
# Bhutan Law Review

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# Dedication

*His Majesty the King is the People's King; an embodiment of wisdom, justice, humility, love and compassion. His Majesty is a perpetual source of inspiration for the people.*

*Within a short span of His Majesty's reign, several reforms emanated from the Golden Throne. Gyal-Suung — the most recent Royal Proclamation is yet another transformative national reform. This will have tremendous impact on the life, career and orientation of our young adults in the service of the Tsa-Wa-Suum.*

*Law is an index of a nation. A strong, independent and professional judiciary is crucial to nurture Rule of Law and embed and deepen democratic values for a free, fair and just society.*

*We are happy to bring out the 13th volume of the Bhutan Law Review as a tribute to His Majesty the King on the occasion of the 40th Royal birth anniversary.*

*We remain committed to disseminating laws, promoting legal education and enhancing access to justice.*

# Content

# *Preface*

2020 is yet another special and historic year in the history of the country. It marks the 40th Royal birth anniversary of His Majesty the King; 12 years of His Majesty's Golden Reign, as well as the 12 years of institutionalization of the *Democratic Constitutional Monarchy*. While counting the blessings showered on us by Their Majesties the Kings, it is also time to reflect on how far we have come and; where we are heading as a nation, institutions and individuals.

At the Bhutan National Legal Institute, we have always drawn inspiration from every word and deed of His Majesty the King and our Hon. President Her Royal Highness, Ashi Sonam Decchan Wangchuck. That has meant working hard and striving to live up the Royal expectations; which entails fulfilling the mandates and purpose for which the institute has been established. Guided by our organizational vision, mission, goals and values, we constantly try to disseminate legal education and promote *rule of law* for a free, fair and just society. This is in addition to our primary mandate of promoting continuing legal education and capacity-building of the judges and judicial personnel. As in the previous, we organized a series of programs to fulfil the above objectives.

The Institute scaled newer heights with not just the number and reach of educational and capacity-building programs for our stakeholders; but it instituted a major judicial reform with the institutionalization of the *Court-Annexed Mediation System* (CAMS) by establishing *Court-Annexed Mediation Units* (CAMU) in all the Courts. This is expected to further enhance access to justice by affording an option or choice for the people to avoid adversarial win-lose outcomes in their cases reaching courts. This is a significant development for a *Gross National Happiness* country where *Community Vitality* is one of the 9 domains under the *Good Governance* pillar. Incidentally, this program afforded opportunity to train over 80 senior judicial officials in the dispute resolution and mediation skills; which will also be useful after they retire from the services and render private para-legal services.

Despite, successive change of judicial leadership and the best efforts of the courts, people are still critical of the judiciary. In the face of mounting public expectation of not being efficient or progressive enough, it may be time to remind ourselves of our position and duties once more. In the temple of justice, judges are the high priests. They are not the mere dispenser or patron of justice, especially in our context. They are the administrators of the courts; and managers of human resources in addition to adjudication of disputes brought before them. Moreover, as the society evolves, the concept and the roles of justice changes with time. Delivery of justice entails cementing human bond by reconciling individual rights with the social good. Professional interpretation of law is very important to achieve the actual purposes of law passed by the *Parliament*. Thus, judges are synonymous with knowledge, experience and skills on all aspects of life and human pursuits. Due to the crucial roles they play and the high esteem to which they are held, the judges who serve at the appeal courts become 'institutions' in themselves. This calls for the continuous self-directed learning in an atmosphere of reflection and contemplation. However, as in other countries, the challenge to force ourselves to the learning tables remain - due mainly to lack of motivation and the need and reward for learning. A merit and competitive system for excellence may turn things around.

Judges speak their minds through the medium of the judgments they render in the cases. This requires good writing and research skills. It was exactly for this reason that the *Bhutan Law Review* was conceived and created for the judges and members of the Bench and the Bar as the forum for academic expressions. Besides, the academic articles written by the judges or legal professionals not only carry more weight than others; but they also expound the current laws and develop jurisprudence – being the true expression of a law or an issue. Such academic space is an important avenue through which judges and legal professionals can be heard. In other jurisdictions, the tradition of judicial scholarship has influenced the law and legal treatises through critical legal studies and publications.

*Bhutan Law Review* is the first and the only law journal of the country. It has witnessed change and improvement both in its content and format over the years. Due to its increasing readership and demand, it is seeing wider distribution and increased cost of publication.

Despite the persistent lack of contribution of quality-articles, as in the previous volumes, we have managed to collect an array of articles on a variety of subjects.

Justice (retired) Lyonpo Sonam Tobgye's work on law and Buddhism give us an invaluable insight into Buddhism as a source of modern jurisprudential practices and values;

Justice Lungten Dubgyur is granting us peek into the minds of our constitution-framers *vis-a-vis* the inspiration drawn from the Indian *Constitution*, in his Paper.

Professor Stanley's work is helping us understand and interpret our *Penal Code* with his scholarly elucidation of the law on mental disability.

In the area of child justice, Dema Lham is exposing the law and jurisprudence of *'restorative justice,'* as a diversion from the judicial proceedings and prosecutions, for the children in conflict with law.

Nima Dorji is leading us on a journey of tracing the history of 'happiness' in the constitutions across the world.

Similarly, Karma Tshering is on a quest to examine spiritual practices in the light of the modern criminal legal system that requires '*proof beyond a reasonable doubt*' for the conviction of the offenders.

Sangay Chedup proposes *Gross National Happiness as a* tool to facilitate mediation of international conflicts.

Considering Bhutan's impending accession to the *World Trade Organization (WTO)*, Garab Yeshey's work on international trade law is timely to gain an insight into the concept and practice of diplomatic immunity as an alternative to arbitration in investment disputes settlement system.

We hope you will find something of your interest to read in this volume. Please write us. Give us your feedback for our growth and improvement. More importantly, read, research and contribute articles for the subsequent volumes of the *Bhutan Law Review*.

# *The Exposition of Constitutional Kuthangs*

The *Constitution* is a sacred legal, political and a social instrument. The oldest constitutions in the world were drafted in the 17th century, which formed a new revolutionary pact for ushering an entirely new political system. In the similar way, *The Constitution of Bhutan* has paved a new way of life, governance and political sanctity proving it as the true and genuine gift of His Majesty the Fourth *Druk Gyalpo* Jigme Singye Wangchuck. As the *Constitution of Bhutan* has emanated from the wisest and most seasoned minds of our leaders, today it has become the collection of the finest values and ideas to create a system of government that would ensure the best chance for Bhutan's progress and stability.

*The Constitution of Bhutan* is the culmination of more than a century of democratic culture and traditions, which existed in Bhutan since 1907. Bhutanese society has always thrived on the firm foundations of egalitarian social values built on the values of compassion, liberty, and happiness. The *Constitution* embodies these rights and virtues by securing them through various constitutional principles and values. Our constitutional creed are a steady distillation of our ancient cultures, values and philosophies that we hold as a nation state. The Bhutanese *Constitution* reflects our unique society, its cultures, legal values, and the principles of a modern nation state. Today, our generations are fortunate to inherit these values and agreed to repose our faith in a great leader's vision and foresight.

This very sacred document of *Constitution* is the foundation of our unique system of democracy, our values, rights, duties and national goals. As the *Supreme Law* of the land, it serves as the repositories of our laws, policies, priorities, hopes and values as a Bhutanese nation. *The Constitution of Bhutan* has come to us in a time of peace to create a system that was best suited for our people, designed to keep the *People of Bhutan* on the path to prosperity, progress and harmony. The structure, principles, and values of the *Constitution* guide us towards a shared understanding of our direction and goals as a society and as a nation.

As a tribute to His Majesty the Fourth *Druk Gyalpo* on His glorious birth anniversary, the *Supreme Court of Bhutan* and the *Bhutan National Legal Institute*, under the noble guidance of Her Royal Highness, Princess Sonam Dechan Wangchuck initiated the paintings of the 34 Articles of

the *Constitution*. Each *Kuthang* represents the Article of the *Constitution* and captures its significance and purpose.

The *Bhutan National Legal Institute* aspires to embrace the profound representation of the wisdom in the *Bhutan Law Review,* Kingdom's first *Law Journal* as a continued tribute to His Majesty the King, His Majesty the Fourth *Druk Gyalpo*, the Country and the People. As we read and embrace the various values and philosophies of our *Constitution,* we will continue to forever hear the voice of the nation.

## Article 6 – Citizenship

1. A person, both of whose parents are citizens of Bhutan, shall be a natural born citizen of Bhutan.

2. A person, domiciled in Bhutan on or before the Thirty-First of December Nineteen Hundred and Fifty Eight and whose name is registered in the official record of the Government of Bhutan shall be a citizen of Bhutan by registration.

3. A person who applies for citizenship by naturalization shall:

    (a) Have lawfully resided in Bhutan for at least fifteen years;

    (b) Not have any record of imprisonment for criminal offences within the country or outside;

    (c) Be able to speak and write *Dzongkha*;

    (d) Have a good knowledge of the culture, customs, traditions and history of Bhutan;

    (e) Have no record of having spoken or acted against the *Tsawa-sum*;

    (f) Renounce the citizenship, if any, of a foreign State on being conferred Bhutanese citizenship; and

    (g) Take a solemn *Oath of Allegiance* to the *Constitution* as may be prescribed.

4. The grant of citizenship by naturalization shall take effect by a *Royal Kasho* of the *Druk Gyalpo*.

5. If any citizen of Bhutan acquires the citizenship of a foreign State, his or her citizenship of Bhutan shall be terminated.

6. Subject to the provisions of this Article and the *Citizenship Acts*, Parliament shall, by law, regulate all other matters relating to citizenship.

**Citizenship**

Brian Turner defines citizenship as a set of legal, economic, and cultural practices which define an individual as a competent member of society. A *"citizen"* is a member of a political community, which is defined by a set of rights and obligations. "Citizenship therefore represents a relationship between the individual and the state, in which the two are bound together

by reciprocal rights and obligations." *The Constitution of Bhutan* entails that citizenship in Bhutan are given to natural born persons. The provisions of the citizenship in the *Constitution* are mainly derived from the *Citizenship Act of Bhutan* of 1985. Citizenship in Bhutan is classified as:

a) Natural born citizens;

b) Citizenship acquired through registration; and

c) Citizenship acquired by naturalization.

The concept of Bhutanese citizenship and its laws are an outcome of great considerations, and an in-depth study of citizenship laws in the country. Our laws on citizenship encapsulates the very important values of unity, progress and stability of Bhutan as a nation state and forges a unique path for development and fulfilment of national goals, with values that all of us share. During the time before the *Constitution* was drafted, laws on citizenship were drafted either by the *Royal Advisory Council*, the *National Assembly* or by concerned agencies in consultation with them. The draft *Bills* were thoroughly debated, keeping the fundamental responsibility to protect its citizens from illegal migration, and bringing negative impacts to our national economy, society, culture, politics and environment. It is believed that a strong citizenship law will protect and enhance our national security, national identity and sovereignty of Bhutan as a nation state.

From a Buddhist philosophy and perspective, all sentient beings, including human beings are born in a place as *"common karma"* and its *"forces"* unites them; giving them an opportunity to experience the values of unity of spirit, dependence and common values. In the similar line, drawing on the *Abridged Gateway to Knowledge* by *Kunkhyen Mipham*, it describes the origination of things and the cycle of *"birth and death"* and the twelve dependent related births. These common values, the ageless wisdom and transition of knowledge are depicted in an image- that reflects our sanctified ideals of Bhutanese citizenship.

The *Eternal Knot* represents the heart of His Majesty the King; that is rested on the anthers of three beautiful flowers, grown from the center of a vast and an immaculate Ocean. The flowers exude iridescent rainbow rays- symbolising the ocean of His Majesty's wisdom that is deep, vast and immaculate. Unquestionably, it also symbolise the methods of obtaining citizenship by birth, citizenship by registration and citizenship by naturalization, which are realized through the prerogative of His Majesty

the King. Therefore, all citizens are natural human beings, who are affected by the circles of birth, rebirth, and the *positive of togetherness* as *Kunkyhen Mipham* says:

*Ignorance, compounded things, consciousness,*

*Name, body, six sense spheres, touch,*

*Sensation, Craving, grasping,*

*Becoming, birth, old age and death.*

# *Law and Buddhism – Vinaya as the Source of Modern Jurisprudence*[1]

## Introduction

The rules which governed the Buddhist community are profound. They are compiled in a treatise called the *Vinaya,* one of the three Baskets of Buddha's teachings – the *Tri Pitakas.* These canons of Buddhist laws have been used to resolve a variety of disputes for centuries in the *Sangha*, the Buddhist community. They laid the foundation for social values and human conduct. They served as the basis for a just society. *Lord Buddha* said:[2]

> *I shall go to Banaras where I will light the lamp that will shine light on the world.*
>
> *I will go to Banaras and beat the drums that will awaken mankind. I will go to Banaras and teach the law.*

It is that law of *Dhamma* that inspires us to find the deeper meaning in His words. Here, I present a comparative study and analysis of the Buddhist laws - the types and objectives of law - civil and criminal jurisprudence, constitution and democracy; the similarities, relevance and application of the Buddhist philosophies, concepts, precepts and principles to modern jurisprudence.

## The Rationale for the Law

The *raison d'être* of the life is the survival, perpetuation of the human race and progress. As Richard Posner said, in the primitive society, devoid of law and teaching, people resorted to self-help and mutual destruction. Depletion of resources due to increasing population and the greed led to the need for the development of laws to regulate and govern the people. The legend of *Mang Pos bKur Bai rGyalpo* states:[3]

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1 Contributed by Justice (retired) Sonam Tobgye.

2 Suresh, K. & Usha, S. (2004). *"Cultural and Religious Heritage of India,"* in S. Radhakrishan, *"Buddha and His Religion."*

3 *Mang pos bkur bai rGyalpo* or *Mahasammatta* literally means the King elevated by many and whose legitimacy was based on popular consent. He was the first King of Buddhist legend. Refer *rtogs brjod dpag bsam 'khri shing'* (1999), p. 93 and Mathou, T.

> *As men lost their primeval glory, distinctions of classes arose; they entered into agreements one with another, creating the concept of private property and families. With this, the theft, murder, adultery and other crimes began; so the people congregated appointed one man among them to maintain order, in return for a share of the produce of their fields and herds.*[4]

The king enunciated profound principles which sowed the seed of social contract theory,[5] the principle of freedom of choice from a rational-choice model of collective action, and public choice theory later propounded by Jeremy Bentham, James Buchanan and Kenneth Arrow. The public choice theory is explained by Amartya Sen as:[6]

> *In the history of public reasoning in India, considerable credit must be given to the Indian Buddhist, who had great commitment to discussion as a means of social progress… The so-called 'Buddhist Councils,' which aimed at settling disputes between the different points of view… these councils were primarily concerned with resolving differences in religious principles and practices, but they evidently also addressed the demands of social and civic duties…*

The king also enunciated the principle of judicial qualities and temperament, which were later advocated by Socrates. Judicial temperament, according to the *American Bar Association* is having compassion, decisiveness, open-mindedness, sensitivity, and patience, freedom from bias and commitment to equal justice.[7] Similarly, in Buddhism, these qualities are ascribed to one who is fit to hold high judicial offices. They were the special attributes of a good king who also personally heard the grievances and resolved the disputes as the judge.[8]

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(2008). *"The Politics of Bhutan: Change in Continuity," Journal of Bhutan Studies.*

4 Fukuyama, F. (2011). *The Origins of Political Order.*

5 The Buddhist view of kingship was governed by the notion of the *Social Contract (Agganna Suttra).*

6 Sen, A. (2006). *The Argumentative Indian.*

7 The role of the *American Bar Association* in the *Judicial Selection Process*: Hearing before the *Committee on the Judiciary,* United States Senate, One Hundred Fourth Congress, second session, May 21, 1996, Vol. 4.

8 *Samghadisesa* XIII; *Mahavagga* VIII, 5,2; VIII, 6.I, 2 p. 25.

## What is Law?

Buddhist aspire for the salvation from the *Samsara* through spiritual, philosophical and intellectual pursuits. This involves unlocking mysteries and seeking truth. The quest for law was one of them. The Greeks gave a conception of universal law for the mankind in which all men are equal and which is binding on all people. Of the two schools of thoughts, the Sophists developed a skepticism in which they recognized the relativity of human ideas and rejected the absolute standards. The basis of law was the self-interests of the lawmakers and the only reason for obedience to law was the self-interest of the subjects. According to the other thought, law was guided by uniform principles which resulted in stability of the society.

Law is social tool[9] which has moral principles and values. Law is synonymous with justice, reason and ethics. It is also an instrument of social change.[10]According to Alexander Bickel, *"Law is the principal institution through which a society can assert its values."*[11] *Lord Buddha* said that law is a tool *"for correcting those who have gone wrong,"*[12] what we term as restorative justice today.[13] Law gives the form and the direction to the social world. It represents the solemn will of the state pronounced through the legislative power for the common good.

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9 For example, *Chanakya* (350-275 B.C.E) who was a philosopher and founder of an independent political thought in India, laid down rules and guidelines for social, legal and political order in the society. *See* Chaturvedi, B. K. *Chanakya, Diamond Pocket Books*, 2001.

10 Pound, R. (1930). *An Introduction to the Philosophy of Law*. According to him, legal order must be flexible as well as stable. Law must be overhauled continually, and refitted continually to the change in the social life, which it is to govern.

11 Alexander, M. B. (1962). *The Least Dangerous Branch*.

12 *Durmangana pudgala nigrahaya bKa'-'rGyur* sutra, *Rapa,* page 57 (back page).

13 Restorative approaches to crime date back thousands of years:

- In Sumer, the *Code of Ur-Nammu* (c. 2060 B.C.) required restitution for violent offences.
- In Babylon, the *Code of Hammurabi* (c. 1700 B.C.) prescribed restitution for property offences.
- In Israel, the *Pentateuch* specified restitution for property crimes.
- In Rome, the *Twelve Tables* (449 B.C.) compelled convicted thieves to pay double the value of stolen goods.
- In Ireland, under the *Brehon Laws* (first recorded in the Old Irish period) compensation was the mode of justice for most crimes.
- In Germany, tribal laws promulgated by *King Clovis I* (496 A.D.) called for restitutive sanctions for both violent and non-violent offences.

In England, the *Laws of Ethelbert of Kent* (c. 600 A.D.) included detailed restitution schedules.

*Nagarjuna*[14] wrote:

> *As the earth is to living and non-living entities; the law is to human beings.*[15]

Dworkin said:

> *…law is a system of rules – the rules laid down by statute and precedent, distinct from the rules and principles of morality.*

Law is a system of rules enforced through a set of institutions; which provides an objective set of rules for regulating conduct and maintaining order in a society. *Lord Buddha* said that: [16]

> *The law is that which leads to welfare and salvation.*
> *It forms conduct and character distinguished by the sense of equality among all beings.*

The first wheel of the laws of *Dhamma* was set into motion at Sarnath when *Lord Buddha* began to preach his five disciples.[17] The spokes of the wheel signified the rules of pure conduct: equality of the length of the spokes of the wheel signified uniformity and consistency in the laws; the wheel symbolized the wisdom; and the hub of the wheel symbolized modesty and thoughtfulness. The fixed axle signified permanence of the truth.[18] The law is for the welfare and happiness of the people, a utilitarian concept. Laksiri Jayasuriya noted that:[19]

> *…In many respects Buddhist ideals of statecraft embodying principles and practices such as the rule of law, deliberative democracy, procedures of governance and the social policies of the Asokan welfare state bear a striking similarity to Enlightenment values in Europe.*

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14 *Nagarjuna* or *Pelgoen Phagpa Lhuedrup* was a famous Buddhist philosopher of the Second Century A.D.

15 Refer *Subrida Lekha.*

16 *Somadeva Nitivakyamrita.*

17 They are the five *"Excellent Disciples"* of *Lord Buddha* namely (1) *kun shes kaun Di nya,* (2) *rta thul,* (3) *rlangs pa*, (4) *ming chen* and (5)*bzang Ldan.*

18 *Dharma Chakra Pravartan.*

19 Jayasuriya, L. (2008). *Buddhism, Politics, and Statecraft*, International Journal of Buddhist Thought & Culture Vol.11, pp.41-74, *International Association for Buddhist Thought and Culture.*

## Types of Law

The Romans followed the Greek conception of natural law, and they classified law into *Jus Civile, Jus Gentium* and *Jus Naturale*. At the end of the Roman era, the principles of natural laws were accepted by Christians. St. Augustine was influenced by the last school of Pagan philosophers, known as the *Neo-Platonists*. The medieval thinkers Augustine, Aquinas and Suarez tried to work out a relation between the inherent constraints on human conduct. Natural law, or the natural rights was elaborated in the 17th century. According to Richard Posner:[20]

> *Natural law project has never recovered from what Nietzshe called the death of god (at the hands of Darwin).*

Laws may broadly be divided into natural law or *jus naturale*[21] and positive laws or *jus positivum,*[22] criminal and civil laws, substantive and procedural laws, public and private international laws, among other laws. Reason and common sense are the basis of natural law. Natural law is the truth; and the truth cannot change. It is derived from the absolute truth based on the divine sources - birth, old age, sickness and death. It denotes a system of rules and principles for the guidance of human conduct, which is different from the positive or the enacted laws.

Similarly, Buddhist laws can be classified into two categories, natural laws - *Rang bZhin gyi Khrims,*[23] and the positive laws - *bCas pa'i khrims*. In Buddhism, the positive laws include the six edicts of law, such as:

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20 Posner, R. *The Problem of Jurisprudence*, p.14.

21 *Natural law* and *Social Contract* theories were rejected by David Hume, which is contrary to empirical truth. Rousseau objected the doctrine of natural law in favour of inalienable sovereignty vested in the *'general will'* as opposed to any individual ruler or oligarchy. *Natural Law Theory* is supported by Grotius, Blackstone, Locke, Pufendorf, Montesquieu, Voltaire and Rousseau. Natural law is divided into *prescriptive* and *descriptive natural law*. The origin of it can be traced to the belief in a law of nature as a system of justice common to all human beings of the Stoics.

22 *Lord Buddha* differentiated laws as *Rang-bzhin* and *bcas pa'i khrims*. Aristotle said that positive laws must be obeyed and *'it is not perfect and it may give rise to inequalities, but we should aim at reforming the law, not breaking it.'*

23 Described in the *bKa'gyur*, *Tripitaka*, *Bodhicharyavatara (spyod 'jug)* and *bde smon* Prayer (*pranidh'ana)* to be reborn in the *Sukhavati* paradise of *Amitabha Buddha* by *Karma chags med(r'a ga a syas),* 17th century.

- *Khri rtse 'Bum bzher gyi khrims* or the Law of Governance of the Army and the Executive.[24]
- *Bum gSer thog Sha-ba-can gyi khrims* or the Law relating to Weights, Measures and Fair Trade.[25]
- *Rgyal-khams dper blangs kyi khrims* or the Law of the State.[26]
- *Mdo-lon zhu-bcad kyi khrims* or the Law of Interrogation.[27]
- *Dbang chen bcad kyi spyi-khrims* or the Law of the great Governors.[28]
- *Khabso nang-pa'i khrims* or the Law relating to Fair Trial.[29]

In Buddhism, law is further broadly classified into five categories:

- *nYen thos kyi khrims or the* Laws for the *Dhamma* followers;
- *Byang Chub sems dpa'i khrims* or the Laws for the Saints;
- *bDe bar gshegs pa'i khrims* or the Laws of Enlightenment*;*
- *dGe 'dun gyi khrims* or the Monastic Laws) and;
- *Kun gyi khrims* or the Secular Laws).

## The Objectives of the Law

The objectives of law is stability, peace and tranquility of all sentient beings. The Buddhist principle of *Sixteen Virtuous Acts of Social Piety* or the *Mi Chos gtsang ma bcu dru* exhorts that the laws of the spiritual monarchs were

24 The first *Law Code* of King *Srongtsen Gampo*. The *Code* enshrines separation of powers and responsibility.

25 It deals with duties of an individual regarding the matter relating to weights, measures and fair trade to name a few.

26 It enshrines duties and obedience to laws.

27 It enshrines *fair trial.*

28 It enshrines adjudication by *due process*.

29 It enshrines delivery of *equal justice* without discrimination

enacted to secure freedom.[30] In this context, *Lord Buddha* said:[31]

> *The law is that which leads to welfare and salvation…*
>
> *The Law is equal, equal for all beings… impartial is the law.*

Law must allow each individual to know, before taking any action, what conduct is illegal, why it is forbidden, and what will be the penalty for the violation. In substance, the law must forbid only such private conduct that violates the individual rights of others. Justice is constant and it perpetually strives to render each man his due and law requires people to live honestly; and not to injure their neighbors. Law should be clear and precise; it should leave no room for any arbitrary power. *Lord Buddha* has said:[32]

> *He is not just because he hastily arbitrates the cases.*
>
> *The wise man should investigate both right and wrong.*
>
> *The intelligent person who leads others not falsely but lawfully and impartially, who is a guardian of law, is called one who abides by righteousness.*

Law should have utilitarian and functionalist purposes.[33] It must encourage virtue, and prevent vice and immorality. The legal principles enunciate legal values without subordinate sections; elaborate legal remedies, and punishes violation and non-compliance. The law must avoid disproportionate punishment and abuse of power. It should be practical and enforceable without undermining transparency, accountability, efficiency and professionalism. It should be same to others and to oneself. It should be just and one should be subjected to it.[34] It should be upheld through mutual

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30 *Freedom* encompasses *bDe ba* to secure happiness, welfare, safety, tranquility, prosperity and liberty.

31 *Dharmasangiti Sutra.*

32 The *Dhammapada,* The teachings of the *Buddha*, Verse 19: *Endowed with Dharma. Spoken in the Jetavna Grove, Dhammañña Vagga, The Just Or Righteous* (Text and Translation by Ven. Nàrada), Chapter 19, verse 256.

33 *Normative Ethics* is rational inquiry into or theory of the standards of right and wrong, good and bad in respect of character and conduct, which ought to be accepted by a class of individuals. Hugo Grotius argued that law arises from both a social impulse. Hayek - *"only the existence of common rules makes the peaceful existence of individuals in society possible… the "rationalist" or "constructivist" understanding of the origins of law."*

34 Tushnet, M. *The insurance theory of constitutional regime - serves as insurance against losing office.*

support, maintain consistency and avoid incoherence. It should be free from passion and ulterior motives. Laws that are biased and legislated in anger will be subjected to the wrath of time. Laws should be as far as possible just and enduring for its normative, procedural and institutional values including institutional responsibility and accountability. No law lasts forever. This is in consonance with the Buddhist philosophy of impermanence. However, the laws must endure the fluctuating human fortunes. Therefore, *Mipham Rinpoche*[35] cautioned:

> *If the laws are amended repeatedly, respect and obedience will diminish.*

## The Judicial Process

Justice is sublime and transcendental. Therefore, Buddhist transcendental wisdom is relevant to law, justice, democracy, freedom and rights. The *Prajnaparamita* intones transcendental wisdom of the right to freedom of speech, thought and conscience. To protect them, *Lord Buddha* established judicial process with due process of law, fair trial and rule of law.

*Lord Buddha* exhorted that:

> *…upholding the law - deliberate well, and lean not to either side …*
>
> *Nor dispense justice in an arbitrary manner; clearly ascertain both right and wrong.*
>
> *Wise men … hear both sides first, then judgment true declare;*
>
> *… a well-weighed verdict*[36] *gives, of righteous judge the fame forever lives.*

There are two prevalent legal systems in the world - the adversarial, accusatorial or the *Common Law System*; and the inquisitorial, continental or the *Civil Law System*. The principles of the adversarial system is enshrined in the *Bardo Thos Grol*.[37] The trial begins with the production of the accused before the *Lord of the Purgatory*, whereby the principle of *habeas corpus* is upheld. The principle of fair and public trial is demonstrated by the fact

35 *Mipham Rinpoche*, *rajaniti shastra,* p. 22.
36 The Doctrine of *Ratio Decidendi.*
37 *Garuda Purran - The Book of the Dead.*

that the accused is tried in the presence of the people.[38] His defence counsel, the *Lha dKarp* represents the accused and; the prosecutor represented by *Dre Nap* brings forth the charges against the defendant. The accused is charged with the commission of various offences or sins such as offence against person, property, cultural heritage, wildlife and environment, fraud, defamation among others. The judge, *Lord of Purgatory* grants the accused opportunity to plead innocent or guilty.

Consequently, the accused pleads guilty but invokes the doctrine of necessity and extenuating circumstances. The defense counsel submits the plea in mitigation of the offences that, the accused is ignorant; that he was not aware of the consequences of his actions. However, the prosecutor *Dre Nagpo* invokes the doctrine of *actus reus* and *mens rea* and submits that the accused is guilty of destruction of wildlife and the environment. He submits that the accused has used slanderous words, injured and killed many innocent animals, assaulted the poor and innocent, condemned the saints and their religion, burnt down the shrines and temples, polluted the ocean and injured marine life. Moreover, he has tormented his parents and demolished many stupas and monasteries.

The trial guarantees the right of the accused not to be condemned unheard or without proof beyond reasonable doubt. The *Judge of the Death* renders the judgment after hearing and considering the arguments of the parties. Therefore, the trial contains all the elements of modern fair trial fulfilling the requirement of the principle of *natural justice*, the right of *habeas corpus,* right to be represented by a *legal counsel*, the right to an uninterrupted hearing, the right to be informed of charges, right to defence, production of evidence and witness, and the delivery of a reasoned decision.

## The Rule of Law

Dicey's rule of law encompasses both the material rule of law and the formal rule of law. The material rule of law requires the realization of a just legal order, and the formal rule of law requires the state activities to be based on laws that are consistent with the constitution. In his treatise,

38 The *gshin-rje lasmkhan* includes representatives of the animals such as the Ox, Boar, Tiger, Lion, Raven, Monkey, Bear, Dog, Sheep, Rat, Owl, among other various animals.

*'The Law of the Constitution,'* he identified three principles, which constitute the rule of law:[39]

(1) The *absolute supremacy* or *predominance of regular law* as opposed to the influence of arbitrary power;

(2) *Equality before the law* or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts; and

(3) The *law of the constitution* as a consequence of the rights of individuals as defined and enforced by the courts.

Buddhism enjoins living life in conformity with righteous laws and principles, both in personal life and in work. Laws must be in accord with moral and ethical values,[40] which encompass cardinal,[41] spiritual, cultural, ethical, legal, moral and normative values. *Lord Buddha* reinforces these values - harmonious moral conduct: maintaining a level of conduct that meets community standards; adhering to community rules, not making oneself an object of distrust in the eyes of the community; refraining from conduct which would be detrimental to the community; contributing to a homogeneous and equal respect for the community laws and compliance therein.

The *Buddha* asked his followers to treat the *Dhamma* or the doctrine of righteousness and *Vinaya*[42] or the constitution and the *Code of Laws* as their teacher after His demise. According to the *'doctrine of righteousness,'* it is said that one may sometimes escape social sanction or punishment, but the ethical basis nevertheless results in punishment in this life or the next. In a Buddhist democracy, the rule of law requires not only consistency in the expression of the law but also in its application. Good law conforms to moral righteousness. It was proclaimed by *Guru Rinpoche* that, *"The powerful*

39 Dicey, A. V. (2003). *Introduction to the study of the Law of Constitution*, Tenth Edition, p. 202-203.

40 Blackstone, W. *Law is the embodiment of the moral sentiment of the people.*

41 Cardinal values of Plato include justice, wisdom, courage and self-control.

42 *The Vinaya Laws.*- Of all the monastic laws, the *Vinaya* laws are most extensive as well as intricate and reveal the legal aptitude as also the common sense on the part of the Buddhists.

*must know the limit of their power."* [43] The *rule of law* is the recognition of the *supremacy of law*, *elimination of discrimination*, *due process of law*, and *judicial review* of administrative action. It conforms to the Buddhist philosophy of *"Upekkha"* - impartiality, fairness, and understanding that all beings experience good and evil in accordance with the karma they have created; steadfastness in maintaining laws that are righteous.

## Equality

The justice system of the community of monks begins with the premise that everyone is equal before the law. The accused is presumed to be innocent until proven guilty. The Buddhist law prescribes rehabilitation and reformation, rather than retribution. The Buddhist belief in *Kamma* led to the development of a system that avoids inflicting unjustified, useless and illogical penalties. The Buddhist ideology of justice serves a pragmatic objective, leading to happiness and welfare for all. *Lord Buddha* said, *"I preach the law equally." Equality*[44] is one of the true supporting values of a constitution. He further mentioned that, *"On my path, all are considered equal."*[45] He also said:

> *…the caste and creed find no place in the path of Sambodhi.*
>
> *Just as rivers lose their identity after falling into the sea, all are equal in our doctrine and there cannot be discrimination against them.*

According to Dr. B.B. Singh, the *Buddha* even appointed a woman as a judge. The *Buddha* had entrusted *Visakha*, a lay-woman of repute, the responsibility to carry out judicial investigation into a disputed matter and also to give her judgment. Though *Visakha* was an exceptional personality, this elevating of a woman in the public life to the extent that they could act as judge was historic.[46]

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43 *Pad ma bka'thang,* p. 150 verso.

44 Freedom and equality mean different things to different thinkers. For example, leftist thinkers emphasize equality, while rightist thinkers favor freedom. *Nietzsche,* who likes aristocracy and does not value equality, is a philosopher to the extreme right.

45 *bka'-'gyur* sutra, *zhapa,* p. 240 verso.

46 *Buddhism and the Women Uplift in India.*

The Buddhist teachings regard every individual as equal and individually responsible for all the volitional acts which he commits. The law i.e. *Kamma* is equal for all beings. Low or middle or high, the law cares for nothing. The Law has no preference.[47] It was reiterated in *Dharmasangiti Sutra* as:[48]

> *The Law is equal for all beings. For low or middle or high the law cares nothing. So I must make my thought like the law. The law has no regard for the pleasant. Impartial is the law…The law does not seek refuge. The refuge of the entire world is the law…The law has no preferences. Without preference is the law. So I must make my thought like the law.*

## Due Process of Law

Due process of law is a fundamental feature of the Buddhist legal system. It means ensuring lawful arrests and searches; access to a fair trial and hearing; access to legal remedies and elimination of unnecessary delays in the judicial processes. It is called *"Nati"*[49] in *Pali*, which formulates the six non-permissive cases of *Tagganiya-kamma*[50] and the twelve cases of a proceeding *Sammukha –Vinaya – "Proceeding in Presence."* [51] In Buddhism, for the decision and settlement of cases *"the Proceeding in Presence"* must be performed:

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47 Sivaraksa, S. *Buddhist Concept of Law*.

48 *World Scripture: Comparative Anthology of Sacred Texts*, Volume 1991, Part 2

49 It is noted that, *"The Bhikkhus must be warned, While warning him, he should be reminded of the law, which he has violated. The offender ought to be charged with the particular offence. The offender must be prosecuted by a discreet and able Bhikkhu. The Bhikkhus approve the carrying out of the Tagganiya-kamma against the Bhikkhus by remaining silent. However, if the motion is not approved, the Bhikkhus must object. The process has not been carried out in a full assembly of properly qualified persons, according to law and justice. The process must be carried out in the presence of the litigant parties. The accused person must confess himself guilty. The proceedings must be carried out with justice in the presence and approval of all the Bhikkhus belonging to the particular circuit."*

50 A proceeding has to be carried out in a full assembly of qualified persons, according to law, and in the presence of the litigant -when it has been carried out after the accused person has confessed himself guilty.

