to all the Vice-Chancellors of the Universities in Pakistan Chairman Higher Education Commission, the Federal Law Secretary and to the Secretary Pakistan Law Commission, Islamabad for information and necessary compliance.	**Compliance** to be assured by all actors.	

Table 1, source: author

Responding to the judgment, PBC took responsibility wholeheartedly. They paid extensive visits and did inspections of the law colleges around Pakistan. PBC pointed out three main flaws in standards of legal education and requested the Honorable Supreme Court to euthanize law institutions suffering from these maladies. The identified fault areas were:

1: Law colleges working beyond their territorial limits

2: Law colleges do not meet the standards of infrastructure contemplated in the rules.

3: Law colleges do not meet the minimum academic standards provided in the rules.

The first of these flaws is self-explanatory. It involves those law colleges that are affiliated with those universities that were either not authorized to grant affiliation at all or were not authorized to grant affiliation to law colleges beyond a certain territorial jurisdiction. Regarding the second flaw, the physical requirements of the universities were found insufficient e.g., the area of law college, classrooms, library and number of books, auditorium, dedicated rooms for girls, etc. Regarding the third flaw, matters like minimum academic standards including the minimum number of faculty members; full and part-time, qualifications and experience of the faculty members, duration of the program, standard of entry to law program, etc. were inspected.

It took PBC eight years, after the judgment, to bring into force the new rules. Per new rules, LL. B degree is juxtaposed with other professional degrees like medical and engineering. The reason, as told by the representatives of the Bar council, is twofold; one that only those students get admission in law school who seriously want to pursue the profession. Whereas the second reason is to ease the overcrowding of the legal profession.

For the former reason, the duration of the law program was extended to five years after secondary school examinations, like medical and engineering graduate programs. To address the latter, the number of law aspirants at the entry is restricted to 100. Another 50 seats could be granted to law schools if PBC finds the academic and infrastructural facilities apt to cater to 150 students. The educational qualification of the teachers, Dean, the minimum number of full-time faculty members, teacher-student ratio, etc. were also fixed.

The Honorable Supreme court once again played the pivotal role in interpreting new rules and the recommendations of PBC and ordered to close, disaffiliate, and stop the functioning of substandard law colleges and the ones working beyond their territorial jurisdiction[1]. Per the Honorable Supreme court, two tests were held compulsory at the entry points of legal education and the law profession respectively. The first one was the Law admission test (LAT) and the second is the Law graduate assessment test (GAT). Both these tests were to be conducted and assessed by the higher education commission (HEC). In analyzing the content of the judgment, the positive actions required to be taken by the law colleges with the expected outcome and the acts not to be done by them with the impact are recorded below.

Analysis of 'The Pakistan Bar Council v. Federal Government and others'

Actions ordered to be done by law institutions	**Expected outcome**	**Actions ordered not to be done by the law institutions**	**Impact**
1. Law admission test (LAT)	Good merit students could get admitted.	● Disaffiliation for being operating beyond territorial jurisdiction and substandard. ● Not to hold LL. M, PH. D classes if not allowed to	Immediate closure of 96 law colleges.
2. To start LL.M, and PH. D, standards of HECP be observed.	Standardization of higher education in law by HECP.		Closure of higher degree programs.

3. Educational qualifications for faculty of law, 4. Dean/Principal: PH. D plus 8 years' experience in practice/teaching or LL. M with 15 years' experience in practice/teaching or retired judge of Supreme court of Pakistan or High court of Pakistan of District and sessions judge plus 5 years judicial experience. 5. Permanent faculty: LL. M plus 5 years' experience in practice/teaching or LL. B with 10 years' experience of practice/ teaching. 6. Visiting faculty: 5 years' experience of practice in the High court. 7. Minimum number of permanent and part time faculty: At least five permanent and five visiting. 8. Teacher student ratio: The above standard ratio. 9. Separate affiliation committees from the affiliating universities, to inspect law colleges within their territorial jurisdiction.	Recognition of law education as a regular university discipline requiring high standards of educational qualification. Quality enhancement Quality enhancement Specialized knowledge to inspect law colleges, acknowledged. Incentives for foreign law degree holders. Involvement of bar in practical training of budding lawyers. PBC and provincial Bars to act for getting budget allocation for legal education.	hold LL. B classes. ● Ban on limit of LL. M, PH. D, students per rules of HECP. ● Ban on 3-year LL. B program ● Ban on evening classes	Closure of higher degree programs Students with 14 years education ignored. Students from other professions ignored.