51 *Pekkheti anupekkhetiti yatha so tam attham pekkhatik eva punappunan ka pekkhati evam karoti. (Samanta Pasadika.) Sammukha-vinaya-patirupakena. The Rule of Procedure*, called *Sammukha-vinaya*, or *'Proceeding in Presence,'* is one of the seven modes of settling disputes in the closing chapter of the *Patimokkha* (*'Vinaya* Texts,*'* Vol.i, p.68), and is more fully described in *Kullavagga* IV, 14,16, and other sections.

- For the consciously innocent;
- In the case of those who are no longer out of their mind;
- On confession of guilt;
- By majority of the chapter;
- For the obstinate; or
- By covering over as with grass.

And a dispute is to be settled in conformity with seven Buddhist principles:[52]

- *mNgon sum du du lba sbyin pa– sammukha vinaya* (proper decorum).
- *Dran pas du lba sbyin pa – amudha vinaya* (legality).
- *Ma smyos pas du dul ba sbyi npa – amudha vinaya* (freedom from duress).
- *dGang tshel shing mang po sbyin pa – yad bhuyasikiya* (decision through majority).
- *Ngo bo nyid btsol ba sbyinpa – tattva svbhavaisiyah* (basis for judicial decision).
- *rTsa bkra pa lta bu sbyin pa – sterna prastarakah* (resolution through rebuttal).
- *Khas blang bar sbyin pa – pratijna karakah* (guilty plea).

Bhutan is a Buddhist country and most laws are derived from the principles of Buddhism. The Bhutanese legal system has a long traditional background,[53] based on Buddhist natural law and on the *Zhabdrung Ngawang Namgyal*'s *Code of Law*.[54] The *Code* was based on the fundamental teachings of Buddhism and addressed the violation of secular and temporal laws[55]

52 *Vinaya* Text, *Nyapa,* p.384.

53 In 1636, a Tibetan writer had referred to the *"Laws of Lhomoen,"* at pages 17, 26 and 37 of *Zhal-lce bCudrug*.

54 *Zhabdrung Ngawang Namgyal* is the first theocratic ruler in Bhutan.

55 It is said that the spiritual laws resemble a *Silken Knot (dargyi mdudphod)*. The *Silken Knot* is light and loose at first but gradually tightens with the accumulation of negative deeds. Similarly, secular laws are compared to a *Golden Yoke (gser-gyi gnya'shing)* that

alike, which serves as the foundation of the contemporary Bhutanese legal system.[56] These laws enshrine the *Ten Pious Acts* referred to as *Lha chos dge ba bcu* and the *Sixteen Virtuous Acts of Social Piety* referred to as the *Mi chos gtsang ma bcu drug*. The *Code* was amended several times over the centuries, but it continues to uphold the principles of Buddhism and natural justice.

It ensures discipline in arguments, exhaustiveness of hearing, time of reflection, documentary records and serves as a self-checklist. This system eliminates repetitive arguments, psychological intimidation and delaying tactics. It recognizes both the static and the dynamic impact of information. The exhaustive stages of hearing are essential but cases may be stopped at any stage on a motion for a *Summary Judgment*, *Out of Court Settlement (Negotiated Settlement)* and withdrawal of cases. The process is in pursuit of the truth and facts, which strengthen due process, fair trial and the rule of law. The *Hearing Procedure* is a series of logical steps that require chronological sequence, and its implementation translates into results.

## Fair Trial

The right to a fair trial has been defined in numerous regional and international human rights instruments. The aim of the right to fair trail is to ensure the proper administration of justice. The right to fair trial includes the following:

- Right to equality before the law;
- Right to be heard by a competent, independent and impartial tribunal;
- Right to a public hearing;
- Right to be heard within a reasonable time;
- Right to counsel;

grows heavier and heavier with the degree of the crime.

56 *Zhabdrung Ngawang Namgyal* promulgated the first set of Bhutanese laws and codifications of these laws were completed in 1652 during the reign of the first temporal ruler *Deb Umzed Tenzin Drugyel*.

- Right to interpretation;
- Right to be notified of charges in a timely manner;
- Right to adequate time and means for the preparation of a defense;
- Right of the accused to defend himself or herself, or the right to a counsel chosen by the accused and the right to communicate privately with the counsel;
- Right not to incriminate oneself;
- Right to appeal at first instance to a higher court; and
- The prohibition of double jeopardy.

*Lord Buddha* also enunciated these rights when he said:

(1) Be charged with the particular offence which is supported with evidence and witnesses;

(2) Be in the presence of a representative and

(3) Be ordered to remember whether he has or has not committed, brought upon himself a new offence ( e.g., obstinacy or prevarication).

Further, the fair trial principle is clearly depicted in the *Seven Practices of Reconciliation*:[57]

(1) The first practice is *samukha-vinaya*, or the face-to-face sitting. According to this practice, the dispute must be stated before the entire convocation of *Bhikkhus*, with both sides of the conflict present. This is to avoid private conversation about the conflict, which inevitably influences people against one side or the other, creating further discord and tension.

(2) The second practice is *smrti-vinaya*, or remembrance. In the convocation, both parties involved try to remember from the beginning everything that led up to the conflict. Details are presented with as much clarity

57 *Seven Practices of Reconciliation* (*saptadhikarana-samtha)* was formulated after four days of discussion by the *bhikkhus*. It is to be used in settling disputes within the *Sangha.*

as possible. Witnesses and evidence are provided, if available. The community listens quietly and patiently to both sides in order to obtain adequate information to examine the dispute.

(3) The third practice is *amudha-vinaya*, or non-stubbornness. The monks in question are expected to resolve the conflict. The community expects both parties to demonstrate their willingness to reach reconciliation. Stubbornness is to be considered negative and counterproductive. In case a party claims he violated a precept because of ignorance or an unsettled state of mind, without actually intending to violate it, the community should take that into account in order to find a solution that is agreeable to both sides.

(4) The fourth practice is *tatsvabhaisya-vinaya*, or voluntary confession. Each party is encouraged to admit their own transgressions and shortcomings without the need to be prodded by the other party or community. The community give each party ample time to confess his failings, no matter how trivial they may seem. Admitting one's own fault begins a process of reconciliation and encourages the other party to do likewise. This leads to the possibility of full reconciliation.

(5) The fifth practice is *pratijnakaraka-vinaya*, or accepting the verdict. When the verdict is reached, it is read aloud three times. If no one in the community voices disagreement, it is considered final. Neither party in dispute has the right to challenge the verdict. They have agreed to place their trust in the community's decision and carry out whatever verdict the community reaches.

(6) The sixth practice is *yadbhuyasikiya-vinaya*, or decision by consensus. After hearing both sides and being assured of the wholehearted efforts by both sides to reach a settlement, the community reaches a verdict by consensus.

(7) The seventh practice is *trnastaraka-vinaya*, or covering mud with straw. During the convocation, elder monks are appointed to represent each side in the conflict. They are high monks who are deeply respected in the *Sangha*. They sit and listen intently, saying little. But when they do speak, their words carry special weight. Their words have the capacity to soothe and heal wounds; to call forth reconciliation and forgiveness, just as straw covers mud, enabling someone to cross it without dirtying his clothes.

*Stare decisis* is a legal principle by which judges are obliged to respect the precedent established by prior decisions. The *Latin* maxim *stare decisis et non quieta movere* means to stand by the decisions and not disturb the undisturbed. Similarly, in Buddhism it is said that:[58]

> *After a legal question has been settled; and if a disputant re-opens the question, such re-opening is a Pakittiya;*
>
> *If one who has conveyed his consent complains of the decision, such complaint is a Pakittiya.*

His Eminence *Jamgon Kongtrul Rinpoche* also said that we have to satisfy both loser and the winner through impartial and due process.

## Criminal Trial

Criminal justice is the system of practices and institutions to maintain social control; deter and mitigate crime; either through religious belief, imposition of penalties on perpetrators of crime. Generally, criminal justice play prominent role in all societies in the world. In Buddhism, there are *Ten Virtuous Acts*, *Lhachos dge-ba bcu*:

- Refraining from taking life – *pranatighatad virati.*
- Refraining from taking that which is not given – *adattadanad virati.*
- Refraining from engaging in sexual misconduct – *kamamithyacarad virati.*
- Refraining from lying – *mrsavadat prativirati.*
- Refraining from speaking harshly – *parusat prativirati.*
- Refraining from slandering – *paishunayatc prativirati.*
- Refraining from engaging in worthless chatter – *sambhinnapralapat prativirati.*
- Refraining from being covetous – *abhidhyayah prativirati.*

58 See *Vinaya Text,* Vol. 20 part III, p. 54.

- Refraining from being malicious – *vyapadat prativirati.*
- Refraining from holding wrong views – *mithyadrsti prativirati.*

These *Ten Virtuous Acts* can broadly be divided into three categories of non-virtuous actions to be avoided and they are:

- The three non-virtuous actions of the body – *truni kayaduscaritani.*
- The four non-virtuous actions of the speech – *catva vagduscaritani.*
- The three non-virtuous actions of the mind – *trini manoduscaritani.*

Criminal justice has two essential pre-conditions of criminal liability that is guilty mind, or the *mens rea* and; commission of an act or the *actus reus*. The commission of crime involves the following four stages:

- Contemplation or the intention to commit the crime;
- Preparation to commit the crime;
- Attempt to commit the crime; and
- The actual commission of the crime.

The *Buddha* has noted that, *"All wrongdoing arise because of intention…"* Any act of an individual by itself does not constitute a guilt or crime, unless it is accompanied by a guilty mind - *actus non facit reum, nisi mens sit rea.*

In Buddhism it is called *sbyor dngos-rjes gsum:*

*a.* *sbyor ba (Parikalpa)/ bsam sbyor* or the contemplation or planning of the acts.

*b.* *dGnos gzhi (Prayatna)* or the implementation of the plan

*c.* *rjes/ mthar thug (Parinispanna)* or the completion of the actual crimes.

Similar to classification of an offence[59] depending upon the degree of crime

59 In the *Buddhist Law Code,* offences are classified under seven categories in a descending order viz. *Parajika, Sanghadisesa, Aniyata, Nissaggiya- Pacittiya, Pacittiya, Patidesaniya,* aad *Sekhiya.* From the legal point of view, *Parajika* is the gravest offence, *Sekhiya* the lightest one. There are also two kinds of offences, which come under *Thullaccaya* and

under the modern criminal jurisprudence, even in Buddhism the crimes have been graded as follows:[60]

a) The gravity of culpable homicide is differentiated depending on the primary and secondary intentions: *'Dod chags kyi sgo nas gsod pa* (*sha khrag phags pa*), *zheldang gi sgo nas gsod- pa (sdang bai sems kyi gsod pa*) and *gtimug gi sgo nas gsod-pa.*

b) Larceny or taking that which is not given (*Ma byin pa len pa)* can be of different kinds: *mThus/dbang gis ma byin par len pa* (taken by force for example seizure and booty from the war, dacoity, extortion.), *Thabs kyis ma byin par len pa* (taken through cheating), and *Jab bu/sgyus ma byin par len pa* (theft without knowledge of the owner).

c) The sexual offences *(log gyem* or *mi tshangs spyod pa)* committed with one's wife (*rang gyi bud med*); sexual offence committed with other's wives (*gzhan gyi bud med)* and other women (*bud med gzhan*); and ordained or celibate women *(chos kyis bsrungs pa'i bud med)*

d) Offence of sowing or incitement can be of *mngon phra, lkog phra*, *ngag 'khyal*, *brnab sems*, *gnod sems* and *log-lta*.

## Judicial Temperament

Justice is a social virtue and an inherent necessity for the human beings. The delivery of justice requires institutional building, legal framework, infrastructural development, technology and human resources. *Mipham Rinpoche* said:[61]

> *Good laws are the guardian and protector of the world;*
>
> *When the laws punish the guilty, it appeases the good people and scares the bad ones.*

According to John Rawls, *"Justice is the first virtue of social institutions."* It promotes virtues and vitiates vices. With the changing time, justice

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*Dukkata* which were a later addition. *Thullaccaya* as the analysis will show, is weaker in jurisdiction than *Sanghadisesa* and *Dukkata* even less than *Pacittiya.*

60 *bKa' 'gyur*, *Mani bka'bum,* and *Zhal lung.*

61 *Mipham Rinpoche*, *Rajaniti Shastra,* 116.

acquired multiple dimensions and categories such as *commutative justice*, *corrective justice*,[62] *compensatory justice*, *social justice*,[63] *distributive justice*,[64] *institutive justice*, *economic justice*,[65] *political justice*,[66] *global justice*[67] among others. *Lord Buddha*'s emphasis on the individual rights to take only what is due to him is echoed in Aristotle's concept of *"corrective justice."* In Buddhism justice encompasses the principles of equality, distributive justice and corrective notions. The laws of *Gyalpo Melong Dhong* incorporate the concepts of retributive, deterrent and reformative justice. In Buddhism, justice should not be based on the four wrong causes of behavior or prejudices: [68]

(1) Prejudice caused by love or desire,

(2) Prejudice caused by hatred or animosity,

(3) Prejudice caused by delusion or stupidity, and

(4) Prejudice caused by fear.

A judge should decide a case with utmost care and deliberation. An important quality of a person whose work is concerned with judging and punishing people is that he must analyze the case from many angles and situations. The *Buddha* said:[69]

> *You first have the advice of a being all-wise like me; It is no wonder if you should judge your case fairly and justly avoiding the four way types of wickedness.*

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62 *Corrective Justice* promotes equality in exchange of goods in accordance with the amount and quality of labour contained therein

63 *Social Justice* aims at abolition of all kinds of inequalities, which may result from the inequalities of wealth, opportunity, status, race, religion, caste, and title, among others.

64 *Distributive Justice* stresses the role of the State.

65 *Economic Justice* at distribution of material resources is for the common good and to prevent concealment of wealth.

66 *Political Justice* is absence of any unreasonable or arbitrary distinction among the people in political matters. It includes single electorate and adult franchise. Every citizen is entitled to contest in elections and participate in voting irrespective of their status.

67 Refer *What is Gobal Justice?* Pogge, T. *Politics as Usual: What Lies Behind the Pro-Poor Rhetoric*.

68 Rhys Davids, T.W. (1957) (ed.), *Dialogues of the Buddha* Vol. IV, trans., Rhys Davids. T. W. and C.A.F. (London: Luzac & Company Ltd., 228.

69 Cowell, E. B. (ed.), N. 67.

When a case arises each party has to be heard patiently and empathetically; and the arguments considered and evaluated before judgment is given. Partiality, ill will or fear should not be allowed to influence one's judgment. In the *Mahavastu*, it is stated that:

> *When a dispute arises, he should pay equal attention to both parties and hear the arguments of each, before deciding according to what is right. He should not act out of prejudice, hatred, ignorance or fear.*

It is said that a judge fails to uphold justice, if he deprives a rightful owner of his property; or pronounce an innocent man guilty out of grudge or animosity against him; or because he was disturbed by another matter, without applying law and legal principles to the case. A judge is exhorted to come to a decision only after carefully considering all relevant facts. A judge who fails to follow these rules is likely to lose prestige and suffer loss of status among his colleagues as well as lose the confidence of the people. [70]

## Social Justice

Social justice means a fair distribution of resources, the impartial application of law and right to enjoy basic freedom. It is said that when one's mind is pure, society will also be purified. Economic policy should be based on fair competition and equal opportunities. There should not be concentration of wealth in a few hands; which will lead to social injustice. According to Buddhist teachings, good laws will result in a healthy social order. A king or ruler should ensure a system of impartial justice.

Thomas William Davids[71] said:

> *The Buddha's doctrine of love and goodwill between man and man is here set forth in a domestic and social ethics with more comprehensive detail than elsewhere. And truly we say even now of this Vinaya or code of discipline, so fundamental are the human interests involved; so sane and wide is the wisdom that envisages them that the utterances are as fresh and practically as binding to-day and here as they were then at Rajagriha. Happy would have been the village or the clan on the banks*

70 *Dri-ma med par grags pa'i mdo (Vimalakirti Nirdesa Sutra).*

71 (http://www.tipitaka.net/tipitaka/study/pageload.php?book=004&page=01) *The Layman's Code of Discipline*, *Sigalovada Sutta.*

*of the Ganges where the people were full of the kindly spirit of fellow feeling, the noble spirit of justice, which breathes through these naïve and simple sayings.*

## Natural Rights

*Lord Buddha* was the first social reformer who empowered people to atone negative *Karma*. *Buddha* also propagated concept of "*natural rights*," i.e., rights which belong to a person by nature or virtue of being a human being. He promoted the right to life or denounced destruction of it. Today, the rights to life and liberty are fundamental rights in granted by almost all the constitutions and human rights charters.

The concepts of rights, freedoms and dignity are ingrained in Buddhism. It accords high regard to human life and dignity. Reverence for the various principles of human rights has been woven in the tapestry of our society. Human rights extends to all sentient beings as compassion extended to all the sentient beings and protection of the five elements. Social interest in conservation of resources covers conservation of natural resources.

The rights enshrined in the constitution of different countries are broadly classified into civil, political, substantive, social, economic, positive, negative, corrective, distributive, perfect, imperfect rights, to name a few. In addition, there are rights *in rem*, *in personam* and proprietary rights. Therefore, we must be conscious of the national aspirations, as well as the existence of perfect rights, which are recognized and enforced by law - *'ubi jus ibi remedium'* i.e., where there is right, there is remedy.

### Democracy

Humanity pursued spiritual liberation relentlessly and they struggled for freedom, liberty and security. Many religious leaders liberated the humanity from the social ills through religious reforms. Simultaneously, the nations battled against external threat for security, independence and sovereignty. The people pursued internal peace, security, individual right, personal freedom and liberty. The result of that pursuit is democracy.[72] In the *Way to*

72 Many Ancient *Sumeria* and India (*Maha Janapadas* and *Vaishali*) are believed to have had some form of democratic set-up initially. However, *Athenian democracy* is among the first to be recorded and one of the most important democracies in ancient times.

*Political Life, Lord Buddha* said:

> *The Way could illuminate the realm of politics, assisting those involved in governing the kingdom to bring about social equality and justice. If you practice the Way, you will increase your understanding and compassion and better serve the people. You will find ways to bring about peace and happiness without depending on violence at all. You do not need to kill, torture, or imprison people, or confiscate property. This is not an impossible ideal, but something, which can be actually realized. When a politician possesses enough understanding and love, he sees the truth about poverty, misery, and oppression. Such a person can find the means to reform the government in order to reduce the gap between rich and poor and cease the use of force against others.*
>
> *My friends, political leaders and rulers must set an example. Don't live in the lap of luxury because wealth only creates a greater barrier between you and the people. Live a simple, wholesome life, using your time to serve the people, rather than pursuing idle pleasures. A leader cannot earn the trust and respect of his people if he does not set a good example. If you love and respect the people, they will love and respect you in return. Rule by virtue differs from rule by law and order. Rule by virtue does not depend on punishment. According to the Way of Awakening, true happiness can only be attained by the path of virtue.*

Similarly, His Holiness *Dalai Lama* said,:-

> *There is similarity between Buddhism and the concept and practice of democracy. At the heart of Buddhism lies the idea that the potential for awakening and perfection is present in every human being and that realizing this potential is a matter of personal effort. The Buddha proclaimed that each individual is a master of his or her own destiny, highlighting the capacity that person has to attain enlightenment...The Buddhist world view recognizes the fundamental sameness of all human beings. Like Buddhism, modern democracy is based on the principle that all human beings are essentially equal... Not only do we desire*

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The word *"democracy"* (Greek *"rule by the people"*) was invented by Athenians in order to define their system of government, around 508 B.C. Abraham Lincoln the President of United States said, *"government of the people, by the people, for the people."*

> *happiness and seek to avoid suffering, but each of us also has an equal right to pursue these goals. Thus not only are Buddhism and democracy compatible, they are rooted in a common understanding of the equality and potential of every individual.*

In Buddhism, the brotherhood of monks was established on democratic foundations with a constitution and code of law governing their conduct of the monks.[73] There was a culture of equalitarian interpersonal relations, advocacy and integrative social and international relations. The rule of righteousness recognizes liberty in its three dimensions, i.e. liberty of thought, liberty of speech and liberty of action. According to Buddhism, liberty of thought depends on the freedom of mind; liberty of speech on what we could express in words; and liberty of body on all external actions. Bob Thurman[74] said that the Buddhist principles of enlightenment, education, individualism, altruism and egalitarianism are achieved through democracy.

The essence of the fundamental rights is the respect for human beings. The provisions of the fundamental rights are based on spiritual values, traditional respect and human rights. The right to life, liberty and security of a person are extremely important in the constitutional doctrine and the right to life in Buddhist principle. Pertaining to right to life, *Lord Buddha* said:

> *Every living being deserves to enjoy a sense of security and well-being. We should protect life and bring happiness to others.*

Buddhist monastic governance is a deliberative form of democracy. The principles and practices governing the organization of the monastic community have indirect effect on the social philosophy and political governance in the Buddhist countries. The monastic community was governed and regulated by a well-formulated *Code of Conduct,* which formed an integral part of the Buddhist teaching. The day-to-day affairs of the Buddhist community were governed by a liberal culture of equalitarianism based on the seniority of ordination in the monkhood.[75] The monastic body

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73 Refer *International Journal of Buddhist Thought & Culture*, Vol. 11.

74 Professor of Indo-Tibetan Studies at Columbia University, President of Tibet House US, and President of the American Institute of Buddhist Studies (AIBS), NYC and Woodstock, NY.

75 *Brahmajala* Discourse No. 3, which enumerates some 62 types of '*religions and*

lives in communal harmony, with communal property and with little or no private material possession. The *Sangh*a also has responsibility towards the wider society of public in general. *Lord Buddha* said that if any institution or country wished to maintain its independence, it should strengthen its more democratic forms of governance.[76]

Within the monastic community, a practice of debates and discussions amongst equals was recognized in keeping with the precept that the truth must be discovered by a process of rational inquiry untrammeled by faith or tradition.[77]He asked the disputants to adopt a dispassionate and critical attitude, employing logic and reason in resolving religious and philosophical disputes. Therefore, Buddhism adopted the logical and rationale form of governance which constitutes a *"deliberative democracy."* This led to a participatory practice and accommodation of difference of opinion and even dissent, without imposing majoritarian decision. In juridical history, personal rights like the right to vote,[78] freedom of speech, thought, conscience and personal liberty occupied a higher status in the hierarchy of values than property rights.

## Conclusion

Many of the legal principles and concepts of the modern legal system and jurisprudence find origin in Buddhism. Buddhist teachings recognize the equality and freedom for the advancement of democracy and rule of law.[79] The system of constitutional values is built on two central points of the substantive value of human rights and the procedural value of democracy. The world has been enriched by the feats of ordinary men and women, shaping the society over the years.

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*philosophies'* (Walshe 1987). *Laksiri Jayasuriya*: *Buddhism*, *Politics*, *and Statecraft.*

76 Mishra, (2004). *International Journal of Buddhist Thought & Culture* in his succinct and readable account of this episode, draws pointed attention to an inherent conservatism in governance (e.g., paying heed to custom along-side other more liberal features such as participatory decision making. This indicates the functional and pragmatic nature of governance.

77 Refer the *Kalama Sutta* or the *Charter of Free Inquiry* (*Bhikku Soma* 1963).

78 The Buddhist concept of *"Tsa Trampa"* was synonymous to the modern concept of election.

79 Professor Venter's developed a hierarchical system of values, which were enumerated in section 1 of the South African *Constitution*.

This is my attempt to raise awareness of the magnitude of work done by so many scholars on Buddhism and laws. There are many similarities in the natural and positive laws and the Buddhist canons. Scholars and thinkers before us have inspired the rest of us to go beyond our own expectations, and through *Karmic* action, we are here, where the great son of India and saviour had walked in flesh and blood to save the tormented soul and the anguished mind. In honouring Him most reverently, let us invoke his blessings to follow the path of *Dhamma*, the eternal and universal laws of liberation and emancipation to benefit all the sentient being.

# *Democratic Transition in Bhutan: A brief Highlight of Inspiration from the Indian Constitution*[1]

## Introduction

The government of India declared 26 November as the *Samvidhan Divas* or the *Constitution Day* through an official gazette on 19 November 2015[2] to pay tribute to the founding fathers of the *Constitution*. *The Constitution of India* was adopted on 26 November 1949. Thus 2019 marked the 70th anniversary of the adoption of the *Constitution of India*.

India is one of the largest democracies in the world and its *Constitution* is one of the lengthiest. It witnessed more than one hundred amendments. Comparatively, in terms of its size the Bhutanese *Constitution* is one of the newest and the shortest in the world; and it has not witnessed a single amendment in eleven years. It is a small, organic document which contains constitutional values and practices that best suits Bhutan. Its endurance without changes for more than a decade proves the vision and wisdom and visionary foresight of His Majesty the Fourth Druk Gyalpo Jigme Singye Wangchuck, *Father of the Constitution*; it has fulfilled the hopes and aspiration of the people; and secured the sovereignty of the country. Befittingly, Bhutan adopted 11 November, the birth day of His Majesty the Fourth *Druk Gyalpo* as the *Constitution Day* as a tribute to Him.

Though Bhutan and India are different in size, geography and population, we have cultivated a strong bond of friendship beginning with the visit of the Prime Minister Jawaharlal Nehru in 1958. The defining spirit of Indo-Bhutan friendship was laid on a solid foundation when Nehru said to the people of Bhutan in the Royal presence of our Late His Majesty the Third *Druk Gyalpo* Jigme Dorji Wangchuck that:

> *India and Bhutan are members of the same Himalayan family and should live as friendly neighbors helping each other.*

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1 Contributed by Lungten Dubgyur.

2 *The Hindu,* Government of India formally notifies 26 November as the *Constitution Day.*

Today, Bhutan and India are one of the friendliest countries in the world. The mark of this strong Indo-Bhutan friendly relationship is visible in Bhutan in all spheres of its development. Law is one such area. We have read, analyzed and passed examinations in one of the word's largest and complicated *Constitution* as law students in Indian colleges. Being fortunate to be a part of the history of constitution-drafting event in Bhutan, the knowledge of the *Indian Constitution* proved useful; and now, it is gratifying as we are charged with interpreting or implementing it. This Paper is an abridged version of the talk I delivered at the *Nehru-Wangchuck Centre*, Thimphu on 29 November 2019, on the occasion of the 70th anniversary of the *Indian Constitution*.

**Sowing the Seeds of Democracy**

Bhutan has been blessed with magnanimous and visionary leadership of successive monarchs. Our kings have always kept the welfare of the people above their own comfort and safety. The enthronement of the first hereditary monarch *Druk Gyalpo Gongsar* Ugyen Wangchuck by the people of Bhutan with the signing of the historic social contract or the *Genja* at Punakha in 1907 ended the discord, strife and political instability in the country. Since then the country witnessed an unprecedented socio-economic development and political transformation. One hundred years later, in 2008, a written *Constitution* was adopted. It also marked the one hundred years golden rule of the Wangchuck dynasty. It also marked the beginning of the golden reign of His Majesty the Fifth *Druk Gyalpo*, Jigme Khesar Namgyel Wangchuck.

Our kings accorded the highest priorities to the welfare and safety of the people and; the security and sovereignty of the country. *His Majesty the Fourth Druk Gyalpo* initiated the decentralization of governance early on during his reign. He established the *Local Government* institutions such as the *Dzongkhag Yargye Tshogchung (District Development Council)* in 1981; and the *Gewog Yargye Tshogchhung (Gewog Development Council)* in 1991. These institutions provided participatory platforms for the people to voice their concerns in their development programs. The success of these people-centric institutions gave way to adoption of similar democratic institutions and practices at the grass-root level which gave people opportunity to elect their own representatives and make decisions which served them

the best. His Majesty always desired that the social and political system of the Kingdom should progressively evolve along the path that secures and protects the social order founded on justice, peace and harmony, the principal tenets of *Gross National Happiness*.

Before His Majesty decided to initiate the drafting of a written constitution, His Majesty systematically strengthened the various organs of the government. For instance, His Majesty ensured the full independence of the *Judiciary* from the *Executive* and the *Legislature*. He also established many constitutional bodies such as the *Royal Civil Service Commission*, *Royal Audit Authority*, *Anti-Corruption Commission*, *Election Commission* and *Office of the Attorney General*. He also ensured an independent media and civil society organizations to provide both horizontal and vertical checks and balances which are essential to sustain a healthy and robust democracy. His Majesty had also issued a *Royal Decree* in 1998 relinquishing His executive powers to an elected *Council of Ministers* to prepare for democratic changes.

**The Royal Decree**

On 4 September 2001, His Majesty King Jigme Singye Wangchuck decreed that a written *Constitution* be promulgated for the Kingdom. The noble decision of His Majesty to grant power of governance to the people at the grass root level was incubated for a long time. It was the perpetual desire of His Majesty the King to devolve power of governance to the people and institute a *Constitutional Democracy*. His profound wisdom and visionary foresight is evident from the prophetic command that:

> *The destiny of the nation lies in the hands of the people. We cannot leave the future of the country in the hands of one person.*

The innate desire of His Majesty led Him to resolve that Bhutan should have a *Constitution*, which would spell out the rights and obligations of those who govern and those who are governed. His Majesty refuted the idea that the *Constitution* was a gift from the *Golden Throne*. He constantly reiterated that this was the right time to initiate the drafting of a written *Constitution* for Bhutan.

In the vision of His Majesty the King, the adoption of a written *Constitution* was not to delineate the traditional roles of the organs of the government

and the duties of the people; but to establish a democratic system, which would be in the best interest of the Bhutanese people for all times to come. It was the noble aspiration and desire of His Majesty the King to adopt a written *Constitution* in times of peace. His Majesty said that the principles and ideals of a democracy are inherently good and a democratic system is desirable for Bhutan to fulfill the aspirations of a rapidly modernizing state - ensuring security, sovereignty, peace, prosperity, justice, and uphold the fundamental values of human welfare and the wellbeing of the people. It is against this backdrop that a *Royal Decree* was issued to constitute a *Constitution Drafting Committee* to draft the *Constitution*. This was followed by constitution of a thirty-nine member *Committee*. The *Committee* submitted the *First Draft of the Constitution* in one year.

**The Essence of the Bhutanese Constitution**

The constitution of a country is its sacred and indispensable document. It must encompass the past, present and the future of a country. It should spell out the needs of the time, keep pace with development including technology, preserve cultural heritage, natural resources and environment. But most importantly, the strengthening the security and sovereignty of the country; and the perpetuation and advancement of the Bhutanese civilization.

The members of the *Drafting Committee* was tasked with the indomitable challenge of coming up with the best of the constitutions in the world. The first, most immediate and difficult task, which the members faced was coming out with the basic framework, and the outline of what should be incorporated in the in the *Constitution*.

There was general agreement on the issues of sharing governmental power between the *Executive*, *Legislature* and the *Judiciary*. But this required understanding the concept of power sharing or separation of powers. Separation of power is an indispensable means for locating the responsibility and fixing appropriate accountability measures in place. An executive body, unambiguously charged with executing a policy set by the lawmakers, can be held liable for its performance or non-performance. If that clear line of distinction and responsibility is blurred, then national and the public interest alike will be in jeopardy.

The members were mindful that the *Constitution* must also secure everlasting peace, individual rights and freedom. While justiciable *Fundamental Rights* were considered as the *sine qua non* elements of the *Constitution*, it was also felt that the *Constitution* must also provide corresponding *Fundamental Duties*. The article on the *"Principle of State Policies"* has been included to guide government in the governance of the country.

In line with His Majesty's vision of decentralization of power to the people, the *Constitution* further strengthened the devolution of power to empower the people at the grassroots level. Therefore, it was essential to develop a mechanism under the *Constitution* to enable people to participate in the political process through periodic elections and proportional representations. Social welfare and economic development goals are secured by the *Constitution* as the foremost policy to achieve the goals of *Gross National Happiness*.

The Bhutanese *Constitution* is a 21st century document, a peace-time product. The *Constitution Drafting Committee*, cognizant of Bhutan's existence in a globalized world took a look at scores of other constitutions. But, except for the cross-cutting universal constitutional institutional bodies, values and principles, the *Committee* refrained from the indiscriminate importation any particular provision or clause. However, the comparative studies afforded us the opportunity to learn and prevent pitfalls. That makes our *Constitution* unique in a sense, with no need for premature amendments. Bhutan's transition to democracy has rightly invoked that idea, particularly when our political institutions and the *Members of Parliament* sanctify constitutional provisions and pitch their argument as to whether one's actions including government is constitutional or not. Any important decisions are made or unmade based on the premise of the *Constitution*.

**Inspiration from the Indian Constitution**

The *Indian Constitution* is one of the world's most working *Constitution*. This is due to the coordinated efforts of all of its institutions; and most importantly, its citizens who uphold the *Constitution* as a sacred document. The modern constitutional theorists acclaim that for the *Constitution* to work and thrive, there has to be a coordinated effort to uphold its provisions under the principle of *"coordinated construction theory."*

The *Indian Constitution* was a huge resource to draw on during the drafting of our *Constitution*. The *Indian Constitution* is not only time-tested but a living document that provided an array of provisions, making India a vibrant democracy in the world. The constitutional debates revolved around inclusion of certain basic features such as whether the *Constitution* should adopt *federalism* or a *unitary* or *parliamentary* form of government; whether the *Legislature* should be represented by a single or two-house *Parliament*; and most importantly when it comes to *Judiciary* – whether to adopt a *Concentrated* or *Diffused System*. The constitutional creation of the *Supreme Court of Bhutan* adopting the *Diffused System* like *Indian Supreme Court* provided the *Supreme Court of Bhutan* as the final interpreter and the guardian of the *Constitution*. This system justly guarantees horizontal check and balances with the other branches of the government while other constitutional offices equally provide delineated vertical checks and balances in a democracy. The creation of the *National Council* equivalent to *Rayja Sabha* in a manner that provide wisdom in law making was an important inspiration wherein the roles of *National Council* in *Money* and *Finance Bills* (including the passing of *Budget)* had to be clarified by the *First Constitutional Case* decided by the *High Court* and later affirmed by the *Supreme Court of Bhutan*.[3]

The landmark decisions of the *Supreme Court of India* in cases over the decades were inspiring. The *Kesavananda Bharati v. State of Kerala*[4] case which laid the principles of the *"Basic Structure of the Constitution"* was useful. The court had also laid emphasis on the principles of supremacy of the constitution, rule of law, parliamentary form of government, welfare state, doctrine of separation of power, principle of free and fair election, equality before the law and *judicial review*. The recent decision of the *Supreme Court* in the *Ayodhya Case*,[5] which crafted a win-win outcome along ethno-religious line is inspiring for the judiciaries of the world.

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3 *Opposition Leader v. Government*, 2010. It is a *Case* concerning the constitutional validity of the tax revision by the government.

4 1973 4 SCC 225. It is the landmark decision of the *Supreme Court of India* that outlined the basic structure of the *Constitution*.

5 On 9 November 2019, the *Supreme Court of India* headed by *Chief Justice* Ranjan Gogoi ruled that the land belonged to the government based on tax records. It further ordered the land to be handed over to a trust to build the Hindu temple. It also ordered the government to give an alternate five-acre tract of land to the *Sunni Waqf Board* to build the mosque.

The application of the *doctrine of judicial review* over recent years by the Indian *Supreme Court* was another area which did not escape the attention of drafter of the Bhutanese *Constitution*. The *Supreme Court of India,* now not only reviews decisions of the lower courts but also re-reviews its past decisions under the doctrines of *'curative petition'* and *'complete justice.'* The doctrine of *Judicial Review* enables rectification of errors; address grievances occurring out of judicial oversight, and most importantly remedy the miscarriage of justice. I am sure, the Bhutanese courts will, based on the context and issues which com before them, will apply these profound principles laid down by the Indian *Supreme Court* – thereby, going beyond the traditional role of pronouncing what is right and wrong. Increasingly, judicial decisions should reflect the common aspiration of the people by finding best possible solutions within the broad parameters and the ambit of laws.

The current Attorney General for India, Mr. K.K. Venugopal was involved in advising us at the final phase of the Bhutanese *Constitution* drafting process.[6] His *pro bono* service, wisdom and guidance in reviewing the *Draft Constitution* was very crucial. His ardent prayers were:

> *This Constitution, I have no doubt will project Bhutan into the 21st century, by arming the people with a powerful catena of basic rights, and concerting the nation into a functioning constitutional democracy.*

Speaking to the members of the *Bar Council* of Maharashtra and Goa at the *Bombay High Court* in 2014, the *Chairman of the Constitution Drafting Committee,* former Chief Justice *Lyonpo* Sonam Tobgye summed up regarding the inspiration drawn from the Indian *Constitution* in the making of the Bhutanese *Constitution* in the following words:

> *Dr. B.R. Ambedkar's words and deeds move the nation and stir the soul through the Constitution of India and roars through the lips and pages of judgments from the Judiciary of India. His constitutional values and avatars in the Judges are the agents of social and economic transformation and protectors of liberties in post-independent India. His embedded social and economic values are transformative and reformative,*

6 Sonam, T. *"The Constitution of Bhutan, Principles and Philosophies,"* p.16.

> *reminding India of its glorious past and the promises of its great future. His constitutional principles and germane values soared and traversed the oceans and the mountains of the globe. Bhutan was a grateful recipient of this wisdom.*

## Conclusion

It is said that the utility of the best of constitutions is not entirely dependent on the wisdom and acumen of framers alone. A good constitution is one which is religiously followed both by the State and its people. The goodness of the constitution lies in how it is applied or used in its true spirit. Dr. B.R. Ambedkar in his final speech to the *Constituent Assembly of India* said:[7]

> *… The working of a Constitution does not depend wholly upon the nature of the Constitution. The Constitution can provide only the organs of State such as the Legislature, the Executive and the Judiciary. The factors on which the workings of those organs of the State depend are the people and the political parties they will set up as their instruments to carry out their wishes and their politics…*

When the 284 members of the *Indian Constituent Assembly* signed the *Constitution of India* on 24 January 1950, it was said to be raining outside. The people of India and those who signed it considered that as a very good omen. Similarly, the auspicious night before the historic signing of the *Constitution of the Kingdom of Bhutan* on 18 July 2008, there was heavy down pour of bountiful rain; and our sparkling rivers and lakes bubbled up to the brim, signifying abundance and prosperity of the country.

Bhutan is a *Democratic Constitutional Monarchy*. The *Constitution* played a crucial roles in our transition to democracy and entrenchment of the democratic values and culture. We witnessed three successive peaceful general elections with a seamless transfer of power between three different political parties. We also saw the ruling government being taken to courts, and the courts having no hesitation in ruling against the government.The *Constitution* has endured steadfast eleven years now; and the constitutional goals of ensuring *social* and *economic justice* with *political stability* and the pursuit of *good governance* have been achieved relatively very fast.

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7 Meera, E. (2018). *"Bar and Bench"* Available from: https://www.barandbench.com/columns/dr-ambedkar-1949-constituent-assembly-speech, (accessed 23 December 2019).

His Majesty during the adoption of *Constitution* said that:

> *…This Constitution is the most profound achievement of generations of endeavor and service. As it is granted to us today, we must remember that even more important than the wise and judicious use of the powers it confers, is the unconditional fulfillment of the responsibilities we must shoulder. Only in understanding our duties will the exercise of our powers be fruitful. If we can serve our nation with this knowledge and in this spirit, then an even brighter future awaits our country…this Constitution was placed before the people of the twenty Dzongkhags by the King. Each word has earned its sacred place with the blessings of every citizen in our nation. This is the People's Constitution. And today, through this, my Hand and Seal, I affix on to the Constitution of the Kingdom of Bhutan, the hopes and prayers of my People.*[8]

8 Sonam, T. *"Making of the Constitution of the Kingdom of Bhutan,"* http://www.judiciary.gov.bt, (accessed 23 December 2019).

# *Criminal Law: A Review of the Defence of Mental Disability in the Penal Code of Bhutan*[1]

## Introduction

The criminal laws of all legal systems around the world recognise a defence of insanity in some form. In Bhutan, the *Bhutan Penal Code* provides defendants with a defence, who were mentally impaired at the time they committed the offence charged. The provision is s. 119 which reads:

> *A defendant shall have the defence of mental disability if, at the time of the conduct, on account of a mental disability, the defendant lacked substantial capacity either to appreciate the criminality of the defendant's conduct or to conform the conduct to the requirement of the law.*

This article comprises a critical appraisal of s. 119, in the form of an examination of its elements and application in practice. In this exercise, we shall consider the equivalent defence in some other legal systems as a means of evaluating the strengths and weaknesses of our own defence. In particular, since s. 119 was borrowed directly from the US *Model Penal Code* (hereinafter the *'MPC'*),[2] it will be pertinent to consider what commentators have said about the *MPC* provision. Before engaging in this exercise, it will be useful to give a brief description of the underlying rationale for the defence.

## The Rationale for the Defence

The defence of *mental disability* is a manifestation of the basic principle of criminal responsibility which regards individuals as responsible agents who should be punished for choosing to engage in criminally proscribed conduct. Where the defendant's conduct is the result of mental impairment, the defence arises. From the viewpoint of the utilitarian theory of punishment,

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1 Contributed by Professor Stanley Meng Heong Yeo.

2 *Model Penal Code*: Official Draft and Explanatory Notes (The American Law Institute, 1985). Section 4.01(1) reads: *'A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of this conduct or to conform his conduct to the requirements of law.'*

mentally impaired defendants would not have been deterred by a threat of punishment from committing the crime charged. Since there is no *'utility of punishing people if they were beyond the control of the law for reasons of mental health,'*[3] the resolution of such cases should involve clinical intervention rather than punishment. Also, from the viewpoint of the retributive theory of punishment, the law would be unduly harsh to punish people who are unable to choose their conduct on account of mental impairment. As William Hawkins noted in the opening sentence of his famous *Pleas of the Crown, '[t]he Guilt of offending against any law whatsoever, necessarily supposing a wilful disobedience thereof, can never be justly imputed to those who agree are either incapable of understanding it, or of conforming themselves to it.'*[4]

Although people who successfully plead the defence of mental disability are free from blame, they may pose a threat to themselves or to society and be in need of treatment. Accordingly, it is inappropriate for them to receive an unqualified acquittal and to be released unconditionally into society. The response of the criminal law is for the court to declare a special verdict of not guilty by reason of mental disability which sets in train a procedure for the disposal of such persons to a clinical regime of custody, observation and treatment.

When formulating a defence of insanity, legislators should bear in mind the following observation by the commentators on the *MPC*:

> *[T]he problem is to etch a decent working line between the areas assigned to the authorities responsible for public health and those responsible for the correction of offenders. It is important to maintain this separation, not least in order to control the stigma involved in a hospital commitment.*[5]

## The Elements of the Defence

For the s.119 defence to succeed, it must be proven that: *(1) at the time of the alleged offence, the defendant was suffering from a mental disability, which (2) caused them to lack a substantial capacity, (3) either to appreciate the criminality of*

3 *R v Porter* (1933) 55 CLR 182, at 187 *per* Dixon J *(High Court of Australia).*

4 William Hawkins, *A Treatise of the Pleas of the Crown* (Elizabeth Butt & Gosling, 1716–1721), p 251.

5 *Model Penal Code*, Part I Commentaries, Vol 2 (The American Law Institute, 1985), p 164.

*their conduct, or to conform the conduct to the requirements of the law*. Hence, it is insufficient to just show that the defendant was suffering from a mental disability; in addition, such disability must have produced one of the incapacities delineated by the provision.

### *A. What constitutes a 'Mental Disability'*

Section 119 requires the defendant to have suffered from a *'mental disability'* which substantially impaired their capacity to appreciate the criminality of their conduct or to conform the conduct to the requirements of the law.

*The Penal Code* does not define the term *'mental disability.'* In comparison, the *MPC* uses the expression *'mental disease or defect'* instead of *'mental disability.'* This difference in terminology is significant. Under the *MPC*, the chosen expression describes the aetiology of the disordered psyche, namely, that it could stem from an acquired disease or an innate defect. By contrast, the expression *'mental disability'* under the *Bhutan Penal Code* it lacks this quality since it refers only to the disabling effect of the disordered psyche. Be that as it may, it is open to our courts to interpret *'mental disability'* to cover mental diseases or defects as the *MPC* has done.

The abstract classification of certain psychological or physiological conditions as amounting to *'mental disability'* is potentially misleading. Section 119 is concerned with *legal insanity* and not with *medical insanity*. The inquiry is always specific to the case under consideration. The question whether a person was suffering from a *'mental disability'* at a certain time is a question of fact for the court, to be decided in light of the clinical evidence, if any. But the term *'mental disability'* is a legal term, and it is finally the responsibility of the court to determine its application in any particular case.

Furthermore, the concept of *'mental disability'* cannot be viewed in isolation but is integrally connected with the cognitive incapacity described in s. 119. This is because *'mental disability' per se* simply refers to mental malfunctioning which could vary in nature and intensity. Section 119 requires the mental malfunctioning to be of such a nature and intensity as to render the defendant substantially incapable of appreciating the criminality of their conduct or to conform the conduct to the requirements of the law.

The uncertain ambit of *'mental disability'* raises the specific issue of whether it covers the temporary effects of intoxication. This is an important consideration in practice since many crimes of violence against the person are committed by defendants who were drunk or otherwise inebriated at the time.[6] The negative effects of intoxication on one's behavior are well known, and can doubtless be classified as a form of mental malfunctioning or disability. But should it be so for the purposes of the s. 119 defence? In support of permitting temporary intoxication to be covered by s. 119, there is s. 118 of the *Penal Code*. This provision is virtually identical to s. 119 except that it concerns a defendant who *'is of permanent mental disability.'*[7] The resulting implication is that s. 119 is left to deal with mental disabilities which are transient or temporary by nature.

However, several reasons militate against this interpretation. First, it could be argued that the proper role of s. 118 is that it deals with cases where a defendant was suffering from permanent mental disability *at any time,* including *after the alleged criminal conduct had occurred*. By contrast, s. 119 is concerned with cases where the defendant was suffering from a mental disability *at the time of the alleged criminal conduct*. This is expressly provided for in the wording of s. 119. This differentiation in the functions of ss. 118 and 119 is further evinced by s. 118 broadly declaring that the defendant *'is not responsible for the criminal conduct,'* whereas s. 119 is much narrower in stipulating that the defendant *'shall have a defence of mental disability.'*

A second reason is to be found in s. 23 of the *Penal Code* which lists a number of mitigating circumstances which a sentencing court can take into account. One of these is sub-clause (h), which reads:

> *At the time of the crime, the capacity of the defendant to appreciate the wrongfulness of the conduct or to conform to the requirements of law was impaired on account of mental disability or intoxication*.[8]

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6 Dorji,L. Gyeltshen,S. Jamtsho,C. Minten,T. Dorjee,T. Namgay,P. and Wangchuk,T. *Crime and Mental Health Issues among Young Bhutanese People* (National Statistics Bureau, 2015), pp 40 and 66.

7 Section 118 reads: *'A defendant is not responsible for the criminal conduct, if the defendant is of permanent mental disability, who lacks substantial capacity either to appreciate the criminality of the defendant's conduct or to conform the conduct to the requirements of the law.'*

8 The relevance of using the word *'wrongfulness'* instead of *'criminality'* in this sub-clause

By having the word *'or'* separating *'mental disability'* from *'intoxication'*, the concluding portion of this sub-clause clearly means for these two forms of mental malfunctioning to be distinct.

A third reason against reading s. 119 as covering cases of temporary intoxication is that doing so runs counter to the rationale of the s. 119 defence. From the viewpoint of the utilitarian theory of punishment, defendants would be deterred by a threat of punishment from becoming intoxicated and committing the crime charged. Hence, there is utility in punishing people if they were able to control their consumption of alcohol or drugs, knowing of the negative effects on their behavior. Also, from the viewpoint of the retributive theory of punishment, it is entirely appropriate for the law to punish people who are able to choose to get intoxicated, knowing of the risk that doing so could result in criminal conduct.

Fourthly, and perhaps the strongest reason for explaining why temporary intoxication falls outside the scope of s. 119, is that a person who had committed a crime while temporarily intoxicated does not require treatment. Such treatment is reserved for cases where the defendant was suffering from an intoxication-induced mental disorder having a degree of permanence such as *delirium tremens* and *alcoholic dementia* occasioned by longstanding substance abuse.

Having determined the issue in favour of excluding temporary intoxication from the ambit of s. 119, the broader question remains: what criteria should be used to determine whether a particular form of mental malfunctioning constitutes *'mental disability'* for the purposes of the defence?

To answer this question, we shall examine the concept of *'disease of the mind,'* which appears in what is universally known as the *M'Naghten Rules*.[9] This concept is the equivalent of *'mental disability'* in the *Penal Code*. The *Rules* were formulated by English judges of the *Queen's Bench* in the 19th century in response to a series of questions put to them by the *House of Lords*. This followed the controversial acquittal on the ground of *insanity* of *Daniel M'Naghten* for the murder of the Prime Minister's *Secretary*. In answer to the question: *'In what terms ought the question [of insanity] be left to*

will be discussed in detail below.

9 (1843) 10 Cl and Fin 200; 8 ER 718.

*the jury as to the prisoner's state of mind at the time when the act was committed?'* the judges of the *Queen's Bench* replied:

> *The jurors ought to be told in all cases that every man is to be presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary be proved to their satisfaction, and that to establish a defence on the ground of insanity it must be clearly proved that, at the time of the committing of the act the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.*[10]

This *Rule* has served as a model for many jurisdictions in the *British Commonwealth*, and would have also influenced the drafters of the *MPC*.[11]

The courts of several jurisdictions, notably Australia, Canada and England, have been active in devising tests to determine whether the defendant's mental malfunctioning was due to a *'disease of the mind.'* These are the *'internal cause'* test and the *'prone to recur'* (or *'continuing danger'*) test. The *'internal cause'* test distinguishes between mental malfunctioning that arises from a source primarily internal to the defendant, such as their psychological makeup or organic pathology, and a malfunctioning produced by an external factor such as intoxication or concussion.[12] The *'prone to recur'* test holds that any condition of the defendant which is likely to recur and thereby present a danger to the public should be treated as a disease of the mind.

The combined effect of these tests is that a distinction is drawn between an underlying mental infirmity (which is required for a *'disease of the mind'*) as opposed to a transient, non-recurrent and externally caused mental malfunction. Thus, a mental malfunctioning caused by some source which lies within the defendant and which is prone to recur, warrants the label of a disease of the mind for the purpose of the insanity defence. From the standpoint of criminal responsibility, defendants who acted while

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10 (1843) 10 Cl and Fin 200 at 210 *per* Tindal CJ.

11 Yeo, S. (2008) *'The Insanity Defence in the Criminal Law of the Commonwealth of Nations'* Singapore Journal of Legal Studies 241.

12 *R v Rabey* (1977) 37 CCC (2d) 461 at 477 and approved by a majority of the *Supreme Court* of Canada in *Rabey v R* (1981) 54 CCC (2d) 1.

suffering from a disease of the mind have not acted of their own free choice and should therefore not be convicted and punished for the crime charged. Yet, on account of the risk that the mental malfunctioning will cause them to commit further criminal conduct, these people should not be released unconditionally. From the standpoint of societal protection, clinical intervention is needed. As Lord Denning in the English case of *Bratty v Attorney-General for Northern Ireland* put it:

> *[A]ny mental disorder which has manifested itself in violence and is prone to recur is a disease of the mind. At any rate, it is the sort of disease for which a person should be detained in hospital rather than be given an unqualified acquittal.*[13]

In contrast, where the mental malfunctioning was caused by some source lying outside (that is, *'external'* to) the defendant, was transient in effect, and is unlikely to recur, clinical intervention is not warranted.[14] At the close of this article, a proposal will be made to formulate a definition of *'mental disability'* under s. 119, which incorporates these two tests.

### *B. Substantial and Not Total Incapacity*

The s. 119 defence requires the court to determine whether, as a result of the defendant's mental disability, they lacked *'substantially capacity either to appreciate the criminality of their conduct or to confirm the conduct to the requirements of the law.'* Conceivably, *'substantial capacity'* does not mean total nor minimal but is somewhere in between, and this is a matter for the court to decide in a commonsensical way. Put in another way, the term *'substantial'* is more than trivial and connotes something that is important or weighty.

This element of the defence involves a value-laden question requiring the court to decide whether the defendant is deserving of avoiding conviction and punishment for their criminal conduct. It is therefore for the judges rather than clinical experts to determine. Nonetheless, given the nature of the inquiry, one would expect expert witnesses to play a critical role in assisting the judge's decision-making.

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13 [1963] AC 386 at 412 *(House of Lords).*

14 See *R v Cottle* [1958] NZLR 999 at 1015; *R v Carter* [1959] VR 105 at 110.

In passing, it is worth noting that, where the defendant's impaired mental capacity was not sufficiently substantial to support the s. 119 defence, such capacity could nonetheless be relied on as a mitigating circumstance in sentencing.[15]

### *C. The Affected Capacities*

A person is not exempt from criminal responsibility simply because they suffered from a mental disability. It must be shown that the mental disability was of a kind and severity which substantially impaired the defendant's capacity to *(1) appreciate the criminality of their conduct, or (2) conform the conduct to the requirements of the law*. Each of these affected capacities will be considered in turn.

### *(1) Incapacity to Appreciate the Criminality of the Conduct*

This form of incapacity involves the defendant's incapacity, due to mental disability, to appreciate that their conduct was criminal. There a several ways by which a person will lack such appreciation. To cite the explanatory note accompanying the equivalent defence provision in the *MPC*:

> *An individual's failure to appreciate the criminality of his conduct may consist in a lack of awareness of what he is doing or a misapprehension of material circumstances, or a failure to apprehend the significance of his actions in some deeper sense.*[16]

To elaborate, the defendant may have been incapable of appreciating the physical quality of their conduct, such as where a person strikes a human being under a delusion that he was breaking a jar, shoots a person thinking she was shooting a demon, or places a baby on the fire thinking that he was a log of wood. In these examples, the defendant does not appreciate the surface features of their conduct, that is, the activity involved in cutting, stabbing or burning of a human being, let alone the harmful consequences to the victim.

There may also be cases where the defendant is capable of appreciating the surface features of their conduct but is too disordered to be capable of appreciating the harmful consequences of such conduct. For example,

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15 See s. 23(h) of the *Penal Code*, reproduced in the main text accompanying note 7.

16 Above note 1 at p 62.

***D*** may appreciate he is attacking a person, ***V***, but not know that the ferocity of the assault will kill or seriously injure ***V***. Since ***D*** knows that he is assaulting a human being but does not know the extent of harm the assault will cause, the cognitive incapacity is partial rather than total. Nonetheless, such partial incapacity is sufficient for the purposes of the s. 119 defence. This is because a person with such an incapacity will not to be deterred by a threat of punishment; as such the case clearly points to a need for clinical intervention. Furthermore, a conviction would be inconsistent with the basic principle of criminal responsibility that both conduct and its consequences are essential ingredients of the physical and fault elements of a crime.

There is a further way by which a defendant can lack the capacity to appreciate the criminality of their conduct. This involves cases where, even though the defendant was fully aware of the physical quality and consequences of their conduct, they are unable to appreciate that their conduct was contrary to law. For example, ***D***, knows that he is stabbing ***V*** with a knife and that such an act will cause a serious injury to ***V***. However, on account of his mental disability, ***D*** does not appreciate that he has committed an offence.

Some jurisdictions, such as Australia, Canada and India, have extended this element of the defence to include a defendant's incapacity to appreciate the *moral wrongness* of their conduct. They have been able to do so because their provision on insanity uses the term *'wrong'*, which has been interpreted as covering not only legal wrongness (i.e. criminality or contrary to law) but moral wrongness as well. The drafters of the *MPC* gave serious consideration to such an extension when they said that *'[w]rongfulness is suggested as a possible alternative to criminality, though it is recognised that few cases are likely to arise in which the variation will be determinative.'*[17]

It is submitted that s. 119 should likewise be extended to include cases where a person was, as a result of mental disability, incapable of appreciating the moral wrongness of their conduct. Although that provision uses the term *'criminality'*, its companion provision under the *Penal Code*'s chapter on

17 Above note 1 at p 164.

sentencing (i.e. s. 23(h)) uses the term *'wrongfulness.'*[18] One might contend that the legislative intent was to make the defence available to cases where a defendant was incapable of appreciating the criminality of their conduct, and to relegate to the sentencing decision, cases where they were incapable of appreciating the moral wrongfulness of their conduct. This contention could be strongly criticised for unnecessarily complicating the law. The better view is that s. 23(h) serves to provide some degree of recognition of a defendant's mental disability at the sentencing stage, where the incapacity caused by the mental disability was not substantial enough to warrant a successful plea of the s 119 defence.[19]

Perhaps the framers of the *Bhutan Penal Code* had really meant to apply the more embracing term of *'wrongfulness'* instead of *'criminality'* to the s. 119 defence. There are several good reasons why this would have been the better course to take. First, it seems counter-intuitive to require a person claiming to have suffered from mental disability to show that they were incapable of appreciating that their conduct was contrary to law. A requirement to this effect would be premised upon the fictitious assumption that normal people are capable of appreciating that their conduct was contrary to law, in spite of the proliferation and complexity of the law. Secondly, recognising an incapacity to appreciate that the conduct was morally wrong accommodates cases where the defendant, owing to mental disability, believed that they were acting under divine instruction or as a result of spirit possession. Cases of this sort are not infrequently found in Bhutan.[20] In these cases, the defendant is likely to appreciate that the conduct was contrary to law but believed that they were morally right to have done it. A third, and perhaps the strongest reason in favour of the recognising moral wrongness is that, from the standpoint of criminal responsibility, the deterrent effect of punishment would be useless on persons whose mental disorder was such as to leave intact their capacity to appreciate that their conduct was contrary to law but who nevertheless persisted in the firm belief that their act was morally justified. In such a case, clinical intervention rather than punishment is the proper recourse.

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18 Section s. 23(h) and reproduced in the main text accompanying note 7.

19 See the main text accompanying note 14.

20 See http://www.kuenselonline.com/spirit-possession-accepted-as-circumstantial-and-corroborative-evidence-in-trongsa-double-murder-case/ (accessed 31st December 2019)

But how, one might ask, is moral wrongness to be determined? It has been judicially observed in jurisdictions which have recognised this form of incapacity that *'[t]he standard to be applied [for such wrongness] is whether according to the ordinary standard, adopted by reasonable men [sic], the act is right or wrong.*[21] Furthermore, whether conduct is right or wrong is not established by merely showing that the defendant's conduct was *'odd'*, *'queer'*, *'abnormal'* or *'unusual'* or that they were conceited, intellectually weak or irascible.[22]

The concept of moral wrongness has been criticised for being too vague and variable *'according to the opinion of one man or of a number of different people.*[23] However, this criticism is not as strong as it appears since the test as expressed by the courts is not entirely subjective. Reference may be made to the following judicial interpretation of the word *'wrong'* appearing in the Canadian *Criminal Code*:

> *'[M]oral wrong' is not to be judged by the personal standards of the offender but by his awareness that society regards the act as wrong … The accused will not benefit from substituting his own moral code for that of society. Instead, he will be protected by [the Canadian provision] if he is incapable of understanding that the act is wrong according to the ordinary standards of reasonable members of society.*[24]

Having this objective component might be criticised for raising its own concerns. It has been queried how the appropriate moral standard is to be proved in a socially diverse country. Furthermore, is the court to determine wrongness according to the views of the majority, or will that of a significant minority suffice? While these concerns cannot be dismissed lightly, one should bear in mind that the defendant has been charged with a crime which, in most cases, would comprise conduct which was morally wrong in the eyes of most reasonable members of their society. Additionally, the crux of the matter is that the defendant has been found, on account of mental disorder, to be lacking the capacity to reason about the rightness or wrongness of their conduct which *'sane'* people would be capable of

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21 *Bapu alias Gujraj Singh v State of Rajasthan* (2007) 8 SCC 66 at [12] and cited with approval in *Surendera Mishra v State of Jharkhand* AIR 2011 SC 627 at [7] and [9] *(Supreme Court of India).*

22 *Ibid.*

23 *R v Windle* [1952] 2 QB 826, at 834.

24 *R v Chaulk* (1990) 62 CCC (3d) 193, at 232–233.

doing. It is submitted that no person should be convicted and punished for a crime if their mental faculties were so disordered as to prevent them from living *'socially integrated lives and to choose conduct which conforms with both moral and legal norms.*[25]

### *(2) Incapacity to Conform the Conduct to the Requirements of the Law*

Mental disorders can affect a person's cognitive capacity, that is, to understand something; such disorders can also affect a person's volitional capacity, that is, to choose or control actions. Section 119 recognises volitional incapacity as a ground for basing the defence of mental disability, expressing it in terms of an *'incapacity to conform the conduct to the requirements of the law.'* This is a somewhat imprecise description of volitional incapacity, and it would have been preferable for s. 119 to have used instead the straightforward description of an *'incapacity to control one's conduct.*[26]

It is submitted that the recognition by s. 119 of volitional incapacity caused by mental disability is a progressive stance. Since criminal responsibility is premised on an ordinary person's capacity to reason and to choose between right or wrong, it would be immoral to convict and punish a person who, due to mental impairment, is unable to so reason or choose.

Those who do not favour recognising volitional incapacity have contended that there is, to date, no objectively verifiable scientific test which can differentiate between a person who *could* not choose their conduct and one who *would* not. In reply, it can be argued that this is not so different from other issues in the criminal law involving questions of concepts such as *'knowledge'* and *'negligence.'* Also, the fact that cases involving volitional incapacity may be rare and difficult to establish is not a good enough reason for excluding them from the operation of the defence. Additionally,

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25 Andrew Simester, Warren Brookbanks and Neil Boister, *Principles of Criminal Law*, 5th Ed (5th ed Thomson Reuters, 2019), p 458.

26 The description of volitional incapacity in terms of lack of control of one's conduct has been used in the statutory provisions on insanity of many jurisdictions where such incapacity is recognised: see note 26.

it would be incumbent on a court to require strong proof from the defendant that they had so severe a volitional defect that they were not criminally responsible.

All told, the *Penal Code* is right to have joined several other jurisdictions which permit the insanity defence to succeed where, even though the defendant fully appreciated the criminality of their conduct, they were incapable of controlling or choosing to perform their conduct.[27]

**Reforming the Law**

While s. 119 has some elements that are worthy of retention, this review has shown up several other elements that are in need of reform. It is proposed to replace the current s. 119 with the following provision, which incorporates many of the suggestions for improvement made in this article. The list of illustrations accompanying the provision show how some of its clauses are meant to operate.

***Section 119: Incapacity by Mental Disease or Defect***

(1) A defendant shall have a defence if, at the time of carrying out the conduct, he was suffering from a mental disease or defect to the extent that he was substantially incapable of one of the following:

(a) Appreciating the nature or consequences of the conduct;

(b) Appreciating the conduct was contrary to law;

(c) Appreciating the conduct would be regarded as morally wrong in the eyes of ordinary persons; or

(d) Controlling the conduct.

(2) For the purposes of subsection (1), mental disease or defect includes mental illness, dementia, intellectual disability, or any illness, disorder or abnormal condition that impairs the mind and its functioning excluding:

27 For example, Ireland, Queensland, Singapore, South Africa and Western Australia. The *M'Naghten Rules* do not recognise volitional incapacity as supporting the insanity defence: see the primary Rule reproduced in the main text accompanying note 9, where only the cognitive defects of inability to know the nature of the act or that it is wrong are recognised.

(a) impairment of the mind from the temporary intoxicating effects of alcohol or other drugs; and

(b) temporary impairment of the mind which are unlikely to recur and do not demonstrate an internal weakness of the mind.

***Illustrations***

*(a)* ***D***, a victim of domestic violence by ***V***, is intensely traumatised by ***V****'s* latest assault on her, causing her to suffer a blackout. During the blackout, ***D*** kills ***V***. ***D*** recovers completely. ***D***'s condition at the time of the killing is not a mental disease or defect. Since ***D***'s conduct may be involuntary, she may not, by virtue of this provision, be guilty of any offence.

*(b)* ***D*** breaks ***V***'s nose with a punch. ***D*** knows that he is punching ***V*** in the face but, due to a mental disease or defect, does not appreciate that his conduct will cause ***V*** any bodily injury. ***D*** is not guilty of any offence.

*(c)* ***D***, while suffering from a mental disease or defect, offers ***V*** as a human sacrifice in order to prevent God from destroying the world. ***D*** knows that her killing ***V*** constitutes the crime of murder but believes that her conduct is morally right in the eyes of ordinary people. ***D*** is not guilty of any offence.

*(d)* ***D*** takes other people's laptops without their consent whenever he sees them unattended. ***D*** knows that this constitutes larceny but cannot resist doing so due to a mental disease or defect. ***D*** is not guilty of any offence.

The new s. 119 exculpates a defendant from criminal responsibility for any offence on the basis of their severe mental malfunctioning when committing the offence. For the defence to succeed, the defendant must have been suffering from a mental disease or defect at the time of the offence, which substantially affected their cognitive or volitional functioning with respect to the criminal conduct. A non-exhaustive and broadly expressed list of mental conditions which could amount to *'mental disease or defect'* is provided in s. 119(2). Mental malfunctioning caused by temporary intoxication is excluded by subclause 2(a). Such cases are dealt with by the *Penal Code* provisions on intoxication.[28]

28 Sections 78 and 79 of the *Penal Code*.

Sub-clause 2(b) excludes other forms of temporary mental malfunctioning which are unlikely to recur and not manifested internally in the defendant. Examples of such forms are concussions, sleepwalking (if there is little risk of reoccurrence) and a psychological blow from an extraordinary external event which could cause an average normal person to go into a dissociative state. For these cases, the defendant would receive an unqualified acquittal on the basis that, since their conduct was involuntary,[29] a fundamental component of the physical element of the offence was lacking. Illustration (a) provides an example.[30]

Whatever form *'mental disease or defect'* might take, the main idea is its effect on the defendant's capacity with respect to one of four matters: *(1) to appreciate the nature or consequences of their conduct; (2) to appreciate that the conduct was contrary to law; (3) to appreciate that the conduct was morally wrong in the eyes of ordinary persons; or (4) to control the conduct*. In relation to (1), there may be cases where a person's mental malfunctioning may cause them not to appreciate the nature of their conduct, for example, believing that they were chopping a log of wood when it was the arm of a human being. There could be other cases where, although the person appreciated the nature of their act, they were unable to comprehend the consequences of that act. For example, that chopping a person's arm would cause immense pain, loss of blood and could even cause death. Section 119(1)(a) covers both these types of cases by stipulating that the defence could succeed if the mental malfunctioning caused the defendant not to appreciate *'the nature* or *consequences'* of their conduct. Illustration (b) provides a further case example where the defence is available to a person who appreciated the nature of their conduct but not its consequences.

A second way by which mental malfunctioning could negate criminal responsibility is to cause a person not to appreciate that their conduct was contrary to law. This is stipulated under the new s. 119(1)(b). Thirdly, s. 119(1)(c) provides that the defence is available to a person who was substantially incapable of appreciating that the conduct was morally wrong according to the moral standards of ordinary members of society. A factual example of this scenario is provided in illustration (c).

29 Sections 49 and 50 of the *Penal Code*.

30 The facts are based on the case of *R v Falconer* (1990) 171 CLR 30 *(High Court of Australia)*.

The fourth way envisaged by the new s. 119 is where the mental disease or defect affects the person's capacity to control their conduct. Such cases are covered by s. 119(1)(c). On account of s. 119(2)(b), the incapacity to control one's conduct would have to be caused by some internal weakness of the mind and which condition is prone to recur. Accordingly, this form of mental disease or defect would have a degree of permanence, which is not to say that it cannot be cured. Illustration (d) provides a factual example.

The overall result of this proposed reformulation of s. 119 is a provision which is precise, comprehensible and comprehensive. As such, it represents a significant improvement to the current s .119.

**Conclusion**

On a final note, The *Bhutan Penal Code* currently lacks legislation on the *Procedure* governing cases where the s. 119 defence is pleaded. The *Legislature* should fill in this gap as soon as possible, and could readily do so by adopting the US *MPC* provisions (or some modification of them) on the matter. Specifically, the *Legislature* could consider the provision on giving notice to the court about the plea and the form of *verdict* and *judgment* when the defence is made out.[31] There is also the provision on the form of expert testimony, access to the defendant by a psychiatrist of their own choice, and the determination of irresponsibility on the basis of the psychiatric reports.[32] Also worthy of adoption is the provision on the legal effect of an acquittal on the ground of mental disability, commitment to an appropriate institution, and on release or discharge from such institution.[33] In the end, laws should not only serve the *"purpose of justice"* as per the letter of the law, but also evolve with time; adopt international best practices that will serve the purpose of our laws, justice and the ends of the society. Penal laws carries a penal force, that either restrains the rights of persons or directly impedes their liberty; any laws of such nature should be scrutinised to allow that laws not only perform their functions in the society, but also serve the foundations of justice both in letter and spirit.

31 Section 4.03 of the *MPC*.
32 Section 4.07 of the *MPC*.
33 Section 4.08 of the *MPC*.

# *Restorative Justice for Children in Conflict with Law: Diversionary Measures as Alternative to Prosecution and Judicial Proceedings*[1]

## Introduction

The concept of children's rights are evolving. The "*best interest of the child"* principle is playing a crucial role in enhancing the welfare, safety and development of the children. People are sensing that children need to be treated with dignity and compassion. Children are considered as a different legal entities based on child-centric principles so that they better cared and protected. They are recognised as not possessing the adequate maturity and conscious decision-making abilities. They are prone to peer pressure, susceptible to taking uncalculated risks, compromise safety, and bring them in conflict with the law.

Children come in contact with the justice system in two ways. They either come as child witnesses or victims or as child in conflict with the law. This calls for a different way of approach to be adopted in the ways the children are treated by the legal, social, and other by the justice institutions that deal with or work for children. All approaches must give primacy to the *"best interest of the child."* One of the very important institutions to protect and enhance the rights of children in the justice system is the courts. As desired by the international norms and standards, our courts are required to promote protection of children by creating a child-friendly ambience in the courts. Although our courts are being progressively reformed, many courts continue to resort to normal court facilities to adjudicate child offences, despite the requirement that children shall not be exposed to formal criminal justice systems.

As per the concept of restorative justice children are diverted from the formal justice system. Although, it is a fairly new concept in criminology, it has enhanced restoration of injuries and injustice on children and enabled the parties to directly communicate with each other. Restorative justice process involves all the concerned parties, and allow them to interact through open communication platforms which is vital to restore the social, psychological and relationship-oriented harm effected by the crime.

1 Contributed by Dema Lham.

Normally, courts are enjoined to resolve disputes which come before them, irrespective of who are the parties are. Restorative justice requires the courts to dispense justice through a non-conventional method when it concerns children in conflict with law; and render justice in the best interest of the children. Amidst the expanding docket of cases and mounting costs for the disposal of the cases, restorative justice may be used as an effective judicial intervention, especially cases pertaining to child delinquency and crimes committed by children.

Several countries beginning in the 1970s developed many restorative justice programs which have gained popularity. It has helped the young offenders to understand their culpable actions and accept the responsibility. It has also directly helped them to change their mindsets and behaviours.