10. Entrance test for foreign law degree holders to be designed by HECP or GAT to be taken. 11. 2 weeks Bar vocational courses during 6 months pupilage to be held by Bar councils. 12. Allocation of funds for promotion of legal education. 13. Reasonable salary and non-practicing allowance to the permanent law faculty. 14. HECP, PBC and Universities to put forward recommendations for examination evaluation and assessments. 15. Establishment of separate secretariat of legal education in PBC. 16. Implementation and monitoring committee to be constituted by HECP and PBC for enforcing the above directions. 17. Students from the disaffiliated colleges are to be	Incentive for full time law academics. Assessment/evaluation system to be improved Recognition of legal education as a permanent agenda for PBC. Monitoring by HECP and PBC. Students not to suffer. 23 weak law colleges could revive.		

accommodated by other colleges. 18. Colleges to improve within six months.			

Table 2, source: author

The Honorable Supreme identified 18 areas of immediate repair. Only the last two, in the above table, are emergency resolves whereas the rest of the 16 resolves are meant to lay down the foundations for a better legal education program. The overall impact of the rules and judgments seems to produce fewer but better law graduates. A total of 96 substandard law colleges were shuttered down and 23 were put on the watch list. The law colleges that were not fulfilling the standards such as physical facilities like building, library, number of classrooms or the academic degrees of teachers, etc. were immediately closed. The takeaway here is that all these colleges that were either shut or warned were deficient in physical facilities.

The setting of academic and professional standards was undertaken by the academics, as representatives of universities to form the curriculum committee of HEC in collaboration with the professional lawyers from the platform of PBC, which boiled down as the curriculum and road map for the 5LL. B (S) in 2015. It was a well-crafted curriculum of legal education in Pakistan. This curriculum and road map was meant for the universities holding their own law programs but the curriculum for the affiliated colleges was yet to be formulated. As affiliated colleges could not hold semester programs so 5LL. B (A) was also recommended by the same committees to hold annual law programs by these colleges. It was expected that both the newly recommended programs, per directions of the Honorable Supreme court, would keep equal standards of legal education for semester and annual programs. The analysis and comparison of these two programs are done in the following pages to find out whether both 5 years programs are following the same standards or not.

Comparison of LL. B (S) and LL. B (A) programs

Academic qualifications required for admission

The academic qualification for entrance in 5LL. B (S) and 5LL. B (A) is F. A., F. Sc., and A level. The students who get admitted to the law program have background knowledge either of science or social sciences at the secondary school level. The background academic knowledge of the law aspirants comprises the introductory knowledge of social sciences or pure sciences, as the case

may be, along with English, Urdu, Pakistan Studies, and Islamic studies/ethics. The qualifications are similar for both programs.

Course Design

5LL.B (S) is a 166-credit hour program. The subjects are classified into three categories, compulsory, general/foundation, and discipline-specific majors. In foundation courses, 8 introductory courses from social sciences are added. These courses are to be taught during the first four semesters. There are 10 compulsory courses comprising English, Islamic and Pakistan studies, computer skills, Introduction to law, Internship, and Moot cases. Generally, except for the moot cases and internship courses, general courses are to be taught during the first four semesters. Internship and moot cases are placed in advance semesters i.e., after 8th and during 9th. Other than these, 38 major courses, comprising law subjects are included in the curriculum. Generally, Law subjects are divided into two courses each, one to be read in one semester and the other in the next following semester. Below is given the categories of courses, the courses contained in each category, and corresponding credit hours.