This Paper attempts to examine the restorative justice concept as a diversion from the court for young offenders in general. It intends to propose restorative justice as a workable method to advance justice for children in the country. It also examines how young offenders can benefit from the *youth conferences* which allow them to participate; and outlines issues and challenges connected therewith.

**What is Restorative Justice?**

Daly defines restorative justice as *"a contemporary justice mechanism to address crime, disputes, and bounded community conflict."* This justice mechanism facilitates the meeting between the child in conflict with the law and the victims, irrespective of the formal criminal justice processes.[2] According to Zehr, restorative justice represents a different *"lens"* of justice with its own process of application.[3] It views crime as more than breaking of the law. It views crime as an injury to the people, their emotions, relationships and the community at large. The proponents of this justice method identifies the need to address the harm and wrongdoings of the perpetrator. This involves healing and repairing of the parties through a facilitated meeting. Such meetings, and open discussions about the harm, injuries and wounds, if any, allows the parties to discuss the matter, indirectly leading to transformational changes in children. The foundational principles on

2 Daly, K. (2016). *"What is Restorative Justice?* Fresh Answers to a Vexed Questions, *Victims and Offenders,* Vol. 11. No 1, p21

3 Zehr, H. (1990). *"A restorative lens,"* Chapter 10 in *Changing Lenses: A New Focus for Crime and Justice,* Scottdale, Herald Press, pp. 177-213

which restorative justice methods are based are as follows:

i. Crime causes harm and justice should focus on repairing the harm;

ii. The people most affected by the crime should be able to participate in its resolution; and

iii. The responsibility of the government is to maintain order of the community to build peace.

**Diversion from Judicial Proceedings**

During the 1970s and 1980s, major changes were introduced in the child justice system which included diversion of *'young people'* from the formal justice system. As part of the reform, the idea of diversion was introduced. Today, diversion has become a widely acknowledged justice for children process. It has created a different judicial pathway to channel towards reformation. Internationally, such judicial methods and processes are supported by different international norms and standards. The *United Nations Standard Minimum Rules for the Administration of Justice,* 1985 *(the Beijing Rules)* has reinforced it when it requires the nations to establish *"a set of laws, rules and provisions specifically applicable to juvenile offenders and institutions and bodies entrusted with the function of the administration of juvenile justice and designed to meet the varying needs of juvenile offenders while protecting their basic rights."*[4] Furthermore, directly buttressing it, Article 40.3 (b) of the *United Nations Convention on the Rights of the Child* also states that the *"State parties shall seek to promote the establishment of laws, procedure, authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law and in particular, whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing human rights and legal safeguards are fully respected."*[5]

Diversion from formal court of law is key to achieve these principles. As a method of rule, restorative justice as a diversion from the court is most commonly used to divert young offenders from the formal criminal justice system. Research has shown that restorative justice is largely seen to be suitable for young offenders and in less serious crimes. Although,

4 *United Nations Standards Minimum Rules for the Administration of Juvenile Justice,* 1985 art 2.3

5 *Convention on the Rights of the Child*, Art 40.3.b, entry into force 2 September 1990

restorative justice is conceptually designed and developed for children, it is also used for adult offenders as well. Different countries have used different approaches of restorative justice. For example, in New Zealand, first time minor offenders are diverted after a warning or disputes are mutually settled through a *Family Group Conferencing*. This method of dispute resolution are based on the tradition of the Maori. In countries such as South Africa, Ireland, and some states of the U.S.A., e.g., Pennsylvania, Montana and Minnesota also use the similar models. However, in England and Wales, they use *Youth Offender Panels.*

**Reformation of Children**

We have always reposed our hopes on our youths as the builders of our nation and architect of its development. Our youth population is quite big. Although, the figures and statistics may be comparatively low when compared with other countries, the number of young people coming in conflict with the law are on rise in the recent years. Young people are by nature curious, and this increases their chances of coming in conflict with the law. Punitive laws and policies that enjoin *'tough stance on crimes'* can adversely affect children coming in conflict with the law, and increase their exposure to the formal criminal justice systems.[6] *The Report of the Royal Bhutan Police* shows that the crime rate has increased by 94% from 2016 to 2017.[7] According to a *GNHC Report*, the rate of victimisation has doubled from 3.5% in 2010 to 7.5% in 2015.[8] Although the *Child Care and Protection Act of Bhutan* of 2011 promotes decriminalisation, but it does not absolutely decriminalise children altogether.[9]

Braithwaite notes that *"attempts to control crime through violence and coercion merely reproduce counter violence."* Therefore, in response, Bhutan introduced various mechanisms in place to treat young offenders and children coming in conflict with the law, with respect and dignity. Moreover, our Kings have always envisioned that treatment of young offenders and children coming in conflict with the law should be judicious, compassionate and uphold the full development of their human personality and promote them as

6 Richards, K. (2011). *"What makes juvenile offenders different from adult offenders," Trends and Issues in Crime and Criminal Justice,* no 409, Australian Institute of Criminology.

7 Kuenselonline, 4942 youth arrested in the last five years, July 7, 2018

8 *GNHC Report* 2015/2017

9 Urbas, G. (2000). *The Age of Criminal Responsibility*, Canberra: Australian Institute of Criminology P1

responsible members of the society. In order to achieve this objective, the *Youth Development and Rehabilitation Centre (YDRC)* was established upon the *Royal Command* in 1997. It aimed at providing reformative and rehabilitative services for children, who come in conflict with the law. The *Centre* has a separate pre-trial detention centres for children coming in conflict with the law established to strengthen its services.

Until 2011, Bhutan did not have any legally formulated or recognised method of dispensing justice for children. *The Child Care and Protection Act* of 2011 brought reformatory legislative practices in the administration of *justice for children* and facilitated a positive social development. It opened up a new avenue to deal with the young people. Since then, restorative justice is seen as an important approach to deal with children coming in conflict with the law. It provides alternative measures to deal with children. Diversion is one of the alternative measures and a child in conflict with the law may undergo a diversion program if the alleged offence committed is not of a serious nature.[10] The *Act* also incorporates *Family Group Conferencing* as one of the restorative measures. It states that*, "the court may refer the offence to the Family Group Conferencing, if the court considers referral to a Conference would allow the offence to be dealt with or without the court making Disposition Order and help the court to make an appropriate Disposition Order."*[11] Other diversionary options include *Legal Advice* and *Cautioning*. Relevant agencies such as the *Royal Bhutan Police*, *National Commission for Women and Children*, *Office of the Attorney General* and *Civil Society Organisations* such as *Nazhoen Lamtoen* have developed *Guidelines* and *Procedures* based on the provisions; have started to implement it. However, the exact number of the cases diverted and referred to *Family Group Conference* is not known; and it is also not clear to what extent these alternative measures are effectively implemented in the country.

## Conferencing Programs

### a) Police Cautioning

*Police Cautioning* was adopted as a major alternative to charging the first-time young offenders and children who committed less serious offences. Like in New Zealand and the United Kingdom, cautioning a minor or first-time child offender has become an important feature of the Bhutanese child

10 Section 187 of *Child Care and Protection Act of Bhutan* 2011

11 Section 196 of *Child Care and Protection Act of Bhutan* 2011

justice system. *The Child Care and Protection Act* of 2011 requires police to *caution* a child who is suspected of a commission of an offence; and brief them on legal implications before he is inquired or questioned about the offence.[12] The *Act* requires the *Police Officer* administering caution to a child to take all the necessary steps to ensure that the child understand the purpose, nature and effect of the *cautioning*.[13] It also requires the police to explain the matter clearly, in the presence of the child's parents, guardian or legal representative or other persons to enable an effective communication with the child.[14]

### b) Conferencing

*Conferences* when used as a diversion from formal prosecution, involves a young offender, who admitted to the offence, the victims, their supporters, if any, a *Conference Convenor* and a *Police Officer*. The purpose of the *Conference* is to discuss the impact and consequences of the offence in a friendly way and create an understanding and non-adversarial environment.[15] The young offenders are given the opportunity to narrate the circumstances leading to the offence; and the affected parties are provided with the opportunity to share their grievances on how the offence has affected them. The *Conference* outlines the outcome, with affirmations of a verbal or written apology, monetary compensation, undertaking community work or for the victim and attending counselling courses, among others. In Australia, *Diversionary Conference* differs between jurisdictions. According to Daly and Hayes they differ in *"the kinds of offences that are conferenced; the amount of time allowed to complete outcomes and the upper limits on outcomes; and the degree to which a jurisdiction is engaged in high volume activity."*[16]

## The Benefits

Studies have shown that compared to the traditional system, *Youth Conference* as a diversion from the formal court has many benefits. The formal justice system is not an appropriate apparatus to combat re-offending of children coming in conflict with the laws; and it does not heal the victims of crime. Some of the benefits of the *Youth Conference* as *Diversionary Programs* are as

12 Section 181 of *Child Care and Protection Act of Bhutan* 2011

13 Section 183 of *Child Care and Protection Act of Bhutan* 2011

14 ibid.

15 Daly, K. & Hayes, H. (2001). *"Restorative Justice and Conferencing in Australia," Trends and Issues in Crime and Criminal Justice*, Australian Institute of Criminology, No 186, p2

16 Ibid, p4

follows:

1. The *Youth Conference* allows the aggrieved parties to meet with the young offender and iron out the method of redress. It facilitates the repair to the harm, and help to reintegrate the young offender into the community. Braithwaite claims that *"conferencing opens up what otherwise can be a private process between the victim and offender, by including other relevant actors."*[17] It also allows the voice of the community to be heard by including the local communities to encourage a responsible community dialogue and discourse.[18]

2. It also reduces the scope for re-offending. Both theoretical and empirical studies have shown that diversionary programs for the young offenders are effective in fighting re-offending. This is based on the comparative studies on re-offending of children between children who attended the *Conference* and those who attended the court. However, many of the researchers still feel that there is little concrete evidence to prove that participating in youth conferences reduce re-offending.

3. Using youth conference as a diversion for young people from the court system may help them to identify family, behavioural or other agents which contribute to their delinquent behaviour.

4. Diverting a young person to a *Youth Conference* can help the children to avoid coming in contact with the formal justice system and the formal court proceedings.

5. The outcomes of a *Conference* are restorative and provides avenues for children in conflict with the law to reintegrate into the society.

6. Usually courts are burdened with heavy case dockets. Diversion helps to reduce court cases directly depressurizing the criminal justice system.

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17 Braithwaite, J. (1994). *Thinking harder about democratizing social control.* In C. Alder and J. Wundersitz (Eds.), *Family conferencing and juvenile justice: The way forward or misplaced optimism*? (pp.199-216). Canberra: Australian Institute of Criminology.

18 Crawford, T. (2001). *Community justice: Transforming communities through restorative justice*? In G. Bazemore and M. Schiff (Eds.), *Restorative community justice: Repairing harm and transforming communities* (pp. 127-149). Cincinnati: Anderson Publishing Co.

## Issues and Challenges

Many critics of restorative justice have raised concerns about the challenges related to restorative justice as a diversion from the formal justice system. Some of them are as follows:

### i) Net Widening

One of the main concerns of the critics is that *diversion* creates net widening. According to them, instead of reducing the number of young people entering the formal child justice system, diversion has actually increased the numbers of young people who otherwise would not have had any contact with the system, by bringing them in contact. Young offenders who would otherwise be warned by police or otherwise diverted are given punitive penalties than they would otherwise receive. Critics have stressed the fact that conferencing models, as an early intervention, have increased the level of state control on offenders instead of reducing it.[19]

### ii) Power Imbalances

Cunnen argues that in police led *Conferences*, power imbalance between the offender and the law enforcement personnel and agencies may lead to increase in investigation, arrest, and punishment without corresponding legal guarantees. This could lead to more stigmatization on the young people.[20]

In counter argument, Morris claims that within the restorative justice framework, power imbalances can be addressed by ensuring procedural fairness by supporting the less powerful by rearranging the power domains and differences.[21] Thus, *Youth Conference* as one method of restorative justice can provide a forum to facilitate victim-offender dialogue. Morris further adds that the facilitator of restorative justice should shoulder the responsibility to create a dialogue-oriented ambience to allow both the victim and the offender to freely participate.

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19 Skelton, A. & Frank, C. (2004). *"How does restorative justice address human rights and due process issues,"* in Zehr, H and Toews, B (eds), *Critical Issues in Restorative Justice,* New York Criminal Justice Press

20 Cunneen, C. (1997). Community conferencing and the fiction of indigenous control. The Australian and New Zealand Journal of Criminology, 30(3), pp. 292-311.

21 Morris, A. (2002). *"Critiquing the critics, A brief response to critics of restorative justice,"* British Journal of Criminology, 42, p608 596-615

### iii) Sex Discrimination

Critics have raised concerns about the capability of the *Youth Conferences* to deal with young female offenders in a non-discriminatory way. Braithwaite argues that young women are often dominated by a patriarchal family structures. It can reinforce the *'boy will be boy'* attitude of family members which may derail the sense of justice between the two sexes.[22]

### iv) Disproportionate or Inconsistent Penalties

Skelton and Frank, argues that there may be a disparity in outcomes of the *Conferences*. They opine that the *Conference* may impose penalties that may be disproportionate to the crime, which is generally flared up by the opportunistic whims of the victims and their families.

### v) Infringement of Rights

### a) Right to be Presumed Innocent

As a matter of criminal defence, every individual has the right to be presumed innocent until proven guilty.[23] However, contrary to the formal criminal justice process, when a young offender takes part in a restorative justice *Conferences*, they are required to admit their guilt and accept responsibility for their conduct. It indirectly waives their right to remain silent. This directly contravenes their right to be presumed innocent until proven guilty. To this, Acorn rightly described restorative justice as an *"exchange of mercy for conversation."*[24] Some argue that the offenders voluntarily relinquish their rights in order to benefit from the restorative justice process.[25] In some cases, the offenders may be pressured to admit the offence and make them gullible to the belief that they are responsible and guilty.[26] There are other dangers that is associated with the admission. Such an admission may be used against the offender, if the *Conference* fails; which may be self-incriminatory.

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22 Braithwaite, J. (1992). *"Juvenile offending: new theory and practice,"* in National Conference on Juvenile Justice, Australian Institute of Criminology, Canberra.

23 *Universal Declaration of Human Rights*, 1984, Art 11

24 Acorn, A. (2004). *"Compulsory Compassion; A Critique of Restorative Justice,"* UBC Press, p62

25 ibid

26 Warner, K. (1994). *"Family Group Conferencing and the Rights of the offender,"* p142

### b) Right to Appeal

In the traditional justice system, the offender has the right to appeal or review by a higher court or the authority. Unlike the formal justice system, in a restorative justice process, there is often no procedural opportunity to appeal for review.[27] Strang and Braithwaite argues that "the right to appeal can be made available in the restorative justice processes where the offender is advised of his right to walk out of the conference at any time to have the matter settled in a court decision that can be appealed to a higher court."[28]

### c) Right to Fair Trial

In order to participate in the restorative justice *Conference*, young offenders indirectly waives their right to a fair trial process. This happens when the young offender is compelled to participate in the restorative justice program.

## Conclusion

There has been mixed reactions among the scholars whether restorative justice as a diversion from the court is a way forward or misplaced optimism. Studies have shown that there remain a number of questions to be answered in the future. However, diversionary programs are beginning to show positive results by preventing the young offenders from facing the formal criminal justice system. It is evident from the researches that youth conferences have been successful in providing suitable framework to bring a cooperative atmosphere and renege on repairing the harm.

Additionally, such *Conference* also helps to reform the behaviour of the offender, by responsibly taking relationship and community connections as vital link to coexist in the community. Restorative justice effectively safeguards the welfare of the young people and ensure that they do not come in conflict with the law. It also help to resolve the fundamental inadequacies of the traditional justice system. These are reinforced and confirmed by evidence of the researchers that *Youth Conferences*, in particular, demonstrate a successful model to deal with young offenders. It is beginning to be regarded by many as a significant development for providing a better

27 Skelton, A. & Frank, C. (2004). "*How does Restorative Justice Address Human Rights and Due Process Issue,"* William Publishing, p206

28 Braithwaite, B. & Strang, H. (2002). *"Connecting Philosophy and Practice":* In Restorative Justice: Philosophy to Practice, Vermont, US, Ashgate Publishing Company, p 205

response to the young offenders. Zehr points out *"whether it will live up to its promises remains to be seen but in many circles today, restorative justice is considered a sign of hope and the direction of the future."*[29] Furthermore, Braithwaite also reaffirms that irrespective of how much restorative Justice is viewed and assessed, it has emerged as an accepted approach at nearly every stage of the criminal justice system.[30] It can be viewed as a *"new social movement."*[31]

29 Zehr, H. and Gohar, A. *"The little book of restorative justice"* published by Good books, Intercourse, Pennsylvania, USA, P2

30 Braithwaite, J. (1999). Restorative Justice: Assessing Optimistic and Pessimistic Accounts. *Crime and Justice: A review of research*, 25(1), p1-127

31 Daly, K. and Immarigeon, R. (1998). *"The Past, Present and Future of Restorative Justice:"* Some Critical Reflections. *Contemporary Justice Review,* 1, p 21-45

# *Constitutional Value of Happiness*[1]

## Introduction

Adam Smith agrees that the purpose of the *Constitution* and government is to promote the *happiness* of the people. However, it is not only Adam Smith who thought *"happiness"* as the end of the *Constitution*. There are many other thinkers and leaders both before and after him who contemplated the same. Including the *Constitution of Bhutan*, there are explicit mention of the term *"happiness"* in the *Constitutions* of twenty-five countries in the world. However, the first official document to reflect happiness in the western world is the resolution adopted by the *Second Continental Congress* of the United States of America on 10 May 1776:[2]

> *…adopt such government as shall, in the opinions of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general.*

The second is the constitutional document of the *Virginia Declaration of Rights*, written by George Mason and adopted by the *Virginia Constitutional Convention* on 12 June 1776:

> *That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.*[3]

Article 3 of the same *Declaration* states:[4]

> *That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community; of all the various modes and forms of government, that is best which is capable of producing the greatest degree of happiness and safety…*

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1 Contributed by Nima Dorji.

2 Grodin, J R. (1997). *"Rediscovering the State Constitutional Right to Happiness and Safety"* 25:1 *Hastings Const. L.Q.* 5.

3 Art. 1, *The Virginia Declaration of Rights* 1776.

4 Art.1, *The Virginia Declaration of Rights* 1776.

The third is the *Declaration of Independence of the United States of America,* unanimously adopted by the *Congress* of the United States of America on 4 July 1776. For the opening paragraphs of the *Declaration of Independence*, Thomas Jefferson relied on George Mason's *Virginia Declaration of Rights* where he wrote:

> *…that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. –That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. –That whenever any Form of Government becomes destructive to these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organising its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.*

There are around thirty State *Constitutions* in the United States of America replicating similar provisions of these founding documents.[5] Pre-federal state *Constitutions* (*Bill of Rights*) adopted the *Virginia Declaration of Rights'* approach – *"Happiness and Safety."*[6] From these thirty state *Constitutions*; approximately 50% of them use the expression *"right to pursue and obtain happiness,"* and other 50% use expression *"right to the pursuit of happiness"* without *"obtaining"* and *"safety."*[7] Most of the *Constitutions* of twenty-five countries mentioned earlier, adopted the *Virginia Declaration of Rights* and the *Declaration of Independence*'s approach to happiness.[8] However, some take different approaches from these founding documents.

Although *happiness* found its place in many constitutions, the value each Constitution accords to it vary. Differences in use of the expression in the founding documents and its failure to find a place in the *Federal Constitution of the United States America (Bills of Rights)*, further complicated the efforts of ascertaining the constitutional value of *happiness* not only in the United States, but also in some of the countries adopting similar approach to

5 Grodin, J.R. *Supra* note 1 at 1.

6 Grodin, J.R. *Ibid* at 7.

7 Grodin, J.R. *Ibid* at 3.

8 Lim, J. claims that the expression, *"pursuit of happiness"* in the *Japanese Constitution* of 1946 and *South Korean Constitution* of 1980 is adapted from the *Virginia Declaration of Rights* and the *Declaration of Independence* in the U.S: Lim J. (2001). *"Pursuit of Happiness Clause in the Korean Constitution," Journal of Korean Law* 75.

*happiness*. The *Fifth* and *Fourteenth Amendment* of the United States *Constitution* excluded or replaced *"happiness"* with *"property"* replicating a Locke's trilogy of *life*, *liberty* and *property (estate)*.[9]

This paper analyses *happiness* as a constitutional value of the *Constitution of Bhutan* in comparison to those twenty-five *Constitutions* in light of the relationship between the *Constitution* and *happiness* proposed by different groups of scholars. From the literature, I identified at least four ways in which various scholars interpret this concept of *happiness* in a constitutional context.[10] For this paper, I refer to them collectively as the *"theories of the constitutional value of happiness."* The first theory claims that the inclusion of *happiness* has no substantive legal value or meaning. The second theory supports the idea that *happiness* is a synonym of *property*. The third theory claims that *happiness* in *Constitution* denotes right to individualised natural rights. The fourth theory argues that *happiness* in the *Constitution* means *public* or *common good*.

This chapter explores these different approaches to the relationship between *happiness* and the *Constitution*. The provisions of all 25 *Constitutions* are examined to see in which category each *Constitution* fall. Finally, the *Constitution of Bhutan* is analysed in light of the provisions of those *Constitutions* and its findings to examine the value accorded to *happiness* by the *Constitution of Bhutan*.

## Happiness Has No Meaning or Value

The most common approach to the interpretation of the phrase, *"pursuit of happiness"* is that it has no substantive meaning.[11] Conklin claims that this group of thinkers assert that the pursuit of *happiness* in the *Declaration of Independence* is inserted to make the phrase pretty and appealing.[12] It is excessively general and does not list any substantive unalienable right.[13] Therefore, it is used as an instrument of rhetoric to beautify the text of

9 The Fifth Amendment, *The Constitution of the United States of America*.

10 Kondo, C. L. and Luciana, R.M. (2018). *The Right to the Pursuit of Happiness and the Right to Access Medical Treatment: Recent Developments in Brazilian Jurisprudence. PHRG Peace Human Rights Governance* 121-124.

11 Conklin, N.C. (2015). *The Origins of the Pursuit of Happiness*. 7 *Wash. U. Jur. Rev.* 200-201.

12 Ibid.

13 Ibid.

the *Declaration* without any practical or substantive meaning.[14] Conklin uses Carl Becker's claim to justify her claim – that Carl Becker best articulates this group's thought when he describes the phrase as a *"glittering generality."* However, Carl Becker did not refer to the phrase *"pursuit of happiness"* alone but the whole of the *Declaration*.[15]

The main idea of this theory is that the *"pursuit of happiness"* has no legal meaning and it is not justiciable.[16] They rely on cases decided by the *US Supreme Court* to claim that *"pursuit of happiness"* is not declared as an enforceable *fundamental right*, but as an end goal or aim of inalienable rights to *"life"* and *"liberty"* or as a principle that helps in interpreting and limiting the meaning of the *"life"* or *"liberty."*[17] Both states and American federal courts interpret the *"pursuit of happiness"* as declaratory political rhetoric without having any normative force.[18] Such reasoning shows that though they do not accord any legal meaning to *"happiness,"* but they seem to accept it as having an aspirational value.

## Happiness as Synonym of Property

John Locke in the *Second Treatise of Government* wrote that a man in the state of nature has rights to *life*, *liberty* and *estate*, which he collectively calls it *"property."*[19] He further wrote, a man is willing to join into the society with others for the mutual preservation of their lives, liberties and estates.[20] According to Locke, the end of government is to protect rights to *life*, *liberty* and *estate*, and if it betrays this trust, the people can dissolve the government and establish a new government.[21] The law of nature – which he calls it *"reason,"* governs the state of nature he posits. Locke claims that this *law of reason* teaches all mankind that every man is *"equal and independent"* and *"no one ought to harm another in his life, liberty, or possessions."*[22] The *law of*

14 Ibid.

15 Becker, C. L. (1922). *Declaration of Independence: A Study in the History of Political Ideas*.

16 Lim, J. *Supra* note 7 at 94.

17 Ibid at 89-102.

18 Ibid.

19 Locke, J. *The Second Treatise of Government*, First Paragraph of Chapter VII – *Of Political and Society* and first paragraph of Chapter IX – *Of the Ends of Political Society and Government*.

20 Locke, J. *Ibid*, the first paragraph of Chapter IX – Of the *Ends of Political Society and Government*.

21 Locke, J. *Ibid,* Chapter XIX.

22 Locke, J. *Ibid,* paragraph 6, Chapter II - *Of the State of Nature*.

*reason* is the basis for civil society and a just government – as *"government exist for men, not men for governments, all governments derive just powers from the consent of the governed."*[23]

Historians claim that Locke's writings influenced the use of *"pursuit of happiness"* in the *Declaration of Independence*. They argue that this expression has substantive meaning – that *"pursuit of happiness"* is a synonym to the *"right to property."*[24] That is, *happiness* is found in the acquisition of material comfort.[25] Therefore, *happiness* is accorded economic value of inherent right to acquire and possess property.[26] In other words, they argue that the founders deliberately mirrored Locke's list of inalienable rights and concept of his state of nature except *"pursuit of happiness."*[27] The reason for substituting *"estate"* with *"pursuit of happiness,"* they claim is not to change the meaning of Locke's *inalienable rights* but was a mere risking of the clarity of meaning for the grace of language.[28]

The historians use of term *"property"* as a synonym for *"happiness"* is not in the collective term used by Locke to denote *"life, liberty and estate,"* but to denote Locke's *"estate"* what we today call as *"property."*[29] Therefore, historians or scholars supporting this theory are claiming that the right to *"pursuit of happiness"* in the *Declaration of Independence* is synonymous with a right to acquire and possess *"property"* as we understand now and *"estate"* as Locke understood then. That is, for their claim, *"pursuit of happiness"* used in the *Declaration of Independence* is not understood as the expression used by Locke in *An Essay Concerning Human Understanding* where he wrote that the thinking beings are in constant *"pursuit of happiness."*[30] However, *happiness* is reduced to mean acquisition and possession of a material property.

Another reason why the *"pursuit of happiness"* is interpreted as *"property"*

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23 Lim, J. *Supra* note 7 at 84.

24 Conklin, C.N. *Supra* note 10 at 199-200.

25 Conklin, C.N. Ibid.

26 Maier, P. (1997). *"American Scripture: Making of the Declaration of Independence* 105-23s, quoted in Patrick J. C. (2011) *"Restoring 'Life, Liberty, and the Pursuit of Happiness' in Our Constitutional Jurisprudence: An Exercise in Legal History"* 20 *Wm. & Mary Bill Rts. J.* 476.

27 Conklin, C.N. *Supra* note 10 at 198.

28 Charles, P.J. (2011) *"Restoring 'Life, Liberty, and the Pursuit of Happiness' in Our Constitutional Jurisprudence: An Exercise in Legal History"* 20 *Wm. & Mary Bill Rts. J.* 476.; Lim, J.(2001). *"Pursuit of Happiness Clause in the Korean Constitution"* 1:2 *Journal of Korean Law* 84.

29 Conklin, C.N. *Supra* note 10 at 197.

30 Locke, J. *An Essay Concerning Human Understanding*, Paragraph 52.

is that they claim that these two phrases were used interchangeably substituting each other in many constitutional documents.[31] Jibong claims on several occasions such as the *resolution* of the first *Continental Congress* of 14 October 1774, and the *Massachusetts Council* on 25 January 1773 used *"property"* with *"life and liberty."*[32] Later, the *Declaration of Independence* and other state *Constitutions* used *"pursuit of happiness"* with *"life and liberty"* which was in the *Fifth* and *Fourteenth Amendment* of the *Constitution of the United States of America* substituted with *"property."*[33] According to Jibong, such interchangeable uses of the term *"property"* and the *"pursuit of happiness"* substituting each other implies that these two phrases are used synonymously. However, this hypothesis, in my opinion, does not prove that *"pursuit of happiness"* is a synonym of *"property"* for reasons, which will be discussed later.

## Happiness and Presumption of Liberty or Individualised Natural Rights

Many scholars view the trilogy of *"life, liberty, and the pursuit of happiness"* as embodying a libertarian ideal that, it is intended to protect economic liberties and support the limitation of government intrusion on individual rights.[34] The *"pursuit of happiness"* when viewed through a libertarian lens, requires a *presumption of liberty* when the constitutionality of legislative acts or governmental actions is examined.[35] Scholars argue that *happiness* is incorporated as an *inalienable natural right* of an individual. It is based on the principle of the *"presumption of liberty"* – which is, that in a free state, an individual has a right against interference by the state. Therefore, anything that inhibits *liberty* must be limited.[36]

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31 Lim, J. Supra note 7 at 92.

32 Lim, J. Ibid at 88.

33 Lim, J Ibid at 88-91.

34 Charles, P. J. *Supra* note 27 at 459.

35 Barnett, E.R. (1998). "*The Structure of Liberty: Justice and the Rule of Law"* 41- 43 referred in Patrick J. Charles, *"Restoring 'Life, Liberty, and the Pursuit of Happiness' in Our Constitutional Jurisprudence: An Exercise in Legal History"* (2011) 20 *Wm. & Mary Bill Rts. J.* 477, 481.

36 Charles, P.J. *Supra* note 27 at 481.

According to Charles, this theory of the *presumption of liberty* is solely based on the modern libertarian conception of Locke's writings.[37] Charles claims that *American Constitutionalism* in eighteenth-century reflected Locke's liberalism in constitutional rights as a limitation against governments, institutions, and individuals seeking to impede individual's natural due.[38] Professor Randy Barnett associates the *common* or *public good* with a legal presumption of *liberty* – that the presumption of *liberty* is a means to the end of achieving justice, which facilitates the pursuit of *happiness* by everyone living in a society with others.[39] What he is claiming is that civil authority should not prohibit or regulate an individual's pursuit of *happiness*.[40] This theory takes a negative rights' approach to *"pursuit of happiness"* relying on the Locke's view of *natural rights*. Locke views his trilogy of natural rights - *life, liberty* and *property* as the *negative rights* which people have individually against the government, as a basis for objecting to governmental interference.[41]

## Happiness and Presumption of Common Good

Some historians and scholars counter arguments made by previous two theories. They claim that *"happiness"* has the highest constitutional value.[42] It has a meaning separate from *"property"* – the role of government is to protect both property and *happiness* of the people,[43] and it does not embody an individualised right or presumption of liberty.[44] Rynbrandt citing John Adams wrote *"the love for liberty may be in the soul of man, but it is also in the soul of a wolf"* and to become more rational, generous or social than a wolf, a man needs to get enlightened by experience, reflection, education, and civil and political institutions.[45] Similarly, citing James Madison, Professor Ryan wrote that the excess of power and excess of liberty results in the same

37 Lim, J. (2001). *"Pursuit of Happiness Clause in the Korean Constitution"* 1:2 *Journal of Korean Law* 83; Charles, P. J. *Supra* note 27 at 478.

38 Charles, P.J. *Ibid.*

39 Charles, P.J. *Ibid* at 479.

40 Charles, P.J. *Ibid* at 478.

41 Grodin, R.J. (1997). *"Rediscovering the State Constitutional Right to Happiness and Safety"* 25:1 *Hastings Const. L.Q.* 15.

42 Grodin, R.J. *Ibid* at 15; Patrick J. Charles, *Supra* note 27 at 475, 483.

43 Musikanski, L.(2014). *"Happiness in Public Policy"* 6:1 *Journal of Social Change* 56.

44 Charles, P.J.(2011). *"Restoring "Life, Liberty, and the Pursuit of Happiness" in Our Constitutional Jurisprudence: An Exercise in Legal History"* 20 Wm. & Mary Bill Rts. J. 498.

45 Rynbrandt, R.(2016). *"The Pursuit of Happiness"* Paper prepared for the *Western Political Science Association 2016 Annual Conference* in San Diego, CA.

outcome.[46] Therefore, the presumption of the common good is more important than the presumption of liberty. Scholars supporting this theory argue that the substitution of *"property"* by *"the pursuit of happiness"* in the *Declaration* itself shows that the drafters meant something substantive.[47] If the phrase *"pursuit of happiness"* appears empty or meaningless, it is because the most common understanding of the word *"happy"* has changed to *"fleeting and temporal" happiness*.[48]

The claims of this theory of presumption of the common good are summarised in seven points. The first point is that *happiness* is the end all humans seek. Ryanbrandt asserts that philosophers like Socrates, Plato and Aristotle have regarded *happiness* as the goal of all human activity.[49] Further, though Plato, Aristotle, Epicurus and Stoic do not agree with the definition of *happiness*, they all agree that *happiness* can be obtained by human effort.[50] According to Halbreich, from the beginning of human history, the struggle for survival is motivated by the desire for *happiness*.[51] Even Locke agrees that human behaviour is driven by an aversion to suffering and a desire for *happiness*.[52] Liberty was essential to Locke not as an end in itself, but as one of the paths to *happiness*.[53] Therefore, the great end of both nation and human existence is their *happiness*.[54]

The second point is that *happiness* is the end of the *Constitution* or the government.[55] According to Thomas Paine, the end of all good government

46 Rynbrandt, R. *Ibid.*

47 Conklin, C.N. (2015). *"The Origins of the Pursuit of Happiness"* 7 *Wash. U. Jur. Rev.* 195.

48 Conklin, C.N. *Ibid.*

49 Rynbrandt, R. *Supra* note 44.

50 Rynbrandt, R. *Ibid.*

51 Halbreich, U. (2018). *"Pursuit of Happiness, Prosperity and Health (P-HPH)" International Journal of Social Psychiatry* 307.

52 Rynbrandt, R. *Supra* note 44 at 6.

53 Rynbrandt, R. *Supra* note 44 at 7.

54 *"That a man is designed for happiness. Happiness is the aim of life and the chief end of mankind"*: Grodin, J.R.(1997). *"Rediscovering the State Constitutional Right to Happiness and Safety"* 25:1 *Hastings Const. L.Q.* 14; Conklin, C.N. (2015). *"The Origins of the Pursuit of Happiness"* 7 *Wash. U. Jur. Rev.* 259; Rynbrandt, R. *Supra* note 44 at 10; and Claus, L.K. and Morilas, L.R. (2018). *"The Right to the Pursuit of Happiness and the Right to Access Medical Treatment: Recent Developments in Brazilian Jurisprudence"* 2:1 *PHRG Peace Human Rights Governance* 122.

55 *"The end of the constitution is to ensure social justice to promote the happiness of the people",* and *"happiness is in truth the only object of legislation of intrinsic valu*e" in Grodin, J.R. (1997).

is the general *happiness* of the people.[56] This group of scholars argues that if the *happiness* is the end goal humans seek, then the purpose of *Constitution* and government formed under it should be *happiness*.[57] According to them, *happiness* is possible only in a perfect society, and the purpose of a government is to create that perfect society.[58] The perfect society and good government enable the development of individual's faculties and *happiness*.[59] Philosophers such as Socrates, Plato and Aristotle, contemplated the ordering of society, politics and governance for the *public happiness* or *happiness of the society*.[60] According to John Adams as cited by Ryanbrandt, the government is established for the common good – for the *happiness* of the people, not for the private interest of a person or group or class of people.[61] Therefore, it is claimed that the purpose of government is not founded on the Lockean libertarian paradigm. The American founders agreed that the *"government existed for the happiness of the people they governed"* and their worth are tied to their ability to promote *happiness*.[62] According to the founders, the *happiness* of the society or public was the purpose and the first law of the government.[63]

The third point is that *happiness* is achieved in interdependent life.[64] According to Aristotle humans are political animals.[65] To achieve *happiness* one must live a social life with parents, children, spouse and in general with friends and fellow citizens.[66] Scholars in this group reject the Lockean system of

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*"Rediscovering the State Constitutional Right to Happiness and Safety"* 25:1 *Hastings Const. L.Q*. 11; and Rynbrandt, R. *Supra* note 44 at 8.

56 Paine, T. (1792) *Rights of Man*.

57 Grodin, J.R.(1997). *"Rediscovering the State Constitutional Right to Happiness and Safety"* 25:1 *Hastings Const. L.Q*. 2.

58 Grodin, J.R. *Ibid* at 11.

59 Grodin, J.R. *Ibid* at 14.

60 "Plato in *Republic* discussed the best societal arrangement for human happiness. Socrates said there is no point of glittering statutes and city walls and warships if those within them are not happy": Rynbrandt, R.(2016). *"The Pursuit of Happiness"* Paper prepared for the *Western Political Science Association* 2016 *Annual Conference* in San Diego, CA.

61 *"Social happiness and the blessings of society depend entirely on the constitutions of government":* Rynbrandt, R. *Supra* note 59 at 10.

62 Rynbrandt, R. *Supra* note 59 at 9.

63 Grodin, J.R. *Supra* note 56 at 15; Rynbrandt,R. *Supra* note 59 at 1, 15.

64 Grodin, J.R. *Supra* note 56 at 11.

65 Aristotle, *Politics.*

66 Grodin, J.R. *Supra* note 56 at 11.

government that prioritises individual's autonomy.[67] Individuals are parts of the larger community.[68] In other words, they prioritise the importance of community and interdependence for *happiness* over the individualised rights approach to *happiness*.[69] As already mentioned in the preceding paragraph, the focus is on public *happiness*, not purely on private *happiness*.[70] To enjoy the general *happiness* of improved societies guaranteed by the government, one must surrender personal independence.[71] If individual disregards the common interest and *"pursues a selfish and separate end,"* their pursuit of such ends will be mutually defeated.[72]

The fourth point is that *"happiness"* imposes positive duties upon both government and the individual citizens. Unlike the Lockean view of *negative rights* – the rights people have individually against the government for limiting the interference, they claim that *happiness* imposes affirmative obligations upon the government to increase the *happiness* of its citizens.[73] The good government has a duty not only to commit to *happiness* as its object but also to possess knowledge of the means for attaining the object.[74] The government has the duty to exercise power conferred on it for the safety and *happiness* of the *"whole body,"* and exercise of power not conducive to this end is unjust.[75] Therefore, *happiness* for the founders meant *"happiness as a way of government"*– imposing a duty upon the government to make its best to *"the highest amount of people."*[76]

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67 Grodin, J.R. *Supra* note 56 at 13.

68 Claus L.K. and Morilas,L.R. (2018). *"The Right to the Pursuit of Happiness and the Right to Access Medical Treatment: Recent Developments in Brazilian Jurisprudence"* 2:1 *PHRG Peace Human Rights Governance* 122.

69 Grodin, .J.R *Supra* note 56 at 13.

70 Grodin, J.R. *Ibid.*

71 Charles, P.J. (2011). *"Restoring "Life, Liberty, and the Pursuit of Happiness" in Our Constitutional Jurisprudence: An Exercise in Legal History"* 20 Wm. & Mary Bill Rts. J. 498.

72 Charles, P.J. *Ibid* at 515-516.

73 Grodin, J.R.(1997). *"Rediscovering the State Constitutional Right to Happiness and Safety"* 25:1 *Hastings Const. L.Q.* 14.

74 The author cites James Madison in Rynbrandt, R. (2016). *"The Pursuit of Happiness"* Paper prepared for the Western *Political Science Association*, *Annual Conference* in San Diego, CA.

75 Charles, P.J. (2011). *"Restoring "Life, Liberty, and the Pursuit of Happiness" in Our Constitutional Jurisprudence: An Exercise in Legal History"* 20 Wm. & Mary Bill Rts. J. 514.

76 Claus L.K. and Morilas,L.R.(2018). *"The Right to the Pursuit of Happiness and the Right to Access Medical Treatment: Recent Developments in Brazilian Jurisprudence"* 2:1 *PHRG Peace Human Rights Governance* 122.

If the end of life is *happiness*, then a man has a duty to pursue *happiness*.[77] The people have the duty to be knowledgeable and virtuous – duty to attain one's natural end, also known as human flourishing.[78] The *happiness* in founding document imposes a duty upon the people to choose a form of government that can ensure *happines*s for his fellow citizens.[79] In other words, it is the duty of the people to refrain from the electoral corruption and elect people with virtuous character to govern them – to promote common good or *happiness* of the greater number.[80] According to Conklin, Jefferson said that it is an indispensable duty of every virtuous member of society to prevent the harm to society or country to promote *happiness*.[81] As the government is instituted for the common good, if it fails to achieve this end, then the people have power and duty to institute new government.[82]

The fifth point is, as evident from the preceding discussions, most of the scholars argue that for the founders, *"happiness"* meant *"self-realisation, the fulfilment of one's essential being."*[83] *Happiness* is a pursuit of virtuous life in the sense of eudemonia.[84] One of the basis scholars provide for their claim is that the founders like Jefferson, John Adams and George Washington not only modelled their public and political lives on ancient virtuous standards but also evaluated the public virtues and political lives of others according to those same standards.[85] The standard of virtuous life is to *"live in harmony with universal reason that organises and directs the natural world."*[86] According to

77 Grodin, J.R. *Supra* note 72 at 14.

78 Charles, P.J. Supra note 74 at 514; Grodin, J.R. *Ibid* at 11.

79 Rynbrandt, R. *Supra* note 73 at 12.

80 Jmadison, J. said, *"People have the duty to be virtuous and intelligent and select men of virtue and wisdom. If there is no virtue among us, no theoretical checks, no form of government can render us secure. To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea":* Patrick, J. C. *Supra note 74 at 526*.

81 Conklin, C.N. (2015). *"The Origins of the Pursuit of Happiness"* 7 *Wash. U. Jur. Rev.* 259.

82 Grodin, J.R. *Supra* note 72 at 11; Rynbrandt, R. *Supra* note 73 at 10.

83 Grodin, J.R. *Supra* note 72 at 16.

84 Conklin, C.N. *Supra* note 80 at 195.

85 Conklin, C.N. *Ibid* at 230-240.

86 Conklin claims that according to Stoics, *"Our natures are part of the nature of the universe and the goal is to live following nature – according to one's nature and that of the universe…True happiness – real and substantial happiness came from living a life of virtue, a life that was fit or rightly ordered in relation to the natural law. In other words, it meant human flourishing achieved through a life of virtue, and which had both private (of a person) and public (of the community) application":* Conklin, C.N.( 2015). *"The Origins of the Pursuit of Happiness"* 7 *Wash. U. Jur.*

Conklin, Benjamin Franklin stated:[87]

> *It is impossible to enjoy ourselves rightly if our conduct be not such as to preserve the harmony and order of our faculties and the original frame and constitution of our minds; all true happiness, as all that is truly beautiful, can only result from order. Therefore, if we pursue happiness through passion instead of reason, we achieve only an "inferior" and "imperfect" happiness, because there is no happiness than but in a virtuous and self-approving conduct.*

According to Jefferson, *virtue is the foundation of happiness*,[88] and *happiness* is defined as the perfect activity and employment of virtue.[89] The virtuous actions require that the private or individual interest give way to the public good.[90] In other words, the public good is not possible without public virtue in the whole of people.[91]

Public virtue takes us to the sixth point, that *happiness* denotes common or collective good – the happiness of the whole.[92] The happiness envisioned by the founders not only included the enjoyment of life but also engaging in purposeful activities of practising *"virtuous and meaningful relationships with and service to others."* [93] The people as a body never desire to harm themselves, and instead, they desire the general welfare of others.[94] If the people and the government are corrupted by selfish motives and base views, the public good is endangered.[95] Therefore, *happiness* denotes the political, constitutional and legal idea that the government or society is

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*Rev.* 235, 254.

87 Conklin, C.N. *Ibid* at 257.

88 Conklin, C.N. *Ibid* at 259.

89 Grodin, J.R. (1997). *"Rediscovering the State Constitutional Right to Happiness and Safety"* 25:1 *Hastings Const. L.Q.* 11.

90 Charles, P. J. (2011). *"Restoring "Life, Liberty, and the Pursuit of Happiness" in Our Constitutional Jurisprudence: An Exercise in Legal History"* 20 *Wm. & Mary Bill Rts. J.* 515.

91 Charles, P.J. *Ibid* at 498.

92 *"The Constitution was established to promote the good of the whole people, not the happiness of one or a few."*: Charles, P.J. *Ibid* at 520; and Rynbrandt, R. (2016). *"The Pursuit of Happiness"* Paper prepared for the *Western Political Science Association*, *Annual Conference* in San Diego, CA.

93 Rynbrandt, R. *Ibid* at 26.

94 Charles, P.J. *Supra* note 89 at 501-503.

95 Charles, P.J. *Ibid* at 515.

established for the public or common good – that is the greatest degree of *happiness for the greatest number.*[96]

The seventh and final point is that happiness denotes presumption of common good, not presumption of liberty.[97] The presumption is that the governmental actions or laws are constitutional because they represent the majority interests intended for the common good. The democratic *Constitution* or government established under it is calculated to produce the greatest good to the greatest number of the people,[98] not to create a utopian society of individualised liberty or libertarian society, as envisioned by modern legal critics.[99] Charles claims that political parties, lobbyists, public interest groups, and influential businesses have diluted the virtuous form of government intended by the founders.[100] These political representatives no longer care about *"the people."*[101] The scholars, supporting the presumption of the common good claim that *"liberty and happiness"* are not individualised personal guarantees; instead, the end that can be achieved only in a virtuous society and public spirit.[102]

## Constitutional Value of Happiness – a Comparative Perspective

### The United States of America

All the above discussions pertain to constitutional value *"happiness"* is accorded or ought to have accorded in the United States of America. I agree with the reasoning of the fourth group of scholars on their seven points. On reading the *Second Treatise of Government* and *An Essay Concerning Human Understanding,* even John Locke appears to agree that *happiness* is the end we seek.[103] His trilogy of *"life, liberty and property"* is nothing but a means

96 Claus, L.K. and Morilas, L.R. (2018). *"The Right to the Pursuit of Happiness and the Right to Access Medical Treatment: Recent Developments in Brazilian Jurisprudence"* 2:1 *PHRG Peace Human Rights Governance* 122; Charles, P. J. *Supra* note 89 at 501-503.

97 Charles, P.J. *Ibid* at 498.

98 Charles, P.J. *Supra* note 27 at 485, 487, 496; Rynbrandt,R. *Supra* note 59 at 1.

99 Charles, P.J. (2011). *"Restoring Life, Liberty, and the Pursuit of Happiness" in Our Constitutional Jurisprudence: An Exercise in Legal History"* 20 *Wm. & Mary Bill Rts. J.* 504-505.

100 Charles, P.J. *Ibid* at 514.

101 Charles, P.J. *Ibid.*

102 Charles, P.J. *Ibid* at 523.

103 *"Everyone constantly pursues happiness, and desires whatever contributes to it"*: Locke, J. *An Essay Concerning Human Understanding,* Para.42-43.

to the pursuit of *happiness*:[104]

> *The mind is usually able to suspend acting on some of its desires, and so-taking them one at a time- to suspend acting on any of them. Having done this, the mind is at liberty to consider the objects of its desires- the states of affairs that it wants to bring about- to examine them on all sides and weigh them against others. In this lies man's liberty; and all the mistakes, errors, and faults that we run into living our lives and pursuing happiness arise from not availing ourselves of this liberty, and instead rushing into the determination of our wills, going into action before thinking enough about what we are aiming at. Ability to suspend the pursuit of this or that desire seems to me to be the source of all freedom.*

When we read Locke carefully, right to liberty he contemplated is, acting according to the fair examination – law of reason. Therefore, liberty is not just unalienable right; it also imposes a duty upon the individual to exercise liberty in accordance with right reason in pursuit of *happiness*. This duty to right reason includes *"not to harm another in his life, health, liberty, or possessions."*[105] The political society – the government is not to be limited. In Locke's words – *"political society can be, nor subsist, without having in itself the power to preserve the property."*[106] Locke further states that when men consent to *"one community or government"*, they willfully make *"one body,"* where majority make the decision.[107] According to Locke, when the government instituted to protect the *"property of the people"* is not able to meet this end, then the people can choose to dissolve the government.[108] Locke's writings suggest that he did not advocate his trilogy purely as individualised rights, but also as an affirmative duty for both government and individual. Therefore, the presumption is of the common good, not of liberty.

As evident from the preceding discussions, unfortunately, the constitutional value rendered to *"happiness"* is not the value founders intended. According to Grodin, some states courts have held that provisions of unalienable

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104 Locke, J. *An Essay Concerning Human Understanding,* Para.47.

105 *"The state of nature has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions"*: Locke, J. *Second Treatise of Government,* para.6.

106 Locke, J. *Second Treatise of Government,* para. 87.

107 Locke, J. *Ibid at* para. 95-96.

108 Note *"property"* Locke uses consists of *"life, liberty and estate:"* Locke, J. *Second Treatise of Government,* para.222.

rights are only advisory and hortatory and not enforceable.[109] He adds that, though Indiana courts once embraced *"pursuit of happiness"* as *"pure libertarian principles,"* other courts were reluctant to read even *"obtaining happiness and safety"* as embodying such libertarian principle.[110] *Happiness* is considered as an aggregate of many particular rights provided in the *Constitutions* or in the generality of *"liberty,"* equating *happiness* with *liberty*.[111] Therefore, in the US context, it is safe to say that *happiness* has no legal, constitutional meaning or value.

**Europe**

The *Constitutions* of few European countries include *"happiness"* in their constitutions. The *Constitution of Austria* provides that the values of schooling should be able to let the student become…*happy*.[112] *Happiness* is listed amongst many qualities a student should be able to possess during or at the end of the schooling. Therefore, the *Constitution of Austria* as such does not guarantee the right to *happiness*, nor it is difficult to conclude if it confers any constitutional value. The *Constitution of Turkey* recognises the happiness of individual and society as the fundamental end goal and duty of the state.[113] To meet this end, the Turkish *Constitution* imposes a duty upon State to *"safeguard the independence and integrity of the Nation, the indivisibility of the country, and the Republic and democracy."*[114] It does not recognise *happiness* as rights. However, it is interesting to note that it uses the phrase *"happiness of individual and society"* – this could be interpreted as adopting *"presumption of common good"* theory of *happiness*.

In France, the *Declaration on the Rights of Man and Citizen* provides that *"the acts of legislative and executive powers of government to tend to the maintenance of the Constitution, and the general happiness."*[115] This provision requires that the legislative and executive powers be exercised to protect the *Constitution* and

109 Grodin, J.R. (1997). *"Rediscovering the State Constitutional Right to Happiness and Safety"* 25:1 *Hastings Const. L.Q*. 19-22.

110 Grodin, J.R. *Ibid* at 22-24.

111 Grodin, J.R. *Ibid* at 26-27.

112 *"Values of schooling should be able to let the student become healthy, self-confident, happy, performance oriented, dutiful, talented and creative humans capable of taking over responsibility for themselves, fellow human beings, environment and following generations, oriented in social, religious and moral values:"* Art. 14(5a), *The Constitution of Austria* 1920.

113 Art.5, *The Constitution of the Republic of Turkey* 1982.

114 *Ibid.*

115 Preamble, *France Declaration on the Rights of Man and Citizen* 1789.

the general *happiness*. Further, the use of the phrase *"the general happiness"* denotes *"presumption of the common good"* – ensuring the *happiness* of the greatest number, not individualised rights to *happiness*.

**Africa**

Some of the *Constitutions* of African countries also make references to *happiness*. The *Constitution of Liberia* 1986 provides that the people have the right to alter and reform the government when their safety and *happiness* so require.[116] By extension, if people believe that the government is not able to ensure their *happiness*; they have the collective power to change or reform the government. *The Constitution of Liberia* adopts the second part of the *Virginia Declaration of Rights* and the *Declaration of Independence*'s language empowering the people to dissolve government or institute new government to secure safety and *happiness*. Therefore, it implies that the state has the *affirmative obligation* to ensure the safety and *happiness* of the people. Unlike the Liberian *Constitution*, the *Constitution of Egypt* 2014 mentions that the Egypt is a *"place of happiness for all its people."*[117] However, it is very aspirational in nature.

The *Constitution of Namibia* 1990 guarantees the right to the pursuit of *happiness*, regardless of race, colour, ethnic origin, sex, religion, creed or social or economic status.[118] The *Constitution of Seychelles* reaffirms the rights of the individual to life, liberty and the pursuit of *happiness* from all types of discrimination.[119] Literally, these two *Constitutions* recognise *"the pursuit of happiness"* as a right against discrimination. The *Constitution of Ghana* 1992,[120] the *Constitution of Nigeria* 1999[121] and the *Constitution of Swaziland* 2005 imposes a duty on the State to ensure that the national economy is managed in a manner to maximise welfare, freedom and *happiness* of every person.[122] These three *Constitutions* associate *"happiness"* with *"national*

116 Art.1, The *Constitution of Liberia* 1986.

117 Preamble, The *Constitution of Egypt* 2014.

118 Preamble, The *Constitution of Namibia* 1990.

119 Preamble, The *Constitution of Seychelles* 1993.

120 *"The State shall take all necessary action to ensure that the national economy is managed in such a manner as to maximise the rate of economic development and to secure the maximum welfare, freedom, and happiness of every citizen"* Art. 36(1), The *Constitution of Ghana* 1992.

121 *"The State shall control the national economy in such a manner as to secure the maximum welfare, freedom, and happiness of every citizen on the basis of social justice and equality of status opportunity"*: Art. 16(1), The *Constitution of Nigeria* 1999.

122 As a nation they desire the happiness and welfare of all the people; and state shall

*economy"* implying material comfort. The *Constitution of Niger* requires the President of the *Republic* and President of *National Assembly* to take an *Oath* affirming their commitment to work tirelessly for the *happiness* of the people.[123] Its constitutional value is not clear.

The common feature of the African constitutions is that they all seek to proclaim freedom from white supremacy, and economic exploitation and discrimination based on skin colour.[124] The constitutions of African countries are adopted to counter sadistic pleasures *(happiness)* derived from external economic exploitation and domination of racial groups.[125] Therefore, economic development should have higher goals of *happiness* of the people in response to the trauma they have suffered.[126] It is claimed that African constitutions embrace *"human dignity"* as a tool for preventing *"right to happiness"* turning into *"sadistic pleasures."*[127] *Happiness*, therefore, is the foundation of the causes and values enshrined in the African Constitutions.[128]

## North America

In North America, the *Constitution of Antigua and Barbuda* assert that people's *"happiness and prosperity can best be pursued in a democratic society in which all persons may, to the extent of their capacity, play some part in the national life."*[129] The *Constitution* associates *"happiness"* with *"democratic society,"* indicating that people can pursue *happiness* up to the optimum level only in a democratic society by taking part in national life. The *Constitution of Belize*,[130] and the

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take all necessary action to ensure that the national economy is managed in such a manner as to maximise the rate of economic development and to secure the maximum welfare, freedom and happiness of every person": Preamble and Art. 59(1), *The Constitution of Swaziland* 2005.

123 Art. 50 and 89, *Constitution of Niger* 2010 (as amended in 2017).

124 Leal, S.T. (2016). *"Constitutional Scapegoat: The Dialectic between Happiness and Apartheid in South Africa"* 22:2 *Fundamina* 297-309.

125 Leal, S.T. *Ibid* at 304.

126 Leal, S.T. *Ibid.*

127 Leal, S.T. *Ibid* at 305.

128 Leal, S.T. *Ibid* at 308.

129 Preamble (c), *Constitution of Antigua and Barbuda* 1981.

130 Guarantees right to the pursuit of happiness. provide that it is aimed at protecting the rights of the individual to life, liberty, basic education, basic health, the right to vote in elections, the right to work and the pursuit of happiness: Preamble (e), The *Constitution of Belize* 2017.

*Constitution of Haiti* guarantees right to the pursuit of *happiness*.[131] These two constitutions adopt the *US Declaration of Independence's* approach. The *Constitution of Nicaragua* claims that it is adopted in the name of those who struggle and offer their lives when confronted by imperialist aggression to guarantee the *happiness* of the future.[132] The Nicaraguan *Constitution* by implication imposes a duty upon the people to counter imperialism to secure their *happiness*.

**South America**

In South America, it is only *Constitution of Guyana* that makes the explicit mention of *happiness*. It provides that every individual is entitled to the basic rights to a happy, creative and productive life, free from hunger, ignorance and want.[133] The Guyana *Constitution* suggests that for *happiness* all you need is to be free from hunger and need not meet your wants. The *Constitution* also requires a person to dedicate her energies towards the *happiness* and prosperity of Guyana. *The Guyana Constitution* implies *"happiness"* as virtuous and contented living and duty to work for collective *happiness*.

Although there is no explicit mention of *happiness* in the *Constitution of Brazil*, in 2011, the right to *happiness* is recognised through judicial construction as a part of the right to human dignity.[134] The court recognised the same-sex family union as a right to "*pursuit of happiness"* and referred to the recognition of *"happiness"* in the constitutions of other countries including Bhutan.[135]

**Oceania**

In Oceania, while the draft *Constitution of Solomon Islands* 2013 reflected *happiness* as one of the mandates of its people and residents *"to uphold and*

131 Provides that the *Constitution* is aimed to guarantee their inalienable and imprescriptible rights to life, to liberty and to the pursuit of *happiness*: Preamble, The *Constitution of the Republic of Haiti* 1987.

132 Preamble, The *Constitution of the Republic of Nicaragua* 1986/7.

133 Art.40(1), The *Constitution of the Co-operative Republic of Guyana* 1980.

134 Claus, L.K. Morilas, L.R. (2018). *"The Right to the Pursuit of Happiness and the Right to Access Medical Treatment: Recent Developments in Brazilian Jurisprudence* 2:1 *Peace Human Rights Governance* 125; Leal, S.T. *"Right to happiness: a new constitutional approach"* blogpost published on October 8, 2015 at https://belconlawblog.com/2015/10/08/right-to-happiness-a-new-constitutional-approach/#_ftn8, Visited on October 30, 2018.

135 Leal, S.T. *Ibid.*

*practise,"*[136] it does not appear anymore in the draft of 2014. However, the *Constitution of Tuvalu* recognises the right of the people, both present and future, *"to a full, free and happy life"* as given to them by God.[137] This right is recognised as one of the principles of their *Constitution* together with a right to moral, spiritual, personal and material welfare.[138] The *Constitution* further provides that the people of Tuvalu recognise and affirm that the stability of Tuvaluan society and the *happiness* and welfare of the people, both present and future, depend on maintenance of Tuvaluan values, culture and tradition, including the vitality and the sense of identity of communities and attitudes of cooperation, self-help and unity amongst those communities.[139] Tuvaluan *Constitution* recognises the right to *"happy life"* as intergenerational rights, and this right to *happiness* can be achieved only if Tuvaluan values, culture and tradition are protected. While it recognises *"happiness"* as a right, it also imposes a duty upon the people to ensure those sources of *"happiness"* are maintained.

**Asia**

Several constitutions of Asian countries make an explicit mention of *"happiness."* The *Constitution of Japan* recognises *"right to life, liberty, and the pursuit of happiness."*[140] It imposes a duty upon the government to ensure that this right is given highest consideration in legislation and governmental affairs if it does not interfere with the public welfare.[141] It uses expression *"pursuit of happiness"* with *"life and liberty,"* which is similar to that of the *US Declaration of Independence*. However, it is not recognised as an absolute or unalienable right. The *"public welfare"* appears to be the highest concern.

The *Constitution of South Korea* mentions one of its objectives as to *"elevate the quality of life for all citizens and contribute to lasting world peace and the common prosperity of mankind and thereby to ensure security, liberty and happiness for themselves and their posterity forever."*[142] It also provides that all citizens shall be assured of human dignity and worth and have the *right to pursue happiness*,

136 *"To uphold and practise self-reliance, gainful occupation, subsistence economy, reciprocation, tolerance, respect, responsibility, dedication, honesty, trust, forgiveness, joy, peace, happiness, caring and sharing within the communities:"* Art.17(d), The *Draft Constitution of Solomon Islands* 2013.

137 Art. 2, The *Constitution of Tuvalu* 1986.

138 *Ibid.*

139 Art. 3, The *Constitution of Tuvalu* 1986.

140 Article 13, The *Constitution of Japan* 1946.

141 *Ibid.*

142 Preamble, The *Constitution of Republic of Korea* 1948.

and it is the duty of the State to guarantee these inviolable human rights of the individuals.[143] The Korean *Constitutional Court* has unlike the courts in the US, held the *"pursuit of happiness"* as having substantial meaning – it is recognised as an enforceable right.[144] The right to the pursuit of *happiness* is used to examine the constitutionality of ordinary legislation.[145] Therefore, the Korean *Constitutional Court* takes *"presumption of liberty"* or individualised rights approach to the *"pursuit of happiness."*

The *Constitution of North Korea* refers to *happiness* as well. It recognises the independent national economy of North Korea as a *"solid foundation for the people's happy socialist life and for the country's prosperity."*[146] *"Happiness"* is associated with the *"economy."* By implication, North Korean takes a materialist approach to *happiness*. On the same, *The Constitution of the Islamic Republic of Pakistan* provides that the *Constitution* is adopted to ensure the prosperity of the people of Pakistan and attain their rightful and honoured place amongst the nations of the World and make their full contribution towards *international peace and progress and happiness of humanity*.[147] It appears very aspirational.

The *Constitution of Thailand* recognises the importance of the unity of the people in observing, protecting and upholding the *Constitution* to bring about *happiness, prosperity and dignity to the people.*[148] The Thai *Constitution* requires government institutions to perform duties in accordance with the *Constitution*, laws and the rule of law for the *common good of the nation and the happiness of the public at large.*[149] The *Constitution* also encourages all sectors of society to co-exist with fairness, *happiness, unity and solidarity*. The *Constitution of Thailand* adopts *"duty imposing"* and *"common good"* approaches to happiness, not the right-based approach.

The *Declaration of Independence of the Democratic Republic of Vietnam* 1945 makes direct reference to the *Declaration of Independence of the United States of America*, particularly on *"inalienable rights to life, liberty, and the pursuit of*

143 Art. 10, The *Constitution of Republic of South Korea* 1948.

144 Lim, J. (2001). *"Pursuit of Happiness Clause in the Korean Constitution"* 1:2 *Journal of Korean Law* 74.

145 Lim, J. *Ibid* at 74.

146 Art. 26, *The Socialist Constitution of the Democratic People's Republic of Korea* 1972.

147 Preamble, *The Constitution of the Islamic Republic of Pakistan* 1973.

148 Preamble, The *Constitution of the Kingdom of Thailand* B.E. 2560.

149 Section 3 and 114, The *Constitution of the Kingdom of Thailand* B.E. 2560.

*happiness."* [150] The *Constitution of Vietnam* recognises the hardships and sacrifices the people made for the independence and freedom of the nation and *happiness of the people*.[151] The *Constitution* mandates the State to ensure that all people enjoy abundant, free, and *happy life* and are given conditions for all-sided development.[152] The *Constitution* also mandates the State and society to provide a favourable environment for the development of a family, which is well off, progressive and happy.[153] While the *Declaration of Independence* adopts the individualised right-based approach, the *Constitution* takes a positive duty approach to happiness.

## Constitutional Value of Happiness – a Bhutanese Perspective

### a. Constitutional Value of Happiness in the Plain and Textual Comparative Context

As mentioned earlier, Bhutan adopted its *Constitution* only in 2008. The Bhutanese *Constitution* is relatively new compared to the other constitutions. To understand the broader textual context of *"happiness"* in Bhutanese *Constitution*, it is relevant to examine how *"happiness"* in the Bhutanese *Constitution* compares itself with constitutions of other countries that provide an explicit reference to *happiness*. There is an explicit mention of *"happiness"* in at least four instances in the *Constitution of Bhutan*. The first mention is in the *Second Schedule* of the *Constitution* that recognises people's collective aspiration for *"peace and happiness to all people."*[154] All constitutions discussed in the preceding section, imply that *"happiness"* is an aspirational goal of their constitutions or the governments instituted under them. Likewise, one of the constitutional values of *"happiness"* that is reflected in the *Constitution of Bhutan* is of an aspirational in value.

The second mention is in the *Preamble* of the *Constitution* which says – *"We the people… Solemnly pledging ourselves…to enhance the happiness and wellbeing of the people for all time."*[155] The first part of this statement indicates the collective commitment or agreement of the people and imposes a collective duty to the

150 http://www.unc.edu/courses/2009fall/hist/140/006/Documents/VietnameseDocs.pdf

151 Preamble, The *Declaration of Independence of the Democratic Republic of Vietnam* 1945.

152 Art. 3, The *Constitution of the Republic of Vietnam* 2013.

153 Art. 60(3), *The Constitution of the Republic of Vietnam* 2013.

154 Second Schedule *(The National Anthem of Bhutan), The Constitution of the Kingdom of Bhutan* 2008.

155 Preamble, *The Constitution of the Kingdom of Bhutan* 2008.

people to work in unity for their *happiness*. It resembles the approach taken by the *Constitution of Thailand* that recognises the importance of the people's unity to bring about *happiness* to the people.[156] *The Constitution of Vietnam* and the *Constitution of Nicaragua* imply the collective duty of the people is to secure *happiness*. Similar to these constitutions, the *Constitution of Bhutan* recognises *"happiness"* as having collective *"duty imposing"* constitutional value. The second part of the statement, *"…for the people for all time"* indicates intergenerational *happiness* of the people. In countries like South Korea, Tuvalu, and Nicaragua, they adopt an intergenerational approach to *happiness* in their constitutions.[157] These constitutions require the collective efforts of the people or impose a duty upon both government and the people to secure *happiness* for both present and future generations. Similar to these constitutions, *"happiness"* also has *"intergenerational"* constitutional value in the *Constitution of Bhutan*.

The third mention of *happiness* is in Article 21(1) of the *Constitution of Bhutan*. It states, *"The government shall…ensure peace, security, well-being and happiness of the people."*[158] Article 21 deals with the constitution and functions of the executive government. Article 21(1) imposes an affirmative duty on the executive government to ensure the wellbeing and *happiness* of the people. Like the *Constitution of Bhutan*, the *Turkish Constitution* imposes a similar duty upon the state to safeguard the institutions that promote the *happiness* of individual and society.[159] The *French Constitution* also imposes a duty on the government to protect the *Constitution* and the general *happiness*.[160] The constitutions of countries such as Liberia (by implication),[161] Ghana,[162] Nigeria,[163] Swaziland,[164] Japan,[165] South Korea,[166] Thailand,[167] and Vietnam,[168] impose a duty on the government or the state to ensure *happiness*

156 *Ibid;* Preamble, *The Constitution of the Kingdom of Thailand* B.E. 2560.
157 Preamble, Art. 2, Preamble respectively.
158 Art. 20(1), *The Constitution of the Kingdom of Bhutan* 2008.
159 Art.5, *The Constitution of the Republic of Turkey* 1982.
160 The *France Declaration on the Rights of Man and Citizen* 1789.
161 Article 1, *The Constitution of Liberia* 1986.
162 Art. 36(1), *The Constitution of Ghana* 1992.
163 Art. 16(1), *The Constitution of Nigeria* 1999.
164 Preamble, *The Constitution of Swaziland* 2005.
165 Article 13, *The Constitution of Japan* 1946.
166 Art. 10, *The Constitution of the Republic of Korea* 1948.
167 Section 3 and 114, *The Constitution of the Kingdom of Thailand* B.E. 2560.
168 Art. 3, Art. 60(3), *The Constitution of the Republic of Vietnam* 2013.

or conditions that promote *happiness*. Therefore, Bhutan, in similar line to these countries, accords *"happiness"* with *"state duty imposing"* constitutional value.

The fourth reference of the *Constitution of Bhutan* to *happiness* is in Article 9(2) – *"the state shall strive to promote those conditions that will enable the pursuit of Gross National Happiness."*[169] This provision imposes on the *"state"* a duty to make all possible efforts to promote those conditions that allow the people to pursue *Gross National Happiness*. The mention of *"happiness"* within the collective phrase of *"Gross National Happiness"* is unique to the Bhutanese *Constitution*. Unlike most of the constitutions discussed earlier, the *Constitution of Bhutan* recognises *"happiness"* as the collective end, not as an individual right. *"Happiness"* in Bhutanese *Constitution* has *aspirational*, *intergenerational*, *collective good* and *duty imposing* values. Although most of the constitutions discussed above impose some form of duty on the government or state, they also recognise *"happiness"* or *"pursuit of happiness"* as the fundamental or inalienable rights of the individual or the people. However, there is no mention of *"happiness"* in Article 7 nor there is a provision that explicitly recognises the right to *happiness* in the *Constitution of Bhutan*.

### b. Contextual Analysis of the Constitutional Value of Happiness

The comparative examination of constitutional texts alone is not enough to ascertain the value *"happiness"* that Bhutan has its constitutional culture. It is important to read relevant constitutional texts in light of the historical, cultural, economic and political contexts. In other words, it requires examining the origin and evolution including changes in how *"happiness"* is understood over time in the Bhutanese legal scenario. While chapters 2 to 7 were aimed at understanding the historical and social statics and dynamics of *happiness*; this section analyses the nature of the *Constitutional Value of Happiness in Bhutan* in light of the relevant discussions and findings.

The first theory is *"happiness"* as not having any legal or constitutional value. This theory has two distinctive approaches – *happiness* as mere rhetoric or as having no substantive value, and *happiness* as having a mere aspirational or guiding value but not having justiciable value. If anything is clear from discussions in all the preceding chapters, it is that *"happiness"* is not a new concept in Bhutan. The origin or importance of *happiness* can be traced

169 Art. 9(2), The *Constitution of the Kingdom of Bhutan* 2008.

back to the arrival of Buddhism in Bhutan in the eighth century.

As already mentioned earlier, *happiness* first appeared in the *Buddhist Legal Code* of 1729 which codified the 17th century Buddhist legal practices established by the *Zhabdrung* from 1616.[170] The *Code* mentioned that the dual system of government was created to secure the *happiness* of all sentient beings, and if it is not able to meet this end, the government has no right to exist.[171] Therefore, the foundational value of the government itself was the *happiness* of the people. The hereditary *Monarchy* established in 1907 continued to remain guided by the same values of governance. The successive Kings initiated various reforms guided by the goal of the *happiness of people*, while they themselves lived a virtuous life. For the people, they became *Dharma Kings* – the virtuous or righteous Kings who truly cared and toiled for the *happiness* of its people.[172] From the early years of development of Bhutan to today, *happiness* still remains as value of our society and also as the bedrock of our governance strategy within the framework of refined pillars of *Gross National Happiness*. Therefore, unlike in the US or some countries discussed earlier, the reference to *happiness* in Bhutan's *Constitution* is an invaluable guiding philosophy that is envisioned to secure the freedoms of the Bhutanese people. We have noticed in the textual analysis that reference to *"happiness"* in the *Second Schedule* of the *Constitution* stems up as a deep aspirational value. However, it also has other important substantive legal and constitutional values for reasons, which will be discussed later.