Courses and credit hours of LL. B. (S)

Course Type	**Number of courses**	**Credit hours**
Compulsory	8	23
General and foundation	08	24
Discipline specific Major courses	35	105
Compulsory Internship, Research methodology, Moot cases, and Research project	4	12
Electives	A list of 30 subjects where from students are required to pick 4 during 9^{th} and 10^{th} semester	12
Total	56	166

Table 1: source, author

The course outline of the equivalent 5-year annual 5LL. B (A) program in given in the following table

Course Type	**No of Courses**	**Allocated Marks**
Compulsory	32	100/course

General and Foundational	Not identified	
Discipline specific	Not identified	
Electives	No provision	

Table: 2 source, author

General features of both the programs

During 5LL. B (S), the students having a background in social sciences i.e., F. A, and some A level students with social sciences, repeat the 8 foundation courses during the first four semesters. Though exact statistics are unavailable to know the ratio of these students; however it is safe to say that they constitute a major part of the class. These courses are new only for students having F. Sc and A levels in science. Regarding 10 compulsory courses, no matter if they come from F. A., F. Sc, A level, repeat similar courses including English, Islamic studies/ethics, and Pakistan studies, which they have already studied.

Similarly, 5LL. B (A), students are required to repeat courses they have studied at secondary school level e.g., English, Pakistan studies, Islamic studies, and those who had done secondary school examination with social science, most of the subjects offered in law had already been taken by them. For students who had done secondary school examinations with pure sciences, the subjects from social sciences are new to them.

Another difference between annual and semester programs is that in semester programs students are required to study social sciences subjects only for one semester whereas in the annual program they are required to study each course of social science for one year e.g., Sociology, Political science, and English language. These courses are divided into two parts. The first part is to be studied in the first year and the second part in the second year.

Comparison of Course Content of both the programs

An important observation is that in 5LL. B (A) program, internship, research methodology, moot cases, and research project are not added despite the verdict by the Hon'ble Supreme emphasizing the importance of advocacy skills and research. The rest of the course content comparison is given below.

Overall comparison of 5LL. B (S) with 5LL.B (A) Program

Year	Semester	5-year Semester Program 5LL. B (S)	5-year Annual Program 5LL. B (A)
1	1		English I Islamic studies/ethics

		English-I Fundamental of Economics Introduction to Law Introduction to Sociology Pakistan Studies Skills Development (Computer skills)	Introduction to Philosophy of Law Sociology I Political science I Introduction to Philosophy of Law Introduction to Arabic Language
	2	English-II Islamic Studies/Ethics Principles of Political Science Legal System of Pakistan History (South Asia) Law of Torts-I	English I Islamic studies/ethics Introduction to Philosophy of Law Sociology I Political science I Introduction to Philosophy of Law Introduction to Arabic Language
2	3	English-III Introduction to Logic & Reasoning Islamic Jurisprudence-I Law of Torts-II Law of Contract-I Constitutional Law-I (UK)	English II, Pakistan Studies Political Science II Sociology II Introduction to Legal Systems IT Skills
	4	Human Rights Law Constitutional Law-II (US) Law of Contract-II Islamic Jurisprudence-II Introduction to Psychology	English II, Pakistan Studies Political Science II Sociology II Introduction to Legal Systems IT Skills
3	5	Jurisprudence-I Constitutional Law-III (Pakistan) Islamic Personal Law-I	Islamic Jurisprudence English Jurisprudence Law of Contract and Sale of Goods Law of Torts and Easements Criminal Law,

		Criminal Law-I Law of Property	Constitutional Law I
	6	Jurisprudence-II Law of Business Organizations (Company Law & Partnership Act), Islamic Personal Law-II, Criminal Law-II, Land Laws.	Islamic Jurisprudence English Jurisprudence Law of Contract and Sale of Goods Law of Torts and Easements Criminal Law, Constitutional Law I
4	7	Public International Law-I Constitutional Development in Paki Civil Procedure-I Criminal Procedure-I Law of Evidence-I Legal Drafting-I	Constitutional Law II Law of Equity and specific relief, Mercantile Law Transfer of Property Islamic Law International Law Special and Local Laws
	8	Public International Law-II Equity and Specific Relief Civil Procedure-II Criminal Procedure-II Law of Evidence-II Legal Drafting-II	Constitutional Law II Law of Equity and specific relief, Mercantile Law Transfer of Property Islamic Law International Law Special and Local Laws
5	9	**Research Methods** Minor Acts Elective-I Elective-II **Moot Cases** and Professional	Civil procedure Code Criminal Procedure Code Qanoon e Shahadat Legal Drafting Administrative Law Minor Acts Labor Laws

		Ethics, **Internship**	
	10	Administrative Law Interpretation of Statutes and **Legislative Drafting** **Research Project** Elective-III Elective-IV	Civil procedure Code Criminal Procedure Code Qanoon e Shahadat Legal Drafting Administrative Law Minor Acts Labor Laws

Table 4, source: author

Comparative analysis of Five years college education of lawyers in LL. B (A) and B. A, LL. B after secondary school.