The second theory is *"happiness"* as a synonym of *property* – Lockean *estate*. We have seen that the scholars and those historians supporting this theory claim that the *"happiness"* is synonymous to *property* for two reasons. The first reason is, the trilogy of *"life"*, *"liberty"*, and the *"pursuit of happiness"* or equivalent phrase in the US founding documents are influenced by John Locke's trilogy of *"life"*, *"liberty"* and *"property."*[173] *"Happiness"* is used in place of *"property"* to beautify the text.[174] The second reason is that the

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170 Ura, K. & et al, (2010). *An Extensive Analysis of GNH Index (The Centre for Bhutan Studies)* 6; Givel, M.S. (2015). *"Gross National Happiness in Bhutan: Political Institutions and Implementation"* 46:1 *Asian* Affairs 105.

171 *Ibid.*

172 Nishimizu, M.(2008). *Portrait of a Leader: Through the Looking-Glass of His Majesty's Decrees (The Centre for Bhutan Studies).*

173 Conklin, C.N. (2015). *"The Origins of the Pursuit of Happiness"* 7 *Wash. U. Jur. Rev.* 198.

174 Charles, P. J. (2011). *"Restoring 'Life, Liberty, and the Pursuit of Happiness' in Our Con-*

different founding documents and constitutional texts have used *"pursuit of happiness"* and *"property"* interchangeably.[175] However, *"happiness"* in Bhutanese *Constitution* is not used as a synonym of *"property."*

Firstly, in the Bhutanese *Constitution*, neither *"happiness"* nor *"property"* is used with *"life"* and *"liberty"* in the *Fundamental Rights* provision. The phrase it uses is, *"life, liberty and security."*[176]

Secondly, there are no court decisions in Bhutan equating *"happiness"* with *"property"*, or claiming reasons for inclusion of *"happiness"* in the *Constitution* as influenced by the US founding documents. Similarly, unlike some of the constitutions, there is no explicit recognition of the US founding documents in the text of the *Constitution*. Thirdly, as seen throughout the paper, *"happiness"* in the Bhutanese context is understood differently from the contemporary western understanding of *"happiness."* Therefore, *"happiness"* in the Bhutanese *Constitution* cannot be reduced to mean *"property."*

The third theory is *"happiness"* as individualised natural rights or presumption of liberty. This theory claims that *"happiness"* is a right against the state's interference on an individual's liberty. It is seen as a *negative right* that limits any governmental action inhibiting personal liberty. Therefore, while examining the legality or constitutionality of governmental actions or legislation, a presumption made is that in the state of nature, a person has the inalienable rights to life, liberty and *happiness*. In other words, the presumption is not that the governmental actions or legislation are exercised or adopted for the public good. However, there is absolutely nothing in the Bhutanese constitutional culture or constitutional texts to show that *"happiness"* as having the value of individualised natural rights. First, we have already seen from the very plain reading of the *Constitution* that, unlike founding document of the United States and constitutions of many countries, Bhutan's *Constitution* does not explicitly recognise *"pursuit of happiness"* or *"happiness"* as an unalienable natural right of an individual either rhetorically or substantively. There is no right to *happiness* recognised under Article 7 that deals with *Fundamental Rights*. Second, historically,

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*stitutional Jurisprudence: An Exercise in Legal History"* 20 Wm. & Mary Bill Rts. *J.* 476.; Lim, J.(2001). *"Pursuit of Happiness Clause in the Korean Constitution"* (2001) 1:2 *Journal of Korean Law* 84.

175 Lim, J. (2001). *"Pursuit of Happiness Clause in the Korean Constitution"* 1:2 *Journal of Korean Law* 92.

176 Art. 7(1), *The Constitution of the Kingdom of Bhutan* 2008.

culturally and traditionally, Bhutan is not a rights-based society.[177] We also saw that *"happiness"* in Buddhism is more of a duty-oriented concept than a rights-oriented concept. We studied that *"happiness"* in Bhutanese context is collective in nature. The discussions on the relationship between the fourth theory and happiness will shed more lights.

The fourth theory is *"happiness"* as the presumption of the *common good*. This theory has seven essential parts or points. The first point as discussed before is that this theory regards *"happiness"* as the end of life. *The Constitution of Bhutan* does not expressly say that *"happiness"* is the end of life. All through, we have seen that *"happiness"* in the Bhutanese context is founded on the Buddhist concept of *happiness*. We found that *"happiness"* in Buddhism is not the end sought only by humans, but also by all sentient beings.[178] We found that all beings desire to end the suffering and attain or *Sukkha* in this lifetime or subsequent lives.[179] Therefore, Bhutan based on these Buddhist principles, as it can be implied from both constitutional texts and traditional practices, considers *"happiness"* as the end of human life. Socrates, Plato and Aristotle have regarded *happiness* as the goal of all human activity,[180] Buddhism contemplated *"happiness"* as the end of life much before them. Buddhism like Plato, Aristotle, Epicurus and Stoic agree that *happiness* can be obtained by human effort.[181] Also, many western philosophers, scholars and leaders such as John Locke,[182] Thomas Jefferson, James Madison, Jeremy Bentham,[183] John Stuart Mill,[184] Ed Diener,[185] Richard Layard,[186] and many others approve *"happiness"* as the end we all seek. Therefore, *"happiness"* as the end of life is not unique to Bhutan.

The second point of the common good theory of *happiness* is, *"happiness"* is and ought to be the end or purpose of the *Constitution* and the government.

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177 Early legal history of Bhutan as no evidence showing recognition of individual rights.

178 Ricard, M. (2011). *"The Dalai Lama: Happiness from within"* 1:2 *International Journal of Wellbeing* 274.

179 *Ibid.*

180 Rynbrandt, R. *"The Pursuit of Happiness"* Paper Prepared for the *Western Political Science Association, Annual Conference* in San Diego, CA.

181 Rynbrandt, R. *Ibid.*

182 Locke, J. *An Essay Concerning Human Understanding*, Paragraph 52.

183 Bentham, J. (2000) *An Introduction to the Principles of Morals and Legislation* (Batoche Books Kitchener.

184 Mill, J.S.(2001). *Utilitarianism* (Batoche Books Kitchener) 15.

185 Diener, E. (1984). *"Subjective Well-Being"* Vol 95:No 3 *Psychological Bulletin* (542-575)

186 Richard, L. (2005). *Happiness: Lessons from a New Science*. London: Allen Lane.

According to this theory, the constitution or government exist for the *happiness* of the people, and they are worthless if they fail to meet this end.[187] This theory claims that for the founders of the United States of America, the *happiness* of the society or public was the purpose and the first law of the government.[188] In Bhutan, the *happiness* of all the sentient beings including the people was the end of the seventeenth-century Buddhist state.[189] The Buddhist state of Bhutan was founded more than a century before the US. The *Legal Code* of 1729 in which *"happiness"* appeared for the first time in Bhutanese legal text attributes its origin to *Zhabdrung* who founded the nation state of Bhutan.[190] The founder of *Gross National Happiness*, His Majesty the Fourth *Druk Gyalpo* based this noble vision on the Buddhist principles, and tirelessly worked on creating a perfect society and a good government.[191] That perfect society and the good government he contemplated required the ordering of society, politics and governance for the *public happiness* or *happiness of the society*, the similar contemplation made by the philosophers like Socrates, Plato and Aristotle.[192]

The third point of the common good theory of *happiness* is that *"happiness"* is not achieved by living an independent life.[193] This statement has greater resemblance to the Buddhist and Bhutanese idea of *happiness*. As already discussed, Buddhism requires us to see everything as interconnected, and nothing exists independently.[194]The interdependence is not only between humans but also between humans and non-humans. Therefore, the Bhutanese way of life is founded on this same Buddhist principle of interdependence, which is evident in the Bhutanese etiquettes, and the principles of *Gross National Happiness*. To live a happy life, Bhutan's founding fathers like early western thinkers, realised that to achieve happiness one

187 Rynbrandt,R.(2016). *"The Pursuit of Happiness"* Paper Prepared for the *Western Political Science Association Annual Conference* in San Diego, CA.

188 Grodin, J.R.(1997). *"Rediscovering the State Constitutional Right to Happiness and Safety"* 25:1 *Hastings Const. L.Q.* 15; Rynbrandt,R. *Ibid* at 1, 15.

189 Ura, K. & et al. (2010). *An Extensive Analysis of GNH Index* (*The Centre for Bhutan Studies*, 2010) 6; Michael Givel, M.S.(2015). *"Gross National Happiness in Bhutan: Political Institutions and Implementation"* 46:1 *Asian* Affairs 105.

190 *Ibid.*

191 Rynbrandt, R. *Supra* note 184 at 2.

192 Rynbrandt, R. *Ibid.*

193 Grodin, J.R. *Supra* note 185 at 11.

194 Richard, M. (2013). *"A Buddhist View of Happiness"* in Susan A. David et al., eds., *The Oxford Handbook of Happiness* (*Oxford University Press)*, 344.

has to lead a social life.[195] A libertarian way of life founded on individual autonomy is not what the founders contemplated.[196] Individuals are seen as parts of the larger community and universe.[197] Many recent scholars have found that *happiness* is dependent on many conditions including family and friends, the stability of political institutions and society, and living in harmony with the natural environment.[198]

The fourth point of the common good theory of *happiness* is that *"happiness"* imposes a positive duty upon both government and the individual. The first part of this point is that *"happiness"* in the US founding documents imposes an affirmative duty on the government to secure happiness.[199] It is critical of the third theory for neglecting the important part of the document by completely focusing on the libertarian paradigm. According to this theory, the duty the government has is to secure *happiness* for the highest number or whole body.[200] From the textual reading, we found that the *Constitution of Bhutan* imposes an affirmative duty under Article 20(1) and 9(2) upon the government to not only promote *conditions of happiness* but also to ensure the *happiness of the people*. Further, we already found that the Buddhist state established in the seventeenth century imposed a duty upon itself to guarantee *happiness* to all sentient beings.[201]

The second part of this fourth point is, *"happiness"* imposes various duties upon the individual. The first duty is a duty to pursue *happiness*. The second duty is a duty to choose the government that can promote the common good. In chapter 2, we found that *"happiness"* in Buddhism is duty imposing. That is, if one desires *happiness*, one must take the virtuous path. Similar to some of the western thinkers, Bhutanese culture that is founded on

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195 Aristotle, *Politics;* Grodin, J.R. *Supra* note 185 at 11.

196 Grodin, J.R. *Supra* note 185 at 13.

197 Claus, L.K. and Morilas, L.R. (2018). *"The Right to the Pursuit of Happiness and the Right to Access Medical Treatment: Recent Developments in Brazilian Jurisprudence"* 2:1 *PHRG Peace Human Rights Governance* 122.

198 Layard, R. and others

199 Grodin, J.R. (1997). *"Rediscovering the State Constitutional Right to Happiness and Safety"* 25:1 *Hastings Const. L.Q*. 14.

200 Charles, P. J. (2011).*"Restoring "Life, Liberty, and the Pursuit of Happiness" in Our Constitutional Jurisprudence: An Exercise in Legal History"* 20 *Wm. & Mary Bill Rts. J.* 514; Claus L.K. and Morilas, L.R. *Supra* note 194 at 122.

201 Ura, K. & et al, (2010) *An Extensive Analysis of GNH Index* (*The Centre for Bhutan Studies*) 6; Givel, M.S. (2010). "*Gross National Happiness in Bhutan: Political Institutions and Implementation"* 46:1 *Asian* Affairs 105.

Buddhist principles contemplates that *"happiness"* imposes a duty upon the individual to be virtuous – not to harm oneself or others.[202] The fundamental duties under Article 8 of the *Constitution of Bhutan* are attuned to these Buddhist principles.[203] The duty to choose good government is a recent phenomenon for Bhutan. It is a duty that came along with the process of democratisation in the country. However, this duty flows from the duty to *"pursue happiness,"* because *happiness* is the interdependent goal. Therefore, as Jefferson said that it is a duty of every virtuous member of society to prevent the harm to society or country to promote *happiness*.[204] This end can be achieved by choosing the good government.

The fifth point of the fourth theory is that, for the founders of the US, *"happiness"* meant eudaimonia or human flourishing.[205] This western definition of *happiness* has the closest resemblance to Buddhist *happiness*. Philosophers like Plato and Aristotle, and the founding fathers of the US like Jefferson, John Adams, Madison, George Washington and Benjamin Franklin agree that *happiness* can be found in virtuous conduct that gives way to the public good – virtuous living in harmony with universal truth or reason.[206] These philosophers and the founders lived virtuous lives themselves.[207] We have already dealt extensively with the Buddhist and Bhutanese concept of *happiness*, and need no further discussion.

The sixth point of the fourth theory is that *"happiness"* in the founding documents or constitutions is the *happiness* of the whole – the *happiness* of the greatest number.[208] The expression used in the *Constitution of Bhutan* is either *"happiness of the people"* or *"pursuit of Gross National Happiness."* Use of such expressions shows that individual pursuit of *happiness* without seeing an individual, as part of a larger community is not practicable. Individual *happiness* will not materialise where the *happiness* of the larger whole is

202 Charles, P.J. *Supra* note 198 at 514; Grodin, J. R. *Supra* note 185 at 11.

203 Art. 8, *The Constitution of the Kingdom of Bhutan* 2008.

204 Conklin, C.N. (2015). *"The Origins of the Pursuit of Happiness"* 7 *Wash. U. Jur. Rev.* 259.

205 Grodin, J.R. *Supra* note 185 at 16; Conklin, C.N. *Ibid* at 195.

206 Conklin, C.N. *Ibid* at 230-259; Grodin, J.R. (2011). *Ibid* at 11; Patrick J. Charles, "*Restoring "Life, Liberty, and the Pursuit of Happiness" in Our Constitutional Jurisprudence: An Exercise in Legal History" 20 Wm. & Mary Bill Rts. J.* 498, 515.

207 Conklin, C.N. *Supra* note 206 at 230-240.

208 Charles, P.J. *Supra* note 206 at 520; and Rynbrandt, R. (2016). *"The Pursuit of Happiness"* Paper prepared for the *Western Political Science Association*, *Annual Conference* in San Diego, CA. 13; Claus, L.K. and Morilas, L.R. (2018). *"The Right to the Pursuit of Happiness and the Right to Access Medical Treatment: Recent Developments in Brazilian Jurisprudence"* 2:1 *PHRG Peace Human Rights Governance* 122

non-existent. As we have seen, in *Mahayana* Buddhism, an individual is expected to engage in purposeful activities that benefit not only one but also other beings.[209] Therefore, *happiness* sought is for all sentient beings. Western scholars and historians claim that the *happiness* envisioned by the American founders included both enjoyment of life and practising virtuous and meaningful relationship with and service to others.[210]

The seventh point of the fourth theory is that the *"happiness"* in the founding documents denotes presumption of the common good.[211] The presumption is that the government is empowered to take affirmative actions to promote the *happiness* of the people – *"the collective people."* Therefore, while examining the constitutional validity of the legislation and governmental actions, the presumption should be that such legislative powers or executive powers are exercised to promote the *happiness* of the general public.[212] In other words, the presumption is not to limit the government power in the libertarian sense.[213] This presumption of the common good holds true for Bhutan. Firstly, as discussed, *"happiness"* is used in a collective sense, not individualised rights sense in the *Constitution of Bhutan*. Secondly, while examining the provisions of the *Constitution*, both textually and contextually, we found that the *Constitution* is adopted to constitutionalise *GNH* – governance framework for the general *happiness*. Her Royal Highness Princess Sonam Dechan Wangchuck, daughter of the founding father of *GNH* and the *Constitution* said the *Constitution of Bhutan* is founded on the pillars of *Gross National Happiness*.[214] Although the Bhutanese courts are yet to decide on the matters of the *presumption of the common good* versus *presumption of the liberty*, the discussions and findings unfolded in this chapter suggest that *"presumption"* is and ought to be of the *"common good."*

The findings in this chapter show that the fourth theory of the constitutional value of *happiness* is the relevant theory for Bhutan. However, the contemporary US and most of the countries, which refer to *"happiness"* in their constitutions, do not take the fourth theory approach. Instead,

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209 Thrangu Rinpoche, (2003). *The Three Vehicles of Buddhist Practice, Ken Holmes translation (Namo Buddha Publications)*, 41.

210 Rynbrandt, R. *Supra* note 208 at 26; and Patrick J. Charles, *Supra* note 206 at 501-503.

211 Charles, P.J. *Ibid* at 498.

212 Charles, P.J. *Ibid* at 504-505.

213 Charles, P.J. *Ibid.*

214 Keynote Address, *GNH and the Law Conference*, 17-18 July 2018 at Thimphu, Bhutan.

few countries whose constitutions do not mention *"happiness"* adopt the fourth theory. However, the expression they use is not *happiness*. In Bolivia and Ecuador, they adopt *Buen Vivir* as their constitutional value.[215] *Buen Vivir* is translated as a good way of living – in other words, a way of doing things that is community-centric, ecologically balanced and culturally sensitive.[216] It relates to the wellbeing but not in an individualistic sense – but the individual in the social context of their community and in a unique environmental situation.[217] South Africa adopts *Ubuntu* as their constitutional value.[218] *Ubuntu* means that a person is a person through other persons – which we affirm our humanity when we acknowledge that of others – interconnectedness based on community solidarity is at the centre.[219]

## Conclusion

While examining Bhutanese *constitutional texts* and *constitutional culture* both in its historical context and comparative context, *"happiness"* is undoubtedly accorded the highest constitutional value. The *"happiness"* in Bhutanese constitutional culture has substantive legal meaning. It is neither an unachievable dream used for the grace of language nor as individual libertarian rights.

However, as literature shows, the approach to *"happiness"* as the constitutional value is not unique to Bhutan. The scholars and historians have found that the founders of the western constitutions, particularly the founders of the US intended *happiness* as the core value of the constitutions and governance. Likewise, some of the constitutions adopt some of the essential characters of the fourth theory. Similarly, in Bhutan, *"happiness"* of the people has been the central to the role of the society and governance, and it remains the same even after the adoption of a *written Constitution*. This is rightly echoed in the words of Thomas Paine:

> *Whatever the form or constitution of government may be, it ought to have no other object than the general happiness.*

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215 Baldin, S. (2015). *"The Concept of Harmony in the Andean Transformative Constitutionalism: a Subversive Narrative and its Interpretations"* 17 *RGDPC.*

216 Gudynas, E. (2011). *"Buen Vivir: Today's tomorrow"* 54(4) *Development* 441–447; Merino, R. (2016). *"An Alternative to 'alternative development'?: Buen Vivir and human development in Andean countries"* 44:3 *Oxford Development Studies* 271-286.

217 *Ibid.*

218 Bagni, S. (2015). *"The constitutionalisation of indigenous culture as a new paradigm of the caring state"* 1:3 *Int. J. Environmental Policy and Decision Making* 205.

219 *Ibid.*

# *Spiritual Power, Healing Practices and Criminal Culpability*[1]

## Introduction

We have always cherished customary beliefs and practices that have evolved into our beliefs and culture. Our cultural practices, norms and values have shaped our ways of life, and strengthened our identity as a Buddhist nation. Our folklores are replete with our beliefs in demons, deities and spiritual entities, and their influence on us. Such beliefs have become part of our daily life and we have co-existed with beings of different realms of the existence; and to some extent we invoke them ritualistically, orchestrating the connections between the humans and the non-human entities.

In the past, when the sound of the conch blown at the nearby monastery is heard in the evening, it signalled the end of the day and beginning of the night – the time of the spirits, ghosts and demons – the formless entities in search of sustenance, mainly the odours. People hastily closed their doors and made ritual offerings by burning incense at the family altars; and grains and flours over the ambers outside the house to appease the 'invisible guests.' People would then congregate around the fireplace to take stock of farm works over the meals and drinks.

Most of the Bhutanese people, especially in the rural areas were god-fearing and spiritually inclined. They believed in the folklores of the magic, mysteries, sorceries, oracles, ghosts, witches and demons. And most children those days were fed and grew up on the fodder of such myths and stories on the laps of their parents and grandparents. Propelled by the fear and belief in spiritual forces, before the modern health services reached the far-flung villages, when people fell sick people consulted the local astrologers and spiritual healers. Based on the astrological divinations, people made proprietary offerings of favourite meals and substances to the deities and spirits to appease them and free the sick of the afflictions they supposedly caused. In many rural parts of Bhutan, it is not a thing of past, but a thriving practice.

When a person earns the wrath of or afflicted by a demonic spirit, people first turn to local priests and religious personnel to aid in the recovery

1 Contributed by Karma Tshering.

from the illness.[2] While some of these healers administer concoctions of materials to the sick; others summon spiritual forces to rid the sick of the afflicting or malevolent spirits. Possession of an individual by spirits and demons is not uncommon; calling for the service of the oracle or shamans to exorcise the sick of the hidden spirit.

In this Paper, I examine some incidents of demonic possessions, exorcism, narrations from the world of the dead, and a case of unusual defence through the lens of law in Bhutan. It seeks to examine the legal consequences of rituals to cure these superhuman-inflicted illnesses, the credibility of certain narrations from the world of the dead and unknown; and the probable dilemma the courts may face in fixing the criminal culpability of the accused persons in the rapidly modernising scenarios and time.

## Demonic Possessions

The phenomena of possession of and disturbance caused by demons are believed in many countries; Bhutan is no exception. It is believed that the concept of demonic possessions is beyond the scope of modern psychiatry and psychoanalysis.[3] The tales of demonic possessions of a human beings by the spirit against their will exist everywhere in the world and pervade across many religious groups.[4] Demonic possession has familiar patterns of behaviour of the possessed that generally involve bizarre physical contortions and altered voices. The victims resort to acts which might harm themselves and others. They utter licentious and profligate voices, show disgust or terror at the presence of holy or sacred objects and personnel, reveal hidden knowledge of prognosis, speak languages that the possessed do not know, and wounds like scratches and bite-marks might appear without known causes.[5]

The methods employed to cure demonic possession in many societies involve shamanic or oracular rituals. *Shamans* play important roles in managing the victims of demonic possessions. They are the messengers and emissaries between the human and spirit realms, acting as the conduits between the two realms. This involves the *Shamans* entering into trances

2 Pelzang, R. (2010). *Religious Practice of the Patients and Families during the Illness and Hospitalization in Bhutan*, Journal for Bhutan Studies.

3 Westerink, H. (2014). *Demonic Possession and historical construction of melancholy and hysteria*, Radbound University.

4 Torrington, C. (2016). *Tales of the Demonic Possession: Extraordinary True Life Experiences*.

5 Ibid.

or state of ecstasy, a type of altered consciousness.[6] The rituals usually involve similar physical signs to those of demonic possessions. *Shamans* appear to enter at a state where they might speak different languages called *glossolalia*, move energetically, contort their bodies, and enter a different state of consciousness. Except that in these rituals, the spirits are invited to enter the performing host Shamans and dismissed at the end of it. The hosts remain in control and use the guest spirits to expel or dislodge the possessed of the uninvited malevolent spirits who have found abode in the in the bodies of the possessed.[7] Spirits are invited and are ushered through shamanistic rituals involving chanting, playing rhythmical music, and wearing special costumes, among other ritualistic attires and dances. Spirits are bestowed with the rules of divinity and appropriate offerings are made to dispossess the possessed.[8] There are tales of demonic sights and possessions elsewhere, including the stories about the demonic presence of *President* Abraham Lincoln in the *White House* in the United States.[9]

There are countless tales of demons, demonic possessions and exorcism in Bhutan. There are numerous extraordinary tales of great *Buddhist Masters* subduing demons who tormented people and converted them into the protectors and the guardians of the Buddhist teachings. One such remarkable historical event that affirms the existence of demons and their ability to possess a living being and the performance of exorcism to dispossess the possessed is found in thr biography of *Guru Rinpoche*. Most importantly, this event also marked the beginning of the arrival of Buddhism in Bhutan.[10] The story has it that a King *Sindhu Raja* fell ill after he ordered the desecration of temples dedicated to *Shelging Karpo,* the chief local deity and the protector of local place, Bumthang in central Bhutan as

6 Ibid.

7 Ibid.

8 Ibid.

9 See Cereno, B. (2002). *Most Bizarre Tales of People being Possessed*, Grunge <https://www.grunge.com/76069/bizarre-tales-people-possessed/>. See also Geers, J. (2016). *10 True Stories o Demonic Possession that will Make You Believe in Pure Evil* - Thought Catalog <https://thoughtcatalog.com/jacob-geers/2016/06/10-true-stories-of-demonic-possession-thatll-make-you-believe-in-pure-evil/>.

10 Yak Holidays Int'l, *Advent of Buddhism in Bhutan* (19 December 2019) <https://traveltobhutan.travel/blogs/advent-of-buddhism-in-bhutan/>. See also Dorji, T.(2016). *Guru Rimpoche's Time in Bhutan,* Kuenselonline <https://kuenselonline.com/guru-rinpoches-time-in-bhutan/>. These major events are well known except for the proprietary aspect of research, some secondary sources are cited.

a revenge for the latter's failure to help him during a war with the feuding rival king. The deity took away king's life force and afflicted serious sickness on the King. When no rituals helped the king to recover from the sickness, the king invited *Guru Rinpoche* for his help; who subdued the local deity through his supernatural powers and the king recovered from the sickness. There are many such colourful and extraordinary tales[11] - the tales of several religious masters who triumphed over demonic forces for the benefit of the sentient beings. As sceptical as we may be, the legends and folklores pertaining to spiritual and supernatural forces do not fail to awe us. Such stories and beliefs continue flood us, although some contradictory information tend to dismiss these myths and tales.[12]

Yet for non-believers, there is still an incomprehensible and weird report of a poltergeist in the southern part of Bhutan.[13] A ghost is reported to terrorise a family, pelting stones and at times injuring the residents. A barrage of stones has reportedly landed on the roof of the house for days. Despite rituals, stone pelting has continued. Pots and pans flew over the premises. While an article suggested that the sight of rocks and pots flying with no humans at the other end is the time to call back the *Shamans*,[14] this weird news attracted some interests beyond Bhutan.[15] A *Shaman* conducted rituals and said the ghost was the soul of the family's great grandfather, a great *Shaman* who renounced *Shamanism* to become a *Sadhu;* but who could not achieve objective.

The *Shaman* said that the family has not conducted the full funeral rites and rituals, which attracted the wraths of his unenlightened soul. This shamanistic finding was endorsed by a Buddhist *Lama* who also called for the proper conduct of rituals for the deceased's soul. This is little settling than the tales of demonic possessions and the performance of exorcism

11 For example, see Humble and Free, (2018). *Drukpa Kuenley – Bhutan's Divine Madman* <https://www.humbleandfree.com/bhutans-divine-madman/>.

12 Ibid.

13 Rai, R. (2019). *Stone-Pelting Ghost of Sombek,* Kuenselonline <https://kuenselonline.com/stone-pelting-ghost-of-sombek/>.

14 Seaburn, P. (2019). *Reports of Stone-Throwing Poltergeist Made by a large Family in Bhutan,* Mysterious Universe <https://mysteriousuniverse.org/2019/12/reports-of-stone-throwing-poltergeists-made-by-a-large-family-in-bhutan/>.

15 For example, see Onmolien, (2019) *Family in Bhutan are afraid of Stone-throwing Poltergeist* < https://anomalien.com/family-in-bhutan-are-afraid-of-stone-throwing-poltergeist/>.

by supposedly acclaimed and accomplished people in the society, involving narrations of, for example, describing how the deceased died.

**Exorcism of the Malevolent Spirits**

Recently, broadcast media carried news about a man who was charged for murder. The story appeared on the national newspaper.[16] The *Office of Attorney General (OAG)* was reported to have charged a fifty three-year old man from Lumang, Tashigang, for the voluntary manslaughter. In this case, the father called the accused to perform a ritual for the ailing eleven-month baby. During the ritual, the parents were not allowed in the room. The accused allegedly told them that he would not be able extract poison from the child in the presence of people born in the year of the Horse, Dragon, Ox and the Snake in the room. Consequently, the child was left alone with the accused. During the ritual, the accused allegedly hit the baby around eighteen times on the head and the forehead. The parents intervened upon hearing the cries of the baby. It was learnt that the child was heavily bleeding with a big cut on the head. While the parents tried to take the baby to the hospital, the accused allegedly hit the child three more times on the head saying that the child was possessed; he said if the child was left unexorcised, it would result in the death of both the parents. Unfortunately, in the midst of the chaos and commotions, the child reportedly died. The accused was alleged to have performed a very dangerous religious stunts with no previous religious or medical experience. The *OAG* contended that the accused had no religious powers to subdue or appease the demons and the local deities and equated such rituals as *'lethal in society.'*[17] The case is apparently *res subjudice* and finding an appropriate solution to the problem remains with the wise wisdom of the honourable court.

Almost across many jurisdictions, including Bhutan, the causes of illness are described in two ways. While the *naturalistic explanations* find the cause of illness in the impersonal forces of nature like germs, parasites, accidents, injury, imbalances in the body; the *personalistic explanations* attribute the cause of illness to the acts or wishes of a person, such as a witch, non-human being like a ghost, evil spirits or even a deity.[18] As such, the

16 Tenzin, T. (2019). *Man Charged for Murder,* Kuenselonline. It may be noted that due to the remoteness of research, the writer could not access the copy of judgment.

17 Ibid.

18 Joseph, D. Calabrese, and Dorji, C. (2014). *'Traditional and Modern Understanding of Mental Illness in Bhutan: Preserving the Benefits of Each to Support Gross National Happiness'*

*personalistic explanation* for illness and the active search for answers in terms of a violation of some spiritual rule are very natural and valid in Bhutan. Understandably, astrologers and oracles are as important as the medical doctors in the country. Though most people might attribute such a case to a mental illness,[19] astrologers and oracles can remarkably cure such illnesses without the interventions of modern medications.

Certainly, such illness and the intervention of spiritual power to cure it, is beyond the comprehension of both science and human intelligence. While *Lamas, Monks*, *Tsampas* and *Shamans* are supposed to possess supernatural powers - but perceptibly, it becomes an issue when an average person claims to possess such a power. Interestingly though, there are cases where an average person though not of the type mentioned can, through some means, find the cause and cure certain illnesses as well. It inherently raises the next inevitable yet confusing questions, such as:

a) How and who else can we consider and allow spiritual practice?

b) Should any outcome of exorcism, including unfortunate mortality, by acclaimed spiritual practitioners be considered permissible?

c) Where would and should we draw the line of criminality on spiritual healing practices?

A detailed analysis of a case involving exorcism that resulted in the death of the wife allegedly possessed in Australia demonstrates the difficulties of accommodating expert evidence concerning religion in a criminal trial, extending the purview of court into the realm of spectral, holding onto the ideal the case is bizarre, and positioning a victim as possessed and accused under the misguided belief.[20] Should the courts adhere to mainstream belief and risk facing even more cases of violent religious beliefs, thus bringing in religion in the courtroom, or alienate courtroom from the mainstream belief and find itself violating religious belief and culturalism? Addressing these questions can have unavoidable implication on how the law and justice might accommodate and see the 'spiritual' use of certain force, for example, when it might be a case of a willing person for whom

30 Journal of Bhutan Studies 1, 8.

19 Ibid.

20 Howe, A. and Ferber, S. (2005). *'Delivering demons, punishing wives False imprisonment, exorcism and other matrimonial duties in a late 20th century manslaughter case'* 7(2) Punishment and Society 123-146, 144.

injury cannot be seen to have been inflicted or suffered, whether willing by a sheer consent or out of what may be coerced consent by spirituality and belief.

## Justice for the Dead

Realistically, the tales of demonic narrations by the possessed to some might be anything but a painful eye-rolling experience. But for the folks in a village in the East, it has been one of the unnerving ongoing phenomena. One evening in the late 1990s, a man failed to return home after what was just a few miles of walk to check his water pipes. Hours of tracing his whereabouts the next morning took some searchers by surprise to a mark on the edge of the long cliff just above his house. There was a slipped mark to that of footmark with a bunch of uprooted grass hanging from the cliff. The searchers could not be sure if the deceased fell off the cliff as they could not see the end of the long cliff. The searchers took about a couple of hours to get to the end of the cliff where the body of the deceased laid cold. He must have perished hours before they could locate him, probably, by midnight.

What looked like a case of accident, hold darker secrets. Following a couple of months and even years after his death, his wandering soul in pursuit of vengeance is said to have possessed a few villagers. The persons who attended the sick were exposed to a pattern of ludicrous narration by the soul of the deceased about the circumstances of his death. The narration recalled his fateful fight with a neighbour about the drinking water that evening which ultimately ended him getting pushed over the cliff to his death. The narration alleged that he was hit with a stone on his forehead and pushed off from the cliff, bringing in a new story of unthinkable human brutality and murder.

Landing at the end of the cliff, the narration recounted his inability to move half of his body, and the pain and cold that slowly dragged him to his painful death. He remembers every member of his family. He was very distressed with the pain of separation from his family and the difficulty they would faced in his absence, especially his youngest child. He wanted to get up and report this incident to the village headman, the *Gup* and the Police. He wanted justice for what has been done to him. The possessed tried to get up and go but the persons attending the sick holds the possessed tight. Such narration of stories by the unseen brings amazing new information of crucial evidentiary value.

Generally, in such instances, usually a *Tshampa* or a *Gomchen,* is ushered in with the request to exorcise the soul that has entered the possessed uninvited. The short ritual involves the incantation of *mantras* and the use of *vajra* and prayer beads to dispel the soul. The uninvited soul is talked to and requested to leave the possessed. The *Sur,* fragrant smoke offerings are made. The soul reluctantly leaves the possessed but the duration it takes varies. This revelation became the talk of the village.

Incidentally, this revelation is said to have reached the court in a case that involved the man who is alleged to have pushed the deceased off the cliff but got judicially brushed off as an irrelevant issue and illogical contention. An effort to lay criminal responsibility upon the perpetrator is said to have made based on this revelation but it could not gather any other concrete evidence. The court then was unwilling to convict a person on these facts alone. This incident could have been seen as an isolated incident with no evidentiary value. Interestingly, there is a reported case of similar circumstance where the court is reported to have considered the narrations of the deceased as corroborative and circumstantial evidence.[21]

The *Kuensel* reported a case[22] in which a security guard murdered a sixty-year old grandmother along with her sixteen-year old grandson. The accused is alleged to have avenged the victim for accusing and shaming him for stealing money, which was witnessed by the grandson. The accused was convicted with the severest punishment for committing what court is reported to have described the crime as 'murders in an extremely grotesque, diabolical and dastardly manner.'[23] Of numerous evidence, including a forensic report, the court is reported to have considered the *'spirit possession'* and the narration that followed as circumstantial and corroborative evidence.[24] The court heard a statement signed by nine witnesses that claimed their account of witnessing the spirit possession of the school cook who claimed that the accused murdered him for no reason and his grandmother while she

21 Dema, T. (2018). *Spirit possession accepted as circumstantial and corroborative evidence in Trongsa double murder case* Kuenselonline <https://kuenselonline.com/spirit-possession-accepted-as-circumstantial-and-corroborative-evidence-in-trongsa-double-murder-case/>.

22 Dema, T. (2018). *Man gets two life sentences for double muder in Kuengarabten* Kuenselonline <https://kuenselonline.com/man-gets-two-life-sentences-for-double-murder-in-kuengarabten/>.

23 Ibid.

24 Dema, T. above n 16.

was peeling an areca nut. The possessed cook tells his house owner that he might die and get inside his room and refuses to open the door. Incidentally, during his death, when his parents, house owner and neighbours broke into the room, they found him holding on to his head tightly. His right hand had became red.[25]

The possessed cook told them the accused murdered him and his grandmother. It was reported that the cook who only attended elementary school spoke fluent English and asked for the Principal, the deceased's favourite teacher and his girlfriend several times. The Court also heard the video footage of the possessed school boy claiming and exposing the person as the accused. The prosecution is reported to have argued that these accounts of spirit possession should be considered as evidence as it not only corroborated the confession of the accused, and indicated the criminal responsibility of the accused. More so, spirit possession is a belief and culturally accepted as a method of communication by the dead.

Upholding the argument of the prosecution, the court is reported to have considered it as corroborative and circumstantial evidence in the light of country's culture and traditional beliefs in spirit possession.[26] Although spirit possession and the ensuing revelations did not play a primary role in fixing the criminal responsibility of the accused, it did get mention in criminal jurisprudence. Will the evidential treatment of such narrations abuse court process in some cases and facilitate in others? Would an abrupt inconsideration for some might amount to an imposition of or restriction on one's culturalism? While the Court is seen to have prudently fared through this delicate matter, the question that remains is to what extent should the demonic possession and the ensuing narrations can lend its invisible hand in fixing criminal responsibility and ensuring fair criminal justice.

## A Case of Unusual Defence

Like the case of demonic possessions and narrations, there are also tales of unusual defences based on anything but superhuman as well. One such incident surfaced on the national newspaper on 14 February 2017, about the *High Court's* decision imprisoning two men for murdering a villager suspected of sorcery.[27]

25 Ibid.

26 Ibid.

27 Dema, T. (2017). *High Court Sentences Two to Life for Murder,* Kuenselonline <https://

In this case, the culprits suspected the victim of plaguing the village with sorcery. One of the accused persons who consulted an astrologer from a bordering town in India about the cause of his mother's serious illness was shown with the image of deceased in a mirror as the cause of the sickness. Enraged, one of the accused person is alleged to have gone to the deceased's house and solicited his hand in selling his potatoes. As he led the deceased, the other accused person waiting in ambush, allegedly hit the deceased on the head with a wood. The accused person who led the deceased towards the ambush allegedly stabbed and murdered the deceased. The accused then threw his lifeless body into a river. The Samdrup Jongkhar *District Court* sentenced the two accused persons to twenty years and six years in prison respectively; as well as awarded payment of cash compensation to the family of the deceased. On appeal by the Prosecution, the *High Court* altered the judgement of the lower court partially, in favour of the *Prosecution* and sentenced the two accused persons to life imprisonment, on the ground that the accused persons have, beyond a reasonable doubt, murdered the deceased purposely, knowingly, and recklessly with premeditated malice.[28] Similarly, there might be other cases in the future where an accused person might argue that the devil or unseen forces made him or her commit a crime.[29]

While there can be no justification whatsoever for taking the law into one's hand, it does raise some questions - can a devil or some dark force compel a rational person to commit evil deeds that they rationally would not? If so, who do we hold accountable? What is the significance of astrology to

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kuenselonline.com/high-court-sentences-two-to-life-for-murder/>. It may be noted that due to the remoteness of research, the writer could not access the copy of judgment.

28 Ibid.

29 A court in the United State of America have heard a case in which the demons were sought to be put on trial by pleading the defence of devil or deed of something and outside of one's mind. This defence was rejected as it could not be objectively and scientifically verified through the available evidence. The court wholly ruled out the relevance of those demonic possession arguments in this case: Swancer, B. (2015). *The Weird Case of Demons on Trial* MYSTERIOUS UNIVERSE <https://mysteriousuniverse.org/2015/05/the-weird-case-of-demons-on-trial/>. See also Stagis,J.(2014).*Killer's Defence was Demon Possession,* Courant, H. <https://www.courant.com/news/connecticut/hc-250-arne-johnson-20140412-story.html>. But whether a court in spiritual Bhutan might indeed admit such defences remains to be seen.

criminology? How will it abuse or facilitate the due process of establishing 'reasonable apprehension or suspicion'? Would or should the police initiate investigation based on such astrological indications? Either way, how justiciable and legally tenable will the action of the police be? The tenacity of the justifications within one's culturalism and myths could at times throw law against itself – having to recognise and violate a right at the same time, the violence the law might have to endure.

## Conclusion

Having grown up in a remote village in the eastern Bhutan, the author is no stranger to such demonic possessions and spiritual healings. But since the author have not lived in the village for a reasonable duration of time for a long time now, it is not certain if the practices and beliefs in spiritual power and forces are as robust. Perhaps, the wandering souls have found their final resting places and settled down. Perhaps, the tales told around the burning embers of pine tinder and sooty kerosene lamps find less relevance today with the arrival of the electricity, internet and cars. Perhaps, we are very sceptical or are less willing to believe in such inanimate revelations. But, unquestionably, as the recent reports suggest, elsewhere in our country such inexplicable forces still exists and we grapple to deal with them. More importantly, the challenge is, living increasingly as we do in a rule-based society – how do we deal with it in terms of holding people accountable for such strange conducts and phenomena.

This Paper explored the phenomenon of demonic-possession and healing techniques involving spiritual power and forces; with the help of certain cases where these forces came into play, and where the courts were called upon to deal with. The question to what extent the law will and should accommodate incidents of demonic possession, exorcism, demonic narrations, and certain unusual defences is likely to be continued to be asked - in a country that still upholds religious beliefs and values; where magic, mystery and sorcery have not waned completely. This will ultimately throw the ball to the court of law to determine the law and develop the jurisprudence. As of now, there exist challenges of fixing criminal culpability on the people accused of possessing spiritual healing or harming power.

# *Mediation of International Conflicts and the Role of Gross National Happiness*[1]

## Introduction

In 2011, Prof. Steven Pinker of Harvard University, in his book *The Better Angels of Our Nature: Why Violence Has Declined* writes, *"[T]oday we may be living in the most peaceable era in our species' existence."*[2] Similarly, in 2016, President Barack Obama iterates that "*[w]e are fortunate to be living in the most peaceful era in human history*."[3] If we look at the history of humankind, these statements might hold a profound truth. Unlike our ancestors, today's generation enjoy unprecedented peace, security, equality under the rule of law, respect for human rights and dignity, unity in times of drought, famine, and human catastrophe. Despite these, war crimes, acts of terrorism, human trafficking, genocide, and crimes against humanity are never-ending phenomena. There is no end to civil wars; and international conflicts are ceaselessly escalating without an appropriate resolution. Crime against humanity is a continuing event, and some parts of the world have become a place not safe for habitation.

Conflicts are inevitable[4] for variety of reasons. In today's world, human desires and wants have skyrocketed, and unreliable political heads mans the governments. Moreover, politicians are becoming corrupt, resources are limited, environment is degrading, developments are not balanced, religious extremism are on a steep rise, different ideologies and beliefs fuel violence, making human conflict inevitable and prolonging. Conflicts are challenging by nature and if not managed effectively, it can result in hostility, brutality and fuel an unending violence.[5]

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1 Contributed by Sangay Chedup.

2 Pinker, S. (2011). *The Better Angels of our Nature: Why Violence Has Declined* (New York).

3 Chasmar, J. (2016). *'Obama: We're living in 'most peaceful' era in human history'* The Washington Times <http://www.washingtontimes.com/news/2016/apr/26/obama-were-living-in-most-peaceful-era-in-human-hi/> accessed 12 March 2017.

4 Authors write, *"conflict is a pervasive social process of a multidimensional character."* See Bercovitch, J. et al., *'Some Conceptual Issues and Empirical Trends in the Study of Successful Mediation in International Relations'* (Feb., 1991) 28:1 *Journal of Peace Research.*

5 See Bercovitch, J. and Houston, A. (1996). *'The Study of International Mediation: Theoretical Issues and Empirical Evidence'* in Jacob Bercovitch (ed.), *Resolving International Conflicts: The Theory and Practice of Mediation.*

Effective dispute resolution mechanisms, whether formal or informal, becomes the most important tool to uphold international peace and security. Bilateral negotiation, mediation, conciliation, and arbitration are some of the mechanisms to resolve the conflicts amicably. However, third party intervention, known as mediation, is significantly considered to be the finest mechanism to resolve the disputes in the history of humankind. Jacob Bercovitch writes that third-party intervention is in many ways as old as conflict itself and has played an important role in resolving the disputes both in industrial and preindustrial societies.[6] Prof. Barbara F. Walter writes that bilateral negotiations are difficult in a civil war environment particularly because combatants cannot enforce or credibly commit to treaties that produce enormous uncertainty in the context of a highly dangerous implementation period;[7] and therefore, third party intervention becomes much more central to the achievement of negotiated outcomes.[8] Studies also show that mediation in both national and international conflict is growing in its popularity each year, and its role in managing conflict more peacefully and cost-effectively has added to its reputation.[9]

Indubitably, mediation is considered to be one of the most effective methods to manage the conflict. Yet, there are series of instances where the method was not very successful. We often articulate that the success and failure of mediation attributes to number of factors, and often, it is difficult to ascertain those preconditions. Authors have given different factors and preconditions for a successful mediation, but yet, those preconditions are context specific depending on the nature of the conflict itself. To say so, there are no standard preconditions that can be applied to in each and every given conflict irrespective of its context. Because international conflicts are often complicated, it is difficult to ascertain which settlement methods can be best applied in which conflicts. Today, mediation in civil war poses certain undesirable results for which the international leaders have become increasingly aware of the problem. Unsuccessful mediation not only threatens the conflicting parties but also disrupts global peace and security.

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6 Bercovitch, J. (1991). *'International Mediation'* 28:1 *Journal of Peace Research* 3.

7 Barbara, F. W. ( 2002) *Committing to Peace: The Successful Settlement of Civil Wars* (Princeton University Process).

8 See Michael, J. G. and Regan, M.P. (2008). *'When Do They Say Yes? An Analysis of the Willingness to Offer and Accept Mediation in Civil Wars' International Studies Quarterly* 759.

9 Bercovitch, J & Houston (n 4).

This paper, therefore, sets out better understanding of characteristics of mediation in international conflicts. First, an attempt shall be made to provide the very nature of the international mediation reflecting on some of the advantages and disadvantages of mediation. Second, this paper will underscore some of the preconditioning factors, which determine the success, and failure of mediation. For my analysis, although factors developed by various international scholars will be discussed, however, emphasis shall be made on the *United Nations (UN) Guidance for Effective Mediation*.[10] Third, this paper seeks to provide the factual basis of Kofi Annan's *Peace Mission* to Syria. This is seen as the best example of an unsuccessful mediation in the modern context. An analysis will be made, in the fourth part of this paper, to consider some of the important factors why Annan's mediation in Syria has failed. I shall place the *UN Guidance for Effective Mediation* as a benchmark for the purpose of this analysis. In the conclusion, this paper will provide some idle solutions and suggestions for the mediation to be successful in international conflicts. At the end of my propositions, I shall briefly discuss some significant points on Bhutan's philosophy of *Gross National Happiness (GNH)* and illustrate why *GNH* values and principles will help maintaining international peace and security.

## Nature of Mediation

Mediation as a process of negotiated settlement by the third party has been used extensively to address international conflicts over a period of time. The 1856 *Declaration of Paris* was considered one of the early international agreements that encouraged member States to settle their maritime disputes by mediation.[11] In 1907, the *Second Hague Conference* recognised the right of third States to act as mediators in international disputes.[12] This was later affirmed by the *Covenant of the League of Nations* in 1919.[13] Today, Chapter

10 See *United Nations Guidance for Effective Mediation* (A/66/811, 25 June 2012).

11 See Mohammad, N.I.J. (2008). *'The Role of Mediation in the Pacific Settlement of International Disputes'*<http://www.asiapacificmediationforum.org/resources/2008/6-Muhammad_Naqib.pdf> Accessed on 15 March 2017. However, mediation was encouraged as early as 1783 by the Peace Treaty of Paris, in which Article VII of the *Treaty of Peace* recommended the mediation of a friendly State in case of differences arising between the Porte and any of the signatory Powers.

12 Ibid.

13 See, Article 13 of the *Covenant of the League of Nations* 1919 which stipulates that member shall submit the dispute to the arbitration or judicial settlement only those that cannot be satisfactorily settled by diplomacy.

VI of the *United Nations Charter* requires all member States to submit their disputes for a pacific settlement. Article 33 (1) of the *Charter* provides mediation as one of the preferred mechanisms for the settlement of international disputes. *The UN Handbook on the Peaceful Settlement of Disputes between States* (1992)[14] further reinforced the understanding of mediation of disputes between States.

The scope of the definition of mediation in international arena remains significant. Prof. Bercovitch defines mediation as *"[a] process of conflict management, related to but distinct from the parties' own negotiations, where those in conflict seek the assistance of, or accept an offer of help from, an outsider (whether an individual, an organization, a group, or a state) to change their perceptions or behaviour, and do so without resorting to physical force or invoking the authority of law."*[15] It is the specific form of third party intervention to assist the conflicting parties to resolve the conflicts amicably as opposed to armed intervention, sanctions, or humanitarian interventions. It is an effort to end conflicts without resorting to force. Thus, as noted in the definition, one of the distinct features of mediation is *'introduction of third party into the negotiation process'* between the disputing sides.[16]

One of the characteristics of mediation is *impartiality*. The mediator is a neutral person who facilitates the process of discussion to reach an amicable solution to the dispute. However, international mediation is carried out not only by an individual, but also by International Organisations like the United Nations, Regional Organisations, and by the States, and therefore, it is generally cannot guarantee the mediators to be impartial.[17] A report from the international symposium at the *Department of Peace and Conflict Research* of Uppsala University shows that biased civil war mediators are more effective than neutral mediators, due to their credibility as information transmitters between the parties.[18] Biased mediators are more likely to be

14 *United Nations, Handbook on the peaceful Settlement of Dispute between States*, 1992, OLA/COD/2394.

15 See Bercovitch, J. (1997). *'Mediation in International Conflict: An Overview of Theory, A Review of Practice'* in William, Z. and Lewis, J. R. (eds.) *Peacemaking in International Conflict: Methods and Techniques* (Washington DC: United States Institute of Peace Press).

16 See Michael, G. & Paul, F. D. (2012). *International Mediation* (Cambridge, UK: Polity Press).

17 *Ibid.* Also see William, P. S. (1985). *'Effectiveness of the Biased Mediator' Negotiation Journal* 363.

18 Mathilda, L. Peter, W. & Helena, G. (2010). *'Meeting the New Challenges to International*

able to persuade disputants to settle their disagreements because they may be more effective at getting its preferred side to back down, particularly if it has good information about the resolution of the opposing side.[19] However, as we shall see later, impartiality is an important element for effective mediation in international conflicts.

Another important salient feature of mediation is its *voluntariness*. Mediation is not mandatory and it is conducted in a non-coercive style. Thus, its proposal and recommendations are non-binding for disputing states. The voluntary nature of mediation requires the willingness of one party to offer to bring the conflicting parties together and the agreement of all warring parties to participate.[20] Mediation therefore will not take place in absence of free and voluntary consent.

Mediation has several advantages than disadvantages. Mediation is a process that works with proper and adequate communication; provide parties an opportunity to express their views, facilitate to generate options, and find satisfactory solutions that is acceptable to both the parties. It is the process to end the conflict without force and coercion. Often, mediation solution is inexpensive and less time consuming. It is a peaceful means of conflict management that helps maintaining or restoring world peace and security. It is because of these numerous advantages that mediation activities have seen a particular upsurge in the last half century. A study conducted for 241 international conflicts between 1945 and 1990 by Bercovitch and Houston reveals that mediation was employed almost six times more often than any other conflicts management activity.[21] Thus, it can be fairly concluded that mediation has established itself as an important tool amongst conflict management styles.

## Prerequisites for an Effective Mediation

As seen above, mediation in international conflicts are increasingly used, and the nature of mediation is on the assumption that the third parties

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*Mediation: Report from an International Symposium'* (Uppsala, Sweden: Uppsala University Department of Peace and Conflict Research).

19 See Jacob, D. K. and Megan, S. *'Ripe for Resolution: Third Party Mediation and Negotiating Peace Agreements'* in David, T. M. and Sara, M. M. (2016). *What Do We Know About Civil Wars?* (Rowman & Littlefield) 109-120.

20 Greig and Regan (n 7).

21 Bercovitch and Houston (n 4) p. 1620. Also see Juan, C. M. (2005). *'A New Framework for the Evaluation of Mediation Success' Brussels Journal of International Studies* 70.

intervention in intrastate conflicts is to bring an end to the violence associated with the underlying dispute.[22] In spite of this, authors like Bercovitch and Houston, in one of their studies reveals that mediation attempts have failed in 55% of the cases studied.[23] The question, therefore, is why does mediation fail? To understand this question, it is imperative to study the prerequisites of a successful mediation.[24] Perhaps, not following the basic requirements of mediation principles might be the contributing factor.

Before I uncover the prerequisites of a successful mediation, let us look at the definition of a successful mediation. It is not surprising to see that much have been written on this particular discipline of mediation in international conflicts, but hardly is there any standard definition of a successful mediation. Marieke Kleiboer writes that the issue of assessing outcomes of international conflict management is a tricky one, and as soon as one starts reflecting upon the evaluation criteria of a successful mediation, they seem to raise more questions than answers.[25] Different scholars provide different definitions. For Bercovitch and Langley, effective mediation would either mean producing an effective cease-fire, a partial settlement, or full settlement;[26] and for Burcu Savun, successful mediation would mean those that reduce the likelihood of conflict and encourage states to make concessions.[27] Kriesberg says *"[m]ediation is successful insofar as it contributed significantly, even essentially, to de-escalating movement, mutually acceptable agreement, or reconciliation, under the prevailing conditions."*[28] Effectiveness, therefore, is a measurement of outcome realised, result achieved, change brought about, or behavioural transformed.[29] Thus, careful understanding of these

22 See Patrick, M. R. *'Conditions of Successful Third-Party Intervention in Intrastate Conflicts'* (June 1996) 40:2 *The Journal of Conflict Resolution* 336.

23 Bercovitch and Houston (n 4).

24 Throughout this paper, the word *'effective'* and *'successful'* mediation have been used interchangeably and would connote same thing.

25 See Marieke, K. (1996). '*Understanding Success and Failure of International Mediation'* 40:2 *The Journal of Conflict Resolution* 360.

26 Jacob, B. and Jeffrey, L. (1993). *'The Nature of the Dispute and the Effectiveness of International'* 37:4 *The Journal of Conflict Resolution* 670.

27 Burcu, S. *'Information, Bias, and Mediation Success'* (Mar., 2008) 52:1 International Studies Quarterly 25.

28 Louis, K.(1991). *'Formal and Quasi-Mediators in International Disputes: An Exploratory'* 28:1 *Journal of Peace Research*, Special Issue on International Mediation 19.

29 Jacob, B. (2006). *'Mediation Success or Failure: A Search for the Elusive Criteria'* 7 *Cardozo*

definitions would fairly bring us to a conclusion that an effective mediation is when conflicts are either reduced or ceased and peaceful agreements are reached between the parties to the dispute.

Having defined what constitute an effective mediation, the next task is to unveil the prerequisite elements that would measure the outcome of the mediation. At the outset, it can be presumably said that not only it is difficult to define what constitute the success and failure of the international mediation, but the theory of how mediation works is not well developed.[30] Gerner and Schrodt points out that finding testable theories in the literature on the correlation of successful mediation is bit frustrating.[31] Prof. Kriesberg also writes that assessing what makes a mediating effort successful is extremely difficult.[32] Thus, it is very exhausting to find out the standard prerequisite of mediation, which ultimately frustrate to measure the outcome of the mediation. Most literatures we find are in an attempt to theorise the significance of mediation, its models and strategies in the international conflicts, not sincerely developing the probable prerequisites of mediation. Few elements provided by authors are, however, not consistent. Different authors provide different elements depending on the facts and circumstances of the conflicts. Authors like Brett, Drieghe, and Shapiro, in their articles however, places enormous emphasis on the mediators and their attributes as key to achieving a successful outcome.[33] To this end, Bercovitch and Langley noted that successful mediation is thus presumed to be dependent on the efforts of gifted and abled mediators.[34] It is an indisputable fact that the success of mediation is dependent on the mediator's influence, but it certainly is not a sole criterion. Other factors would impinge on a mediation relationship.[35]

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*Journal of Conflict Resolution* 289.

30 See Andrew, K. (2003). *'Which Side Are You On? Bias, Credibility, and Mediation'* 47:4 *American Journal of Political Science* 597.

31 See Deborah, J. G. and Philip, A. S. (2001) *'Analyzing the Dynamics of International Mediation Processes in the Middle East and the former Yugoslavia'* Paper presented at the annual meeting of the *International Studies Association*, Chicago.

32 Kriesberg (n 27).

33 See Brett, J.M. Drieghe, R. Debra, Shapiro, L (1986). *'Mediator Style and Mediation Effectiveness'* 2:3 *Negotiation Journal* 277.

34 Bercovitch & Langley (n 25).

35 *Ibid.*

Prof. Bercovitch identifies three factors that contribute to effective mediation: (a) the parties must be motivated and committed to settle their conflict through mediation; (b) the conflict must be ripened for intervention; and (c) an appropriate mediator must be available.[36] In another article, Bercovitch provides fairness, participant satisfaction, quality of effectiveness, and efficiency as four different sets of elements that determine the success and failure of mediation.[37] Thus, Bercovitch himself is not consistent. However, he concluded that none of these criteria could be used by itself as a total condition of success.

In another article, Bercovitch and Houston provide different factors and conditions that determine success and failure of mediation. According to them, outcome of mediation depends largely on different factors: the qualities of mediator, mediation process, nature of the disputes, and the nature of the parties.[38] Each of these elements has again various supporting factors.

While the works of Bercovitch are significantly notable, the elements of mediation provided by Kleiboer are equally noteworthy. In her article *'Understanding Success and Failure of International Mediation'* she provide elements of a successful mediation under four categories: (1) characteristics of the disputes, (2) parties and their interrelationship, (3) characteristics of the mediator, and (4) international context.[39] Under each category, Kleiboer provide different variables that measure the success and failure of mediation.[40]

Dryzek and Hunter provide yet four different conditions for international environmental disputes, which according to them are necessary for mediation is to bear the fruits.[41] First, which according to them is obvious, is that there must exist some conflicts in the eyes of one or more significant actors. Second, there must be intermediary who are easily available willingly, and who are competent and credible. Third, mediation is mostly practicable if all the conflicting parties have roughly equal capabilities. According to

36 Bercovitch (n 14).
37 Bercovitch (n 28).
38 Bercovitch and Houston (n 4).
39 Kleiboer, (n 24).
40 ibid.
41 See John, S. D. and Hunter, S. (1987). *'Environmental Mediation for International Problems'* 31:1 *International Studies Quarterly* 87, 94.

them, capabilities encompass political power, veto power, information resources, the capacity to hurt the other parties, or the ability to give the other parties something they want. The fourth crucial condition is that each party need to regard the others as legitimate participants of equal standing.

From the foregoing discussions, it can be fairly established that different authors provide different conditions for a successful mediation. This might be the reason for the *Office of the United Nations* to publish the *Guidance for Effective Mediation* in June 2012. The *Guidance* was issued with a view to strengthen the role of mediation in the peaceful settlement of disputes, conflict prevention and resolution. In the same year, *Conflict Prevention Centre for Organisation for Security and Co-operation in Europe (OSCE)* has undertaken a consultation work with regional, sub-regional and other international organisation to develop the *Guidance for Effective Mediation*.[42] This OSCE report has further expanded the *UN Guidance for Effective Mediation*.

The *UN Guidance for Effective Mediation* is worth noting. It provides the following elements:

a) **Preparedness —** The first element of an effective mediation is its *preparedness*. It is the first and foremost responsibility of States or organisations seeking to play a mediation role. Developing a good strategy, analysing the conflict comprehensively, providing induction and training for mediators and their teams are some of the preparatory works mentioned in the *UN Guidance*.[43] The States or organisations seeking to play a mediation role should be ready to commit resources to respond rapidly and to sustain support for the mediation process; select a competent mediator with experience, skills, knowledge and cultural sensitive for specific conflict situation; and undertake conflict analysis and regular internal assessments of the processes.[44] Thus, preparation contributes significantly to a successful mediation.

b) **Consent —** As noted previously, mediation is a *voluntary* process that requires *consent* of the parties to the dispute. All conflicting

42 *OSCE*, *Developing Guidance for Effective Mediation: Consultation with Regional, Sub regional and Other International Organizations*, (December 2012) *Conflict Prevention Centre*, <http://www.osce.org/cpc/99875?download=true> Accessed on 16 March 2017).

43 See *UN Guidance* (n 9).

44 Ibid. at p.7.

parties need to consent to the involvement of a mediator in the dispute. The *UN Guidance* explicitly mentions about the importance of understanding whose consent is necessary for a viable mediation process to start.[45] *Consent* will create the space for good understanding of mediation, engage with local community-based actors or organisations, build trust between the conflict parties and the mediator and the parties, build confidence in the mediation process, and be consistent, transparent and even-handed in managing the mediation process and respect confidentiality.[46]

c) **Impartiality —** Neutral and impartial mediator is a cornerstone of mediation. Oran Young defines *impartiality* as *"[h]aving nothing to gain from aiding either protagonist and in the sense of being able to control any feelings of favouritism."*[47] The conflict parties will anticipate their mediation process to be neutral and unbiased which will ultimately assist in the meaningful progression to resolve the conflict. Impartiality is one of the very important aspects of the qualities of mediator. Mediator's ethics and integrity certainly plays a role to uphold the quality of impartiality. The *UN Guidance* says that, *"[A]s a mediator, especially a United Nations mediator, is typically mandated to uphold certain universal principles and values and may need to make the explicitly known to the parties."*[48]

One can find numerous articles written on *impartiality* of a mediation process. Although *impartiality* is important for a successful mediation, however, this view has been contested over a period of time. Touval & Zartman claims that *"[m]ediators do not have to be perceived as impartial in order to be acceptable or influential."*[49] In the work of Burcu Savun, it was found out that biased mediators are more likely to deliver successful mediation outcomes than unbiased ones.[50] Burcu writes that *"[t]he higher the degree of bias a*

45 Ibid. at p.9.

46 Ibid.

47 Young, O.R. (1967). *The Intermediaries: Third Parties in International Crises* (Princeton University Press).

48 See *UN Guidance* (n 9), p. 10.

49 See Zartman, W. and Touval, S. (1985). *'International Mediation: Conflict Resolution and Power Politics'* 41:2, *Journal of Social Issues* 27; Also, see Bjereld, U. (1995). *'Critic or Mediator?* Sweden in World Politics, 1945-90' 32:1 *Journal of Peace Research* 23.

50 Savun, B.(2008). *'Information, Bias, and Mediation Success'* 52:1 *International Studies*

*mediator has toward one of the disputants, the higher is the likelihood of mediation success."*[51] One of the reasons for this argument was that mediator's close relationship to one side might make them more credible transmitters of information.[52]

d) **Inclusivity —** *Inclusivity* is another important element for an effective mediation. According to the *UN Guidance for Effective Mediation*, inclusivity refers to the process of integrating and representing the views and needs of conflict parties and other stakeholders in an effort to successful mediation.[53] This process primarily is to understand and identify root cause of the conflict and thereby addressing it accordingly. With inclusivity, it derives legitimacy. Civil society, women leaders, and women's groups can play a very critical role and are often effective in peace making at community levels.

e) **National Ownership —** Another element for effective mediation is the *national ownership*. The notion of ownership is closely related to the principle of inclusivity of all relevant parties in the mediation process.[54] By ownership, it implies a commitment of the conflicting parties and the broader society to the mediation process, agreements and the implementation of peace agreement. If certain degree of commitment from all relevant parties to engage in the mediation is absent, the risk of failure is high.[55] By ownership, it would also mean generating solution between them, which would ultimately mean, that the mediator should avoid imposing solutions or forcing decision to the parties without consent.

**f) International law and normative frameworks —** By and large, mediation is *informal* and *voluntary*. However, this does not mean that mediation process should, and in reality, does not, operate in a norm vacuum. The *UN Guidance for Effective Mediation* imposes the mediator an obligation to conduct the mediation within a

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*Quarterly* 25.

51 Ibid.

52 See Wanis, A. J. and Ghais, S. (2014). *'International Conflict Resolution: From Practice to Knowledge and Back Again'* in Coleman, P.T. Morton Deutsch & Eric C. Marcus (eds.), *The Handbook of Conflict Resolution* (San Francisco, CA: Jossey-Bass) Ch.56.

53 See *UN Guidance* (n 9), p. 11.

54 See *OSCE* (n 41).

55 Ibid.

normative legal framework. Although mediator might work on the basis of the mandates and within the parameters drawn by their appointing entity, however, the UN mediators need to work within the framework of the *UN Charter*, relevant *Security Council* and *General Resolutions*, and the *Organisation's rules and regulations*.[56] In addition, mediator must also adhere to the rules of international law that governs the given situation, *inter alia,* global and regional conventions, international humanitarian law, human rights and refugee laws and international criminal law, including where applicable, the *Rome Statute of the International Criminal Court*.[57]

**g) Coherence, coordination and complementarity of the mediation effort —** Another prerequisite for a successful mediation in international conflict is the *coherence* and *co-ordination*. This is particularly important in a situation where multiplicity of actors is involved in an effort to mediate the conflicting issues. *Coherence* and *co-ordination* can ensure complementing mediation effort thereby avoiding duplicating and contradictory messages.[58] An optimal approach would be to appoint a lead mediator, which shall unify the stance of all mediators involved.

**h) Quality peace agreement —** The final element for effective mediation provided by the *UN Guidance for Effective Mediation* is the quality of peace agreement. By *'quality peace agreement'*, it would mean an implementable agreement. A good quality agreement must address the past wrongs and create common vision for the future.[59] The *OSCE* report for *Consultation on Guidance for Effective Mediation* provides three central principles that an implementable peace agreement should adhere to. First, it should be *realistic*, *precise*, *comprehensive* and *holistic*. This first principle holds that agreement should have resolved the issue holistically. Any unresolved conflict may lead to re-emergence of future violent. Second, prioritisation of actions in the implementation phase should be acknowledged in the agreement. Third, agreement should include monitoring mechanisms and capacity building efforts between the parties.[60]

56 See *UN Guidance*, (n 9).
57 Ibid.
58 See *OSCE* (n 41).
59 See *UN Guidance* (n 9), p. 18.
60 Ibid at p. 20.

Having given the elements of a successful mediation, both from the perspectives of authors and from the *UN Guidance to Effective Mediation*, it can be fairly concluded that there is no standard prerequisites for a successful international mediation. Different authors provide different theories to test the prerequisites for the effectiveness of mediation; and identify different variables that they viewed to be important, but there are no standard variable that has universal application that commits itself without reference to the context of the conflicts. Thus, it would be very difficult to assert which particular prerequisites for the effective mediation will work in a given situation. Similarly, the *UN Guidance for Effective Mediation* is not conclusive either. It is an attempt to provide some suggestions as to how they might be applied in a real mediation practices.[61] However, mediators, parties and those involved in the mediation process might need careful assessment, proper planning, and regular monitoring and evaluation in order to obtain best out of mediation process. While all these factors provided in the *UN Guidance* are significant, the success or failure of mediation process ultimately depends on parties' acceptance to the mediation and their commitment for a suitable agreement. In order for mediators to play an invaluable role, it eventually relies upon parties' genuine willingness to explore solutions to the negotiation.

**Example — Failure of Kofi Annan's Peace Mission in Syria.**

As noted above, there are many factors that determine the success and failure of international mediation, but there are no single standardised preconditions applicable to each and every conflict uniformly. Many factors were drawn based on the analysis of a given case, and all most all factors are context specific depending on conflict situations. Therefore, the next task is to analyse one of the examples of an unsuccessful mediation in the international conflict and examine its failure in line with the prerequisite of effective mediation provided in the *UN Guidance*. For the purpose of this analysis, I shall examine Kofi Annan's Peace Mission in Syria and provide some of the reasons why his mediation efforts were not successful.

War in Syria is bad. It has been already nine years, and there is no significant hope on the horizon for peace. *The UN*, *the Arab League*, *the European Union*, the United States, and many other countries have condemned the violence against civilians in Syria, but no effective solution have been found out. Good office, peace talks, and mediations have not produced

61 Ibid at p. 23.

any desired outcome. As of October 2019, 11.7 million people are in need of humanitarian assistance.[62]

Given the situation in Syria, the international leaders and organisations have felt a strong desire to end the conflict. Therefore, the United Nations appointed Kofi Annan as a *Joint Special Envoy (JSE)* of the *United Nations* and *League of Arab States (LAS)* on 23 February 2012. Kofi Annan has demonstrated the world that he is one of the most popular and acknowledged diplomats of our times; and his international reputation as an experienced international mediator has led the Ban Ki-moon to pick him to solve the knotty and complex crisis in Syria.[63] As a *JSE*, Kofi Annan was tasked with huge responsibility to bring an end to all violence and human rights violations, and promote peaceful solution to the Syrian crisis. Thus, his first priority was to reduce the violence, because he had a belief that longer the war would bring more fragmentation, radicalisation, and militarisation, which would make it harder to resolve.[64] Despite the *LAS* failure, Annan evidently believed that the backing of the global great powers for his mission and the prestige of the UN as compared to the *LAS* would make the difference. He also explored and asked the international support and commitment of the permanent members of the *United National Security Council (UNSC)* for his mission.

Kofi Annan's mission can be briefly explained into four phases. *First* phase of his mediation mission was a preparation stage. He developed *Six-Point Plan* which was based on the *LAS* plan. An inclusive Syrian-led political process, the UN supervised cessation of armed violence, timely provision of humanitarian assistance, release of arbitrarily detained persons, freedom of movement for journalists, and respect for freedom of association and the right to demonstrate peacefully were his six plan of action.[65] As

62 See *United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA),* <http://www.unocha.org/syria> accessed on 12 October 2019.

63 See Troeltzsch, F. (2015) *'Syria—The Failure of Three Wise Men: Kofi Annan' Global Public Policy Watch* <https://globalpublicpolicywatch.org/2015/04/01/syria-the-failure-of-three-wise-men-kofi-annan/> Accessed on 22 March 2017.

64 Hinnebusch, R and William, Z. et al., (2016). *'UN Mediation in the Syrian Crisis: From Kofi Annan to Lakhdar Brahimi'* New York: *International Peace Institute*.

65 See Annexed to *Security Council Resolution* 2042 (2012) of 14 April. <http://www.un.org/en/peacekeeping/documents/six_point_proposal.pdf> accessed 22 March 2017; also see, Gowan, R. (2013). *'Kofi Annan, Syria and the Uses of Uncertainty in Mediation'* 2(1): 8 Stability, pp. 1-6, DOI: http://dx.doi.org/10.5334/sta.ax Accessed

he convincingly obtained the *UNSC* support of his plan, the plan was formally negotiated with the Syrian regime, enlisting Russia to pressure Assad into accepting it, which it was formally accepted both by the regime and Russia.[66] Moreover, Annan even negotiated a ceasefire between the conflicting parties, which did not hold longer than a single day. Second, the *JSE* tried to implement his peace plan. Despite violence after breakdown of the cease-fire, Annan still stated that his plan was on right track. It was only during the Massacre of Houla where UN observers were attacked and women and children were killed, Annan started to criticise the Syrian government where he noticed himself that his approach to the conflict was not working. Third, in response to Houla massacre, Annan convened the *Action Group for Syria*, a high-level meeting, later known as *Geneva I Conference*, with an aim to obtain adequate backing from the participants to increase the pressure on the regime. This meeting passed *Final Communique*, in which it has called for a peaceful solution of the Syrian conflict and a democratic process in the country. Fourth, the *Geneva Communiqué* was not implemented, and strong fighting spread even further to Syria's two biggest cities Aleppo and Damascus. Meanwhile, France, the US and the UK tabled the *UNSC* resolution under Chapter VII of the *UN Charter* to put non-military sanctions on the regime if they did not end the use of heavy weapons, withdraw troops from those two cities, and implement the peace plan. However, Russia and China vetoed this resolution, insisting on Chapter VI of the *UN Charter*. This veto has put an end to Annan's mission and resigned as a mediator on 2 August 2012.