If the comparison of the 5LL. B (A) is done with the previous 3Years Law program, it is not difficult to find out the similarity between the two. In the top two lines of the following table, B. A (Bachler of Arts) is also included to give a clear picture that how the first two years of LL. B (A) is different from the previous B.A. Except for introduction to the philosophy of law, legal system, and basic IT skills, the first two years of LL. B (A) is hardly any different from the previous B.A program. All law courses are to be studied during the rest of the three years in 5LL. B (A) which shows how much it is similar to what was being taught previously in 3-year LL. B program could be seen in the following table.

	5LL. B (A)		**Old 3Years LL. B**
LL. B-I	English I Islamic studies/ethics Sociology I (first part) Political science I (first part) Introduction to Arabic Language **Introduction to Philosophy of Law**	BA-I	English Language and Literature (I) Islamic Studies/Ethics Elective I (first part) Elective II (first part) Optional (Generally a Language)
LL. B-II	English II, Pakistan Studies Political Science II (second part) Sociology II (second part) **Introduction to Legal Systems** **IT Skills**	BA-II	English Language and Literature (II) Pakistan Studies Elective I ((second part) Elective II ((second part)

LL. B-III	Islamic Jurisprudence English Jurisprudence Law of Contract and Sale of Goods Law of Torts and Easements Criminal Law, Constitutional Law I	LL. B-I	Islamic Jurisprudence English Jurisprudence Law of Contract and Sale of Goods Law of Torts and Easements Criminal Law, Constitutional Law I
LL. B-IV	Constitutional Law II Law of Equity and specific relief, Mercantile Law Transfer of Property Islamic Law International Law Special and Local Laws	LL. B-II	Constitutional Law II Law of Equity and specific relief, Mercantile Law Transfer of Property Islamic Law International Law Special and Local Laws
LL. B-V	Civil procedure Code Criminal Procedure Code Qanoon e Shahadat Legal Drafting Administrative Law Minor Acts Labor Laws	LL. B-III	Civil procedure Code Criminal Procedure Code Qanoon e Shahadat Legal Drafting Administrative Law Minor Acts Labor Laws

Table 5, source: author

Students learning in both the programs

1st Year

After the first year, in the semester system, students learn about Islamic studies, Pakistan Studies, two courses of English, Computer Skills, fundamentals of Law, Economics, Political Science, Sociology, the legal system of Pakistan, Logic, reasoning, History of South Asia, and one course of Torts. Whereas after the first year of studies in an annual system students learn about Introduction to Philosophy of Law, Political Science, Sociology, Arabic language, and one course of English and Islamic studies.

2nd Year

After completion of the 4th semester of the program, students learn about the third course of English, the introduction to logic and reasoning, along with the first part of the law of Contract, Tort, Constitution, Human rights law, and two courses of Islamic Jurisprudence. After the second year of the annual program, students learn the second part of Political science, English, and Sociology, along with Pakistan studies, IT skills, and an introduction to Legal systems.

Students learn only two introductory courses of law i.e., introduction to legal systems and philosophy of Law during their initial two years of law college in comparison with four semesters at universities where they expose themselves to the breadth of subjects from social sciences and complete four courses of hard-core law including, Contract, Tort, Constitution of US and UK, Islamic Jurisprudence, Human Rights along with Logic and reasoning and advance course on English writing.

3rd Year

After completion of the third year, in the annual system, students learn about Islamic and English Jurisprudence, Law of Contract, Tort, Criminal Law, and Constitutions of the US and UK. Whereas after six semesters students end up with courses in Property law, Business Organizations, Islamic Law, Land Law, and the constitution of Pakistan.