**Analysis — Annan's Peace Mission and Preconditions to a Successful Mediation**

The most straightforward question would be, what went wrong in Annan's mediation efforts? Which factors of a successful mediation were missing in Annan's Peace Mission?

*First,* the *UN Guidance for Effective Mediation* provides *preparedness* as first prerequisite for a successful mediation. It would be not fair to say that Annan's mission lack adequate plan and preparation. His six-point plan

on 22 March 2017.

66 Hinnebusch, R. and William, Z. et al., (n 63).

strategy testifies this point. There was also consent from the conflict parties, and most importantly, as we have seen from the facts, his mediation efforts were inclusive. He ensured that all relevant national and international actors as well as Assad and the Opposition were included in his mission. He has personally spoken to the leaders of the United States, Iran and Russia, emphasising on the regional actors like Turkey, Jordan and Lebanon. The only country he did not visit was Israel. Despite these facts, many parties failed to join the negotiation process; and especially at the *General I Conference*, the regime was crucially missing.[67]

*Second,* an important precondition for a successful mediation is *impartiality*. Although some of the authors claim that international mediator is not expected to be impartial,[68] a neutral and impartial mediator is an important facet for successful mediation under the *UN Guidance*. The situation in Annan's mission proved that mediators are required to adopt impartial strategy. Annan's *Six-Point Plan* placed all the demands on the regime and therefore, Assad did not feel he receive a fair treatment.[69] When mediation is designed in such a way that it favours one and disregard the other, there is less likely to be successful.

*Third,* although mediation by and large is *informal* and *voluntary* process, the *UN Guidance* urges the mediator to conduct within the parameter of *UN Charter*, *UNSC* and *General Assembly Resolutions* and the Organisation's rules and regulations. What remains significant is to determine whether there was adequate legal backing from the *UNSC* or *UN General Assembly* so as to adopt the leverages (carrots and sticks) methods. Leverage is the ability to influence the parties to the conflict for peace processes and shape the incentives of disputants. This ability to influence the peace processes originates from the international law and the mediator's mandate to mediate the conflict. Were Annan's peace mission backed by the *UNSC*? Annan might have enjoyed high prestige and respect among all the parties, yet this cannot be translated as a substantive leverage over the parties. As we have seen, political ideology of the West on the one hand, and Russia and China on the other, did not provide Annan enough *UNSC* backing. Adequate legal backing of the *UNSC* would have strengthened Annan's mandate to push for mediation. Thus, there was no coercive power available to

67 See Mancini, F. and Vericat, J. (2016). *'Lost in Transition: UN Mediation in Libya, Syria, and Yemen'* New York: *International Peace Institute.*

68 Smith (n 16), Zartman and Touval (n 48), Bjereld (n 48).

69 Mancini, F. and Vericat, J. (n 66) at p 23.

push demands on the Syrian regime. At the same time, the opposition lack enough military capacity or external support to force regime to make concessions. Thus, Annan had little, or no leverage to persuade the regime to step down, or even to agree to a gradual political transition.[70]

*Fourth,* the issue of leverage can also relate to coherence, coordination and complementarity of mediation efforts. *UN Guidance to Effective Mediation* stipulates that coherence and coordination is important in a situation where multiplicity of actors is involved in an effort to mediate conflicting issues. In the Syrian Civil War, many international actors are involved, and every actor is working individually. To be said so, there is hardly any coordination among the foreign involvement, specially that the West and the Syrian opposition set Assad's departure as a precondition for negotiation while Russia wanted a power sharing compromise. There is serious inability of the US and Russia to join in a common approach for Syrian conflict that pulled out the rug under UN mediation efforts. This has complicated Annan's mediation.

*Fifth,* besides the *UN Guidance to the Effective Mediation*, I have also discussed various factors for a successful mediation developed by various scholars. One of the factors that scholars hugely rely upon is that the conflict must be ripened for intervention. Lundgren in his forthcoming work, questions whether the conflicting parties in the Syrian Civil War, at least until 2015-16, were receptive to external mediation.[71] When Lakhdar Brahimi[72] resigned from his post as a mediator, he considered the conflict as not ripen for resolution.[73] If the conflicts during the time of Brahimi were not ripen, the conflict at the time of Annan's Mission would not have been ripen for third party intervention. Hinnebusch & Zartman, et al. accordingly writes that "[K]ofi Annan was appointed in a highly uncompromising context when the conflict did not appear to ripe for a negotiated settlement".[74] Thus, it is not always wise to beat the iron when it is hot.

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70 Ibid.

71 Lundgren, M. (2015). *'Mediation in Syria: Initiatives, Strategies, and Obstacles, 2011-2016'* (Forthcoming in Contemporary Security Policy); Also see, Lundgren, M. *'Peacemaking in Syria: Barriers and Opportunities'* UI *Brief No.*1, *Swedish Institute of International Affairs.*

72 After the resignation of Annan, his efforts were continued by Lakhdar Brahimi who received his mandate as UN-LAS special envoy to Syria on August 17, 2012 and resigned on May 14, 2014.

73 Hinnebusch, Zartman, et al., (n 63).

74 Ibid. 7.

From these analyses, it can be noted that Annan has complied with some of the preconditions of the *UN Guidance to Effective Mediation*, and at the same time, few elements were missing. The question is, would Annan's mediation have been successful had all the elements of *UN Guidance to Effective Mediation* were used? The answer cannot be simply affirmative. The fact remains that, for a mediation to stand a chance, parties' acceptance and commitment is crucial. Parties' genuine willingness to explore a negotiated settlement would contribute largely to a successful mediation. However, in Annan's mediation in Syria's internal conflict, parties' commitment was lacking which ultimately illustrates lack of national ownership over the conflicts. It is evident from the factual circumstances where Assad warned that no political dialogue could succeed with the terrorist groups that are operating and spreading chaos and instability.[75] On the other hand, the opposition was very firm and rigid with their position and declared that Assad's departure was something not negotiable and stated to embrace UN mediation only if it would serve the purpose of regime change. Lack of commitment and support from the parties failed the mediation. Annan blamed the failure of his mediation on both the regime and the opposition for their refusal to implement his *Six-Point Plan*. On the one hand, Syrian government refused to the *Six-Point Plan* and on the other hand, there was escalating military campaign from the opposition side, and lack of unity in the *UNSC*.[76] This clearly evidences that the *UN Guidance* is neither comprehensive nor is there established preconditions set out by the scholars.

## Conclusion

In most of our conflict management courses, we often articulate mediation as one of the best methods to resolve the conflict; that it is informal and voluntary process, that parties decide their own outcome, that it is cost effective, that it is less time consuming, and that it is a win-win approach as opposed to formal adjudication. These qualities of mediation might hold truth in a conflict between two individuals, and certainly, mediation is less time consuming and cost effective when opted for managing the conflicts between individuals. However, it is certainly challenging when it comes to international conflicts, which is too complex in nature. What remains truth is, if third party intervention can resolve disputes, it can bring amicable resolution without blood and bones, but if both the parties are reluctant

75 Ibid.

76 Annan, K. (2012). Press Conference, *UN Office* in Geneva.

to commit for mediation, it is often frustrating and take years to resolve with combat and fits. We have seen this over a recent period of time; the conflicts in Syria being one of the best examples where third party intervention is not one and the only best alternative. In fact, as the Syrian civil war escalate; critics often argue whether Annan could be responsible for the deteriorating conflict.[77] But because mediation did not bring positive outcome in a given single case (Annan's effort as discussed above) does not adequately allow me to conclude that force as a better choice of dispute settlement mechanism. Mediation can certainly bring peace and happiness and end the conflict if we can exploit its strength congruently.

In order to exploit every strength of the mediation, it is important that we overcome the main challenges facing mediation in this generation. Triumphing over the shortcomings of the mediation will definitely produce effective mediation. What do the international actors need to focus on?

*First,* we experience that the world is getting smaller, compact and easier with the advancement of science and technology. We live in a global village. Technology has given a platform for better information and communication. With adequate connectivity, there are increasing actors playing direct or indirect roles in international mediation environment. This shows a strong sense of unity, collaboration and cooperation in the pursuit of common goal. However, as many cooks spoil the broth, there is likely that many actors with less coordination would impair mediation strategies and processes. With diverse actors decanting diverse political and economic interests, drawing a workable strategy was often felt difficult. Coordination and collaboration can, therefore, increase the quality of overall mediation and bring effective results.[78] Unity within the international community, especially within the members of the *Security Council* would not only legitimise but also decisively strengthen the mediators' leverages, which would stand on a high chance for effective mediation.

*Second,* our society is becoming extremely judgmental and mediation is not an exception. In fact, one of the basic principles of mediation is non-

77 Gowan (n 64).

78 Svensson, I. and Onken, M. (2015) *'Global Trends of Peace Negotiations and Conflict Mediation'* in Michèle Roth, Cornelia Ulbert, and Tobias Debiel (eds.), *Global Trends 2015*: *Prospects for World Society* (Development and Peace Foundation, Institute for Development and Peace/Käte Hamburger Kolleg - *Centre for Global Cooperation Research*).

judgmental; that mediator should be a neutral third person. The conflicting parties should control the ownership over the dispute, and the mediators' role is to control the process. Unfortunately, this is not happening in modern international mediation. In fact, mediators are becoming awfully judgmental and bias, and leaders put their political agendas on the top priority. Such deficit personality trait of mediators brings chaos and unsuccessful result. As in the case of Syria, ousting the regime was the desired end result of the Western powers; and the anti-Assad precondition was impartial efforts on the part of Annan that bears no fruit. If mediation is to be successful, mediators need to be successful in maintaining impartiality in their conduct

*Third,* the decision-making process in the *UNSC* is not democratic. In this era of free expression and information, where we promote democracy and majority participation in the decision-making processes, the United Nations is within the bracket of powerful P5 minority. Their veto power is nuclear weapon that destroys the decisions of the majority of weaker states. One veto is overly powerful to obstruct the interests of many. Veto and democratic principles do not run in a parallel dimension. In the case of Syria, while thirteen members of the *UNSC*, including the US, France and Britain voted in favour of the resolutions condemning the Syrian government's repression of protesters; Russia and China vetoed thereby nullifying the majority position of the *UNSC*. This division in the *UNSC* removed all possible coercive power over the Assad regime.[79] In other words, mediators do not enjoy legitimate leverages to urge the conflict parties to settle the conflict. In such factual situation, international law stands in a comical stage where it bends towards the powerful states neglecting the insignificant weaker states.

*Fourth,* recalling that the international conflicts are complex and cannot be resolved easily, the world leaders need to learn to prevent the conflicts at the very first instance rather than resolving them after its occurrence. Most of the conflicts that happen today were preventable or can be resolved at its initial stage. Conflicts are mostly prevalent when development is not balanced, when leaders are corrupt, when people are not adequately informed, and mostly exasperated by socio-cultural dissimilarity, cognitive imbalance, status differences, and triggered by perception of opportunity or threat or injustices. These sources of conflicts are, by and large, preventable. State can play vital roles in its endeavour to provide peace and security through various measures.

79 Mancini and Vericat (n 66).

If I may be allowed to relate an example from the development philosophy of Bhutan — the *Gross National Happiness (GNH)* — there is so much so that the world leaders can embrace to prevent and/or manage the conflicts effectively. For Bhutan, *Gross National Happiness* is more important than the *Gross Domestic Product*.[80] However, *GNH* is often misinterpreted. People's perception of GNH is too literal, most commonly perceived as a pleasure, gain, satisfaction, joy, feel good mood, or any other words that you may find in English vocabulary. But *GHN* for Bhutan is more than a mere literal translation of happiness. It is the economic policy by which the Government is free to carry out its development activities within the framework of *GNH*.

*GNH* works on four main pillars — (i) Good Governance; (ii) Sustainable Socio-economic Development; (iii) Preservation and Promotion of Culture; and (iv) Environmental Conservation.[81] These four pillars are backed by nine domains and 33 indicators that guide the overall progress of the country. This holistic and sustainable approach to development balances the material and non-material values with the conviction that the ultimate humans' desire is the *happiness*. Through its screening tool, all development policies and projects in Bhutan are reviewed under the lens of *GNH*, and ensure that all plans and policies are within the purview of four pillars and nine domains. His Majesty the Fourth *Druk Gyalpo* has firmly believed that, *happiness* is an indicator, and a sign of progressive development for the Bhutanese people. Similarly, in the words of His Majesty the King Jigme Khesar Namgyel Wangchuck, *GNH* means development with values – the fundamental values of kindness, equality and humanity and the necessary pursuit of economic growth.

Therefore, I believe that the *GNH* framework not only shapes the economic development of a country, but also help preventing major international conflicts. For instance, good governance pillar would demand transparency, public accountability and responsibility within the framework of rule of law. It will ensure good leadership, and measure any development activity

80 Ura, K. (2015). writes that *"During the mid-1970s, Bhutan's King Jigme Singye Wangchuck, still a teenage monarch, first introduced Gross National Happiness (GNH), and said that Gross Domestic Product (GDP) is less important than GNH because GDP alone could not deliver happiness and well-being."* See Karma Ura, *'The Experience of Gross National Happiness as Development Framework'* ADB *South Asia Working Paper Series*.

81 See http://www.gnhcentrebhutan.org/what-is-gnh/four-pillars-and-nine-domains/ (Accessed on 26 March 2017).

through good governance paradigm. Similarly, sustainable socio-economic development would ensure state to exploit resources within the limit of our consumption so that future generations are not disturbed. Preservation and promotion of culture would make leaders appreciate diverse culture and religion, and respect them with equality and dignity, promote with humility and modesty, and governed the subjects with mutual co-existence in a democratic way. These are some of the tenets of preventing cultural and religious conflicts. Environment conservation pillar is important not only because it contribute fresh water and clean energy, but also because it provides aesthetic and other stimulus for the wellbeing of the people. In order to ensure this, *Gross National Happiness Commission (GNHC)* spearheads the government's plans and programmes in Bhutan. If leaders around the world can unequivocally embrace this realistic framework of development, there is no reason why conflict cannot be prevented. It is always intelligent to prevent first than to devise series of methods to resolve the conflict at the advanced stage. At the end of the day, every sentient being in this universe aspire to lead their life peacefully and happily.

# *International Trade Law: Diplomatic Protection as an Alternative to Arbitration in Investment Disputes Settlement System*[1]

## Introduction

Corporations are considered to have a distinct legal personality; and as legal persons they possess both rights and obligations under the laws of incorporation.[2] Like citizens, corporations are not confined to one particular state, rather they are often found to be associated and operating in the state other than the state of incorporation. The traditional approach is that corporations are not treated as subjects of international law, since the legal personality of a corporation are founded on municipal laws. In the past, when corporations were subjected to violations of their rights in a foreign state, it necessitated the corporations to seek diplomatic protection from their state to protect their rights and redress claims on their behalf. On the contrary, a modern trend of concluding *Bilateral Investment Treaties (BITs)* and *International Investment Agreements (IIAs*) provides adequate provisions for the protection of the corporations. Typically these investment treaties provide *Alternative Dispute Resolution (ADR)* mechanisms as the means to settle disputes between corporations and states, usually through arbitration. Corporations today have sufficient choice of forums to redress their claims under international law. A conventional method of diplomatic protection of corporations becomes relevant to those states that are not parties to *BITs* or *IIAs*. However, it does not mean that it would be in the best interest of those states that are not parties to investment treaties to conclude such treaties.

This Paper is a result of academic interest in the concept, which may have lost its relevancy in the face of modern investment treaties providing various options to corporations to redress their claims. I attempts to inquire the relationship between a corporation and the state of incorporation, which entitles the latter to exercise diplomatic protection on behalf of the former.

Diplomatic protection is one of the means where the state can make claims on behalf of its nationals for the injury resulting from breach of

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1 Contributed by Garab Yeshey.

2 Shaw, N. M. (1997). *International Law* (4th edn, Cambridge University Press) 137.

international law in the foreign state.[3] The Swiss jurist Emmerich Vattel is said to be an exponent of this theory of diplomatic protection who stated that *'whoever ill-treats a citizen indirectly injures the State, which must protect that citizen.*'[4] States brings the claim based on indirect injury from third state inflicted upon its nationals. This legal fiction dictates that injury to its national is injury to the state of that national. According to customary international law which is reflected in the *Draft Articles on Diplomatic Protection (Draft Articles) of International Law Commission (ILC)* and reaffirmed by *International Court of Justice* in *Diallo* case:[5]

> *Diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.*[6]

Diplomatic protection is a traditional mechanism designed to secure reparation for injury to a national of a state premised largely on the principle that an injury to a national is an injury to the state itself.[7] In this relation, John Dugard shares the existence of diplomatic protection to those days when the western European states and United States' business with Latin America,[8] wherein those powers were found themselves in dispute with the governments of Latin American countries over their personal and property

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3 Künzli, A.V. (2007). *'A Matter of Interest: Diplomatic Protection and State Responsibility Erga Omnes'* 56 ICLQ 553, 554.

4 Dugard, J. *'Articles on Diplomatic Protection'* United Nations Audiovisual Library of International Law 1.

5 *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), (Preliminary Objections)* [2007] ICJ Rep 582, para 39. Okowa, P.N. (2008). *'Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo) Preliminary Objections'* 57 ICLQ 219.

6 *Draft Articles on Diplomatic Protection*, Article 1 (Text adopted by the *International Law Commission* at its fifty-eighth session, 2881st meeting in Geneva, Switzerland on 30 May 2006). See also Peter Pavlovic, *'Protection of EU Citizen According To Art. 23 TFEU: Diplomatic Protection As Defined by International Law?'* < http://www.magnanimitas.cz/ADALTA/0201/papers/A_pavlovic.pdf.> accessed 15 August 2019.

7 *Draft Articles on Diplomatic Protection* with Commentaries, (2006) vol. II, Part Two *Yearbook of the International Law Commission* 22, 23.

8 Dugard (n 3).

rights to which they resorted the intervention of their national states for the protection through arbitration or use of force.[9]

The theory of diplomatic protection place its basis on the states' willingness to accept one another's jurisdiction over person or property within their territory with the exception to invoke its right to render national protection in the event of injury to person or property from the act undertaken in breach of international law.[10] Although the trends amongst the states in the field of business and investment laws have changed over the time, whereby, the protection of corporations are enunciated in much clear terms through various forms of *BITs* and *IIAs*. The increased references of investment disputes to arbitration are the result of the states resorting to conclude investment treaties. A modern trend of concluding *BITs* has superseded traditional treaties of on friendship, commerce, and navigation between two states. The inclusion of arbitration clause in investment treaties is found in almost every *BITs* as well as in multilateral investment treaties such as *North American Free Trade Agreement (NAFTA)* and *Energy Charter Treaty (ECT)*. To this day, there are 2896 *BITs*, out of which 2337 are said to be in force.[11] These *BITs* contains almost similar provisions in substance and are based on similar principles. These *BITs* typically contains dispute resolution clause, which is normally through arbitration – requiring investors to resort to international arbitration considering it as a viable dispute settlement mechanism. However, the diplomatic protection still remains as one of the mechanism to protect corporations by its state of nationality to ensure the just treatment in the foreign state.[12]

## Right to Exercise Diplomatic Protection

In essence, it is the right of the state to exercise diplomatic protection for injury ensuing from the international wrongful acts of other states against its nationals. This right of state stems from the nationality link between the state and its nationals.[13] One of the earliest judicial pronouncement on this regard is made in the *Mavrommatis Palestine Concession Case*[14] wherein the

9 *Ibid.*

10 Leigh, G.I. (1971). *'Nationality and Diplomatic Protection'* 20 ICLQ 453, 455.

11 UNCTAD, <https://investmentpolicy.unctad.org/international-investment-agreements> accessed 15 August 2019.

12 Dugard (n 3) 2.

13 Leigh (n 9) 453.

14 *The Mavrommatis Palestine Concessions* [1924] PCIJ Series A No 2, 12.

*Permanent Court of International Justice (PCIJ)* observed that *'by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights; its rights to ensure, in the person of its subjects, respect for the rules of international law.'* Further, the *Court* also pointed out that *'once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter, the State is sole claimant.'*

In this regard the *International Court of Justice (ICJ)* in the *Barcelona Traction Case*[15] held that the state is the sole judge whether the diplomatic protection is to be granted or not.[16] In the sense, the state has the discretionary power to exercise such right in a given case based on certain circumstances including political. Nevertheless, it is claimed that there is some form of obligation on state to exercise diplomatic protection when its national sustains serious violation of their rights in the foreign state.[17] In this context, Article 19 of the *Draft Articles on Diplomatic Protection*[18] provides that the state should give due consideration when there is significant injury to its nationals. However, it is to be noted that such inferences from the reading of provisions of the *Draft Articles* does not place a state under obligation to exercise its rights rather the international law as it stands today does not obligates a state to extend the diplomatic protection.[19]

## Prerequisite Conditions

There are certain prerequisite conditions for the application of the diplomatic protection both for the natural and legal persons including corporations that must be met before admitting the claims of a state brought before any of the international dispute settlement mechanisms by way of diplomatic protection. When there is a breach of international law by a host state, a state of nationality may extend diplomatic protection to

15 *The Case Concerning the Barcelona Traction, Light and Power Company Ltd. (Belgium v. Spain),* (Judgment) [1970] ICJ Rep 3.

16 *Barcelona Traction Case,* para. 79.

17 Dugard (n 3) 4.

18 Article 19 of the *Draft Articles* provides that, A State entitled to exercise diplomatic protection according to the present draft articles, should: *(a) give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred; (b) take into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought; and (c) transfer to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions.*

19 *Draft Articles on Diplomatic Protection* with Commentaries (n 6) 29.

its national only if certain conditions are fulfilled. First, the state exercising the diplomatic protection must have legal interest established through nationality between an injured national and the claimant state. Second, that an injured national must first exhaust the local remedies available in the state responsible for the injury. These two conditions must be first fulfilled for a claim to be admissible before international forum through diplomatic protection.

**State of Nationality**

It is the right of the state to exercise diplomatic protection on behalf of its injured nationals in breach of international law. If a state opts to exercise this right, then it becomes the claim of a state.[20] This right of a state is limited only to its nationals and may not extend to claims of foreign nationals.[21] For a state to invoke diplomatic protection there should be connection between the two through nationality. Similarly, with respect to a corporation, there should be link of nationality between a corporation and the state. For a nationality link to be established between the two, international law is based on municipal laws governing a corporation. The *ICJ* in *Barcelona Traction* case recognized that the right of diplomatic protection of a corporation to the state is based on the laws of the state in whose territory it has its registered office.[22] In addition to it, the *ICJ* also conceded to the state practice of incorporating the corporations based on seat or management or center of control in the territory of the state. However, the genuine link theory recognized in the *Nottebohm Case*[23]was rejected in the *Barcelona Traction Case* on the ground that it has no general acceptance.

In this relation, Article 9 of the *Draft Article* deals with state of nationality by which the nationality link between a corporation and the state is established in order to extend the diplomatic protection by the state to a corporation. It is provided in two instances, wherein the states are entitled to exercise its rights to diplomatic protection. First, a corporation must be incorporated under the laws of the state extending the diplomatic protection. Second, it provides a situation where a corporation is controlled by nationals of another state or where there are no substantial business activities in the

20 Shaw (n 1) 563. See also The *Mavrommatis Palestine Concessions Case.*

21 *Ibid.*

22 The *Barcelona Traction Case,* para. 70.

23 *Nottebohm case (second phase) (Liechtenstein* v. *Guatamala)* [1955] ICJ Rep 4.

state of incorporation and the seat of the management and financial control of a corporation is located in another state, then in such case, the state of nationality should be considered that state and not the state of incorporation of the company. The straightforward determination of state of nationality of a corporation based on state of incorporation or the seat of registered office does not *per se* clarify as to which state is to be treated as the state of nationality in the case of *Multi National Enterprises (MNEs).* As they are usually comprised of companies carrying out its activities in different countries where both control by private persons, state or its ownership and their relationship are so interlinked to one another. Moreover, the nature of *MNEs* operation in different states is such that *MNEs* possess equally strong links with each host state. Considering the hypothetical situation, wherein the *MNEs* sustains injury resulting from an act of host state, in such case, the question arise if all the host states be treated as state of nationality and entitled to exercise the diplomatic protection. In such situation, the problem of determining the state of nationality turns out to be difficult. Therefore, an option to exercise diplomatic protection in respect of *MNEs* becomes untenable.

The *Draft Articles* attempts to avoid the problem of multiplicity of claims based on state of nationality as *ICJ* has dealt it with precaution in *Barcelona Traction* case that such adoption could create an atmosphere of confusion and insecurity in international economic relations,[24]although *ICJ* was specifically referring it to the shareholders. In fact, the *Draft Articles* recognizes that the right of diplomatic protection can be exercised either by a state of incorporation or by a state of seat of management and financial control of a corporation. In case of latter, if the seat of management and financial control of a corporation are located in different states then the state of incorporation is the state entitled to exercise the right of diplomatic protection.[25]Likewise, in the case of *MNEs* if it is located in different countries apart from the state of incorporation, then in such cases, the right to exercise the diplomatic protection belongs to the state of incorporation.

In addition to the nationality connection between the state and the corporation, the corporation must remain a national of the state claiming on its behalf from the time of the injury to the time at which the claim is

24 The *Barcelona Traction Case,* para. 96.

25 *Draft Articles on Diplomatic Protection* with Commentaries (n 6) 35.

presented before an international forum.[26]This is also expressed in the *Draft Articles*, which requires that the continuity of nationality must be present between the date of the injury and the date of the official presentation of the claim.[27] In the case where a corporation ceases to exist owing to the reason of injury, then the state of incorporation is entitled to exercise the diplomatic protection.[28]However, the state, which acquires the nationality of a corporation only at the time of presentation of claim, has no right to exercise the diplomatic protection.[29]

**Exhaustion of Local Remedies**

The rule of exhaustion of local remedies is another prerequisite for the exercise of diplomatic protection by the state. Under this well-established rule of customary international law, before making any international proceedings, an injured party must exhaust the local remedies available in the state allegedly responsible for the injury. The local remedies as per the *Draft Articles* means, legal remedies, which are open to, injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the state alleged to be responsible for causing the injury.[30] The *ICJ* in the *Interhandel Case*[31] held that,

> *[T]he rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. (…) the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.*

This rule however does not apply to the circumstances where the injury is direct in nature to the state. On the contrary, an injury of the state while exercising the diplomatic protection for a corporation is indirect one; this

26 Leigh (n 9) 475.

27 *Draft Articles on Diplomatic Protection* with Commentaries (n 6) 56.

28 *Ibid,* Article 10 (3).

29 *Ibid,* Article 10 (2).

30 *Ibid,* Article 14.

31 *Interhandel Case* (*Switzerland v. United States of America*) *(Preliminary Objections)* [1959] ICJ Rep 6, 27.

rule must be fulfilled before making any claim on behalf of its nationals.[32] The *ICJ* in *ELSI Case*[33]wherein Italy claimed that the local remedies had not been exhausted, on the other hand, the US argued that the case was brought before the *ICJ* under the *Treaty of Friendship, Commerce, and Navigation* 1948 between the two states which provided that disputes between the two arising from it to be brought before international courts where there is no specific mention of local remedies at all. The US interpreted this provision as implicitly dispensing the parties with the application of the rule; the *ICJ* held that *"it finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention do so."*[34] Further, US contended that the injury was in fact direct injury resulting from the *Treaty*, the court reiterating the *Interhandel Case* however was not convinced with its contention and held that the United State's claim as a whole was the alleged damage to its two corporations i.e. *Raythe*on and *Machlett* to which the rule of local remedies apply.[35] Exhaustion of local remedies rule was further reiterated and reaffirmed by the *ICJ* in *Diallo Case*.[36]

This rule turns out to be a procedural barrier to the state-making claim before international dispute settlement forum on behalf of its national. But there are certain exceptions in the application of this rule incorporated in the *Draft Articles* that may be invoked to avoid this procedural barrier. Firstly, when there are no effective available local remedies or there is no possibility that the local remedies will redress the claim.[37] Secondly, where there is undue delay in the remedial process, which is attributable to the state alleged to be responsible.[38] Thirdly, if there was no relevant connection between the injured person and the state alleged to be responsible at the date of injury.[39] Fourthly, the injured person is manifestly precluded from pursuing local remedies.[40] And lastly, when the state alleged to be responsible has waived

32 Shaw (n 1) 568.

33 *Case Concerning Elettroanica Sicula S.p.A.(ELSI)* [1989] ICJ Rep15.

34 *ELSI* case, para. 50.

35 *ELSI Case, para. 52.*

36 *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), (Preliminary Objections)* [2007] ICJ Rep 582, paras. 42-4, 47.

37 *Draft Articles on Diplomatic Protection*, Article 15 (a),

38 *Ibid,* Article 15 (b).

39 *Ibid*, Article 15 (c).

40 *Ibid,* Article 15 (d).

the requirement that local remedies be exhausted[41]like for example through explicit declaration in the treaty.[42] All in all, the rule of exhaustion of local remedies sorts out the claims before the international dispute settlement mechanism, where the injured national enforce its rights against the host state. The customary international law requires that available local remedies should be exhausted before exercising diplomatic protection by the state.

**Protection of Shareholders**

The law on diplomatic protection is that the state extends diplomatic protection to a corporation based on state of nationality of a corporation and not based on the nationality of shareholders of a corporation.[43] The diplomatic protection as to the shareholders was rejected by the *ICJ* in *Barcelona Traction Case*. Wherein, the right of Belgium to espouse claims of Belgian shareholders in a company incorporated in Canada was rejected and the *ICJ* observed that there is difference between the rights of the shareholder and those of the company, which is distinct to one another based on the concept enunciated in municipal laws.[44] Although there is no denial that an injury caused to a corporation in turn affect its shareholders, but this does not imply that both a corporation and its shareholder can redress the claim.[45] The *ICJ* further noted that an act infringing the company's rights do not necessarily involve responsibility toward the shareholders, even if their interests were affected. In such circumstances, the shareholders must solicit the company to take action although both suffer from the same wrong[46]but it is only one entity's right that is infringed. The *ICJ* by referring to those generally accepted rules of municipal legal systems stated that an injury to the shareholder's interest resulting from an injury to the right of the company is insufficient to found a claim. Furthermore, the *ICJ* stated that no rules of international law expressly confers such a right on the shareholder's state, if different from

41 *Ibid,* Article 15 (e).

42 Shaw (n 1) 568.

43 *Draft Articles on Diplomatic Protection* with Commentaries (n 6) 58. Dugard (n 3) 5.

44 Lutz, P.D. (1970). *'Diplomatic Protection of Corporations and Shareholders-Capacity of Government to Espouse Claims of Shareholders of a Foreign Corporation'* 1 (1) Article 10 CWILJ 141. Mann, F.A. ( 1973). *'The Protection of Shareholders'* Interest in the Light of *Barcelona Traction Case* 67 AJIL 259.

45 The *Barcelona Traction Case,* para. 44.

46 The *Barcelona Traction Case,* para. 44.

the corporation's state rather it is the state of a corporation alone can seek redress by way of diplomatic protection.[47]

The *Barcelona Traction Case* clearly suggests that it is only the state of nationality of a corporation that can exercise the diplomatic protection not the state of shareholders. Nevertheless, there are certain exceptions where the state of nationality of shareholders might exercise diplomatic protection. The *ICJ* in *Barcelona Traction Case* did indicate such exceptions namely where the company had ceased to exist in the state where the corporation was incorporated and the case where the company's national state lacking capacity to take action on its behalf.[48] Likewise, Article 11 of the *Draft Articles* recognizes such exceptions where *'the corporation has ceased to exist according to the law of the State of incorporation for a reason unrelated to the injury,'* or *'the corporation had, at the date of injury, the nationality of the State alleged to be responsible for causing the injury, and incorporation in that State was required by it as a precondition for doing business there.'* These exceptions was however not applied in the *Barcelona Traction Case*, as the company had not ceased to exist in Canada which is the state of incorporation[49] and Canada being the state of nationality of the company did not lack the capacity to take action on behalf of the company. In fact, the *ICJ* recognized that Canada's right to exercise the diplomatic protection on behalf of the company is unaffected which Canada chose not do so for the reason best known to Canada.[50]

Furthermore, the *Draft Articles* recognizes the situation in which the state of nationality of shareholders can exercise the diplomatic protection when there is direct injury to its shareholders, which is distinct from those of corporations.[51] However, the *Draft Articles* does not clearly specify the distinction between the rights of shareholders and that of corporations for the purpose of diplomatic protection rather it is left open to make determination based on individual case.[52] This attempt of codification by *ILC* in *Draft Articles* was drawn from the recognition made by *ICJ* in the *Barcelona Traction Case* wherein it stated that whenever the direct rights of shareholders are infringed, the shareholders has independent right to

47 The *Barcelona Traction Case,* para. 51.

48 The *Barcelona Traction Case,* para. 64.

49 The *Barcelona Traction Case,* paras. 66-68.

50 The *Barcelona Traction Case,* para. 83.

51 *Draft Articles on Diplomatic Protection*, Article 12.

52 *Draft Articles on Diplomatic Protection* with Commentaries (n 6) 67.

take action.[53] In *Diallo Case*, Guinea instituted proceedings against the Democratic Republic of Congo (DRC) by way of diplomatic protection on behalf of Diallo Ahmadou Sadio, a businessman of Guinean nationality who had been resident in the DRC, wherein one of the allegation was that by expelling Mr. Diallo from DRC, it has infringed his rights associated with two companies i.e. *Africom-Zaire* and *Africontainers-Zaire*. But DRC contended that Guinea's claim is inadmissible so far as it sought to protect Mr. Diallo's direct rights as a shareholder of two companies. The *ICJ* in its preliminary judgment rejected this preliminary objection of DRC and upheld the Guinea's standing for diplomatic protection of Mr. Diallo's direct rights as a shareholder of those two companies.[54]However, on the contrary, the *ICJ* in its latter judgment (merits) held that there was no violation of Mr. Diallo's direct rights by DRC and Guinea's allegation on infringement of Mr. Diallo's rights was rejected.[55] Although, there is statement of exceptions in *Barcelona Traction Case* and incorporated in *Draft Articles* where the state of shareholders can exercise diplomatic protection, but there is no sign of recognizing the right of shareholders to be protected by way of diplomatic protection under international law.

## Conclusion

Resorting to diplomatic protection must fulfill the procedural requirements of state of nationality and exhaustion of local remedies before a claim is brought to international dispute settlement forum. The present state of international law is yet to be settled in recognizing the diplomatic protection of shareholders. Despite the fact that there are several international instruments where the rights of the corporations are protected and represented under international law, extending diplomatic protection to corporations still stands as a conventional alternative to *ADR* mechanisms as provided in the *BITs* and *IIAs* to protect the interests of corporations by bringing a claim before international dispute settlement forum.

However, it may be stated that states have reservations in extending diplomatic protection to corporations due to varied reasons, as there are only few instances where such option were invoked by the states. In other

53 The *Barcelona Traction Case,* paras. 46-47.

54 The *Diallo Case,* para. 67.

55 *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo),* (Merits), [2010] ICJ Rep 639, paras. 117-59. See Bjorge, E. (2011). *'Ahmadou Sadio Diallo'* 105 AJIL 534.

words, it is seemed to be appropriate for states to provide other mechanisms of protection to corporations through investment treaties. Moreover, with the movement of concluding *BITs* and *IIAs* among states and the *Convention* such as the *International Centre Settlement of Investment Disputes (ICSID)* came into existence, extending diplomatic protection to corporations comes in the bottom of the list for states and its practical relevancy is dropping out of sight.

# Profile of the Contributors

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