Students in the semester stream are ahead of annual programs in at least four law courses namely, Business Organizations, Property, Land, and Islamic Personal Law. The students of the annual program learn these subjects but are almost a year behind the students of the semester program.

4th Year

After completion of the fourth year the students are trained in Pakistan Constitution, Equity and Specific Relief, Mercantile Law, Transfer of Property, Islamic personal Law, and local/special Laws. After the 8th semester, the students are trained in the Specific Relief Act, International Law, Civil Procedure, Criminal Procedure, Qanoon-e-Shahadat, and Legal drafting.

All the above-mentioned subjects, students learn in their forthcoming final year. Students of the semester are still one year ahead of the students in the annual program.

5th Year

After the fifth year of law education, the student is now ready for the market with the knowledge of Civil Procedure, Criminal Procedure, Qanoon-e- Shahadat, Minor Acts, Legal Drafting, and Labor Taxation law. By the end of the 10th semester, the students are ready for the market with the knowledge of all laws that annual students learn but with the addition of a few important features. The semester students who remained a year ahead of their annual program colleagues get more time to learn within the bracket of five years. They are required compulsorily to do an Internship after the 8th semester. They learn Research Methodology in the 9th semester which they utilize in

the 10th semester to produce a dissertation of 8000 to 10000 words, they are trained in the skill of mooting during the 9th semester in a full course on moot cases, and they also have additional knowledge of four elective courses, selected from a range of 30 courses recommended by HEC and PBC. They also learn Legislative drafting in the 10th semester.

Earned Credit

Below is given the comparison of what students end up with after five years of education in terms of the skillset and the earned credits. It could be seen that out of 166 credit hours fixed for 5LL. B (S), 30 credit hours comprises the courses which are truly experiential, and skill-based. These credits are absent in 5LL. B (A) program as no such courses are included in their curriculum.

Comparison of the credit student earns in semester and annual program

Newly added areas in 5LL. B (S) Program	**Credit**	**Newly added areas in 5LL. B (A) Program**	**Credit**
Internship, after completion of 8th semester and before 9th semester (during summer vacations)	3 credit hours	No provision	NA
Research Methods, during 9th semester	3 credit hours	No Provision	NA
Moot Cases, during 9th semester	3 credit hours	No Provision	NA
Dissertation during 10th semester	3 credit hours	No Provision	NA
Legislative Drafting, with interpretation of statutes during 10th semester	3 credit hours	No Provision	NA
Research project, during 10th semester	3 credit hours	No provision	NA
4 Elective subjects	3 (4) = 12 credit hours	No Provision	NA
Total	30 Credit hour Learning	Non	Non

Table 6, source: author

A comparison is made between 5year semester and annual programs about skillset these programs develop in students. The competencies students gain is classified into three groups i.e., academic competence, Practical exposure, and lawyer's skills. Following is the picture. The white column represents semester and grey represents annual program.

Comparison of the skillset after 5 Year LL. B Programs

Academic competence 5LL. B (S)	**Academic competence 5LL. B (A)**	**Practical exposure 5LL. B (S)**	**Practical exposure 5LL. B (A)**	**Skills 5LL. B (S)**	**Skills 5LL. B (A)**
Knowledge of 5 social science subjects Functional English Language, Functional Computer Skills Research methods and project Legislative drafting 4 Elective courses	Knowledge of 2 social science subjects Functional English Language Functional Computer Skills Non Non Non	Moot cases training, 3 credits 2 months Internship, 3 credits	Non Non	Basic Advocacy skills including, Drafting, Examination in Chief, Cross Examination, Making Statements before courts Law office management Opinion Writing Legal Research	Non Non

Table 7, source: author

Not the whole Picture: Problems with 5LL. B (S)

Internship

After comparing the semester program with the annual, a few areas from the semester program need scrutiny. First is the Internship which students are required to undertake during the summer of the 8th and 9th semesters. The internship has not been standardized in the sense that what skillset is required to be learned by the students during these 10-12 weeks. As the skillset is not identified,

so is the mechanism of assessment. Along with these major problems, there are minor issues like how the internship is going to be held, how much is to be supervised by university and by the Law office, what is the quality assurance mechanism, etc. An internship is a 3credit hour's course that requires attendance of the students, modules, activities, assessment, review of assessment, and finalization of the grades earned by students along with other details are to be assessed and kept a record. Because at the end of the day if students go out for an internship without any counter check, how will the quality control be established. What is the assurance that they are not skipping the training? How will the training by different law offices be synchronized? These are only a few of the questions, but they have every potential to make a mockery of the whole exercise.

Another confusion is that of internship and pupilage. Students doing semester-based programs are exempted from pupilage. Will the ones doing the annual program get an exemption, as they don't do a compulsory internship? If the pupilage is exempted as the students have gone through the internship at law offices, placing it after the 8th semester gives rise to another question. Is there any evidence showing that if pupilage or internship opted after the 8th semester, that could produce better lawyers compared with the pupilage?

Research Methodology

The next area is research methodology during the 9th semester and dissertation during the 10th semester. Both courses are to polish the research skills of the students. It is a very good addition, but standardization of the assessment and tools for such assessment needs the indulgence of Bar and academia. An important aspect regarding these courses is that both are absent from the annual program. As per the verdict of the Hon'ble Supreme Court of Pakistan keeping up the quality of legal education and minimization of the disparities is the responsibility of all stakeholders. Students should not suffer due to unequal training in both programs (Creswell). The other side of the picture is that if some are working better than the other, both should not be treated equally. The logically connected issue is whether students doing a dissertation or research project be treated differently in their entrance to the Bar due to better training?

Moot Cases

The course on moot cases is to be taught during the 9th semester. The content suggested by the HEC and PBC says that moot cases are to be taught without any mention of the actual skills premised through teaching these cases. It could be assumed that advocacy skills like drafting, making statements (opening and closing), examination in chief, cross-examination, argumentation,

etc. could be the focus of this skill. Or if anyone goes a bit in detail, the skills like interviewing the clients and preparation of witnesses for the court, etc. But the problem with these skills and the course is that the nomenclature of the course is moot cases which means the cases at the appellate level. If advocacy skills were the focus of these cases, the nomenclature should have been the mock cases or mock trials. Where all trial-related skills could be taught.

The next appendage of the problem related to this course is that as the skillset is not assorted, law departments of different universities are teaching it differently. Some are emphasizing the rial skills as are required by Pakistani courts and some are teaching the mooting skills as are practiced at appeal level or in western countries.

Legislative Drafting & 4 Electives

The next area is legislative drafting and four elective subjects which the semester program offers an annual doesn't. The four elective subjects are from the list of 30 subjects recommended by HEC and PBC. Law faculties at universities could improve this list from time to time to keep it updated with the latest national and global trends. The importance of legislative drafting goes without saying as this has been, historically, part and parcel of the lawyer's basic skills. All these subjects increase the knowledge and employability of the students by increasing their choices in the areas of the profession. Here again, the skillset has to be assorted and properly evaluated, which lacks in the semester program. But the annual program is altogether deficient in these courses. The factor increasing the probability of employability for the semester students could be a disadvantage for annual program students who lack this training.

From the above comparison, it could be observed that in the effort to make legal education at par with the world, two additional years are added to the previous 3-years program. To make entry tough, seats are lessened but on the academic side, there is a lot of disparity between semester and annual programs. The annual program is quite like the previous 3 years' LL. B program except two additional years added to teach social sciences to the law students. Areas of distinction i.e., moot cases, internship, research methods, Dissertation, and elective subjects are absent in the annual program.

That does not mean that the semester program is flawless. The semester program has its own problems. The biggest is the assortment of skillset required for lawyers and then to standardize them. To synchronize the quality of semester programs in all universities, the need to standardize these skills and assessments is a must.

Findings

The question arises here, how the landmarks change in course and courses of LL. B is going to improve the standard of legal education? The above comparisons show that new programs are different in their design from the previous ones. Is merely making the course of work narrow and long guarantee high standards of legal education? Are we toeing the right direction to improve the standards of legal education, or are we naively applying the demand and supply principles to the legal profession instead of allowing an open competition for all aspirants?

If the above questions are legitimate, then the need is to set objective standards and the skillset required from a lawyer, instead of tapering the opportunity to become a lawyer. Historically, similar questions had been posed to many countries, though during different times and in different backdrops, the work done by them could be a source of inspiration for Pakistan. The most appropriate model was worked out by the US about three decades back.

The advent and prevalence of scientific inquiry in research have affected the research paradigm overall. Per the scientific method, norms, qualities, or skills that were previously considered to be discussed or tested through subjective research only are now capable of being quantified. In social sciences, a lot of work has been done to quantify the universal norms, values, and skill sets. Similar techniques could be utilized to quantify the lawyer's skills. This exercise was undertaken towards the end of the last century. In 1989, ABA took another substantial step to narrow the gap between legal education and law practice. For this sake, a task force, chaired by Robert MacCrate, was appointed.

The task force presented its report in 1992. The task force assembled a few basic skills required for the practice of law (Sebert, 2001). The same year, when the MacCrate Report surfaced, a group of clinicians founded the Clinical Legal Education Association (CLEA) to organize all clinicians on one platform. (Clinical Legal Education Association, 2011) In 1994 CLEA began publishing a peer-reviewed journal dedicated to promoting clinical legal education. After the publication of the MacCrate Report, the ABA disseminated Standard 301 to law schools demanding to maintain an academic program "designed to prepare their graduates to participate effectively in the legal profession" (Ramsey, 1995).

In 1996, three years after adopting standard 301, the ABA amended standard 302 to ask law schools to provide, "Other professional skills regarded as necessary for effective and responsible

participation in the legal profession. The same year the ABA included a provision in the accreditation standard to provide clinical faculty the substantive equivalent to tenure protection traditionally awarded to the academic faculty" (Joy, 2017). Per the above-said standard generally, there are two types of standards required of law students to get admitted to the Bar.

A: A strong grip over the substantive part of the law.

B: A rigorous training in advocacy and other related skills.

The theoretical part of the curriculum comprises, "Legal analysis and reasoning, legal research, problem-solving, and oral communication; Writing in a legal context, including at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year" regarding the other skills, "Other professional skills generally regarded as necessary for effective and responsible participation in the legal profession, and The history, goals, structures, values, rules, and responsibilities of the legal profession and its members" (Bücker & Woodruff, 2008).

Regarding the second category a law school shall offer substantial opportunities to students to train themselves in the following fields, "live-client or other real-life practice experiences, pro bono activities; and Small group work through seminars, directed research, small classes, or collaborative work". In addition to the identification of these skills and training, the task force also found that these skills are to be collectively inculcated in law students through mutual efforts of the law schools and the bars. But the question that remained open was the apportionment of this responsibility between the school and the bar.

Main lawyer skills and values as some core skills and values are identified after an exhaustive survey and research by a group of experts and the famous, the McCrate report was prepared. On the basis of this report, the report are listed below,

- "Problem Solving"
- "Legal Analysis and Reasoning"
- "Legal Research"
- "Factual Investigation"
- "Communication"
- "Skill of Counseling"
- "Skill of Negotiation"
- "Litigation and alternative dispute resolution"

- "Organizing and Managing Legal Work"
- "Recognizing and Resolving Ethical Dilemmas"

The task force also found four, of what they call, "the core values" in addition to the aforesaid ten skills. The first value is:

"The Provision of Competent Representation"

- "Striving to Promote Justice, Fairness, and Morality"
- "Strive to Improve the Profession"
- "Professional Self-Development"

Conclusions

Crucial is that the two existing programs are the outcome of the tireless efforts of the top-notch policymakers and the apex court. The one is devoid of the courses meant to develop and polish the experiential learning of students. And the second one, though contains the courses but to implement the courses, there are no standardized guidelines and tools available. The research suggests the following steps to be taken.

The first is that the scheme of 5LL.B (S) which prima facie reflects that the areas of research skills, internship, dissertation, moot cases, legislative drafting, and a list of contemporary law courses are of prime importance to improve the standard of legal education. This scheme is to be aligned into two parallel streams of the semester and annual programs. The discrepancies existing between them, as has been discussed above, would not only ruin the outcomes of the programs but also would create a void between the two streams.

The second step is to understand that the subjects/courses are a means, not the end. To identify the end and to implement courses in letter and spirit the need is to assort qualitative measures to assess not only implementation but the outcomes of these courses. This is the real task to uplift the standards of legal education in Pakistan. For that, Pakistan Bar Council must, as Bars of the neighboring countries like India and Bangladesh, work closely with academia in setting standards, making them quantifiable by developing the monitoring and assessment tools for professional legal education in the light of the MacCrate report on legal education. The expected outcome of the proposed hard work could be seen from the examples of the countries ahead of us in this regard. They are harvesting what they cultivated because only pickles could beget pickles, not thistles(Clinical Legal Education Association).

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- The preferred maximum length of Articles should be 7000-8000 words, essays should be 5000-6000 words, notes should be 3000-4000 words, book reviews should be 1500-2500 words and judgment reviews should be 5000-7000 words including the abstract (200-250 words) and footnotes.
- Contributors must have a separate Title Page with the manuscript title, writers' names, affiliations, e-mail addresses, and postal addresses.

1.3 Writing your article The contributor may submit their article under a covering letter addressed to the editor, containing the following statement:

1. I confirm the accuracy of the citations in the attached manuscript.
2. I confirm that I have read and understood the journal's submission policy and that my manuscript complies with it.
3. I certify that no part of the manuscript infringes ~~on~~ someone else's copyright.

1.4 The manuscript should be structured as follows:

- Instead of using 's' spellings, use 'z' spellings. This means that words ending in '-ise,' 'isation,' and similar suffixes would be spelled with a 'z' (for example, 'recognise,' 'organise,' and 'civilise').
- Use British spellings/*English* rather than American spellings/*English* (for example, 'programme' rather than 'program,' 'labour' rather than 'labor,' and 'centre' rather than 'center').
- Throughout, use single quotes. Just use double quotes inside single quotes. Words in quotes should not be altered in spelling.
- Use the terms 'twentieth century' and '1980s'. Spell out numbers from one to nine, 10 and above to remain in figures. However, only use figures for accurate measurements (3 km, 9 per cent, not %). Instead of lakhs and crores, use thousands and millions.
- Italics and diacritical can be minimized but used consistently. Tables and figures should be identified by numbers rather than placement such as (see Table 1) and not like (see Table below). In the text, all figures and tables should be cited. Regardless of whether or not permissions are needed, the source for figures and tables should be listed.
- At the end of the article, a compiled list of all books, papers, essays, theses, and documents cited (including those cited in the tables, graphs, and maps) should be given.
- Figures, including maps, graphs and drawings, should not be larger than page size. They should be numbered and arranged as per their references in the text. All photographs and scanned images should have a resolution of minimum 300 dpi and 1,500 pixels and their format should be TIFF or JPEG.
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2.1 Peer-review policy The UCP-JLLE follows a strict double-blind review policy in which both the reviewer and the author's identities are kept secret from both parties. **2.2 Authorship** Both parties who contributed significantly to the article should be classified as contributors. The relative scientific or technical contributions of the individuals concerned, regardless of their rank, should be used to assess principal authorship, authorship order, and other publication credits. **2.3 Acknowledgements** All contributors who do not meet the authorship requirements should be acknowledged in a segment called Acknowledgements. An individual who provided only technical assistance or a department chair who provided only general help are examples of those who should be remembered. Any acknowledgements should appear first at the end of your article prior to your Declaration of Conflicting Interests (if applicable), any notes and your References. **2.3.1 Third party submissions** A declaration must be included in the Acknowledgements section of the manuscript and the accompanying cover(*ing)* letter if an individual who is not listed as an author submits a manuscript on behalf of the author(s). The declarations must include the following:

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4 Reference style

The UCP-JLLE adheres to The Bluebook (19th Ed.) reference style for law related articles and APA 6th Ed. for articles for the legal education section.

5 Information required for completing your submission

- You will be asked to provide contact details and academic affiliations for all co-authors and identify who is to be the corresponding author.
- These details must match what appears on your manuscript.
- The affiliation listed in the manuscript should be the institution where the research was conducted.
- If an author has moved to a new institution since completing the research, the new affiliation can be included in a manuscript note at the end of the paper.
- At this stage, please ensure you have included all the required statements and declarations and uploaded any additional supplementary files (including reporting guidelines where relevant).

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