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Dedication

His Majesty the King has said, His Majesty the Fourth Druk Gyalpo is a rare and precious gift to us, the likeness of who, we haven't had in the past; and, we may not see one in the future. He is indeed an enlightened being who showered us with love and compassion and nurtured us in an era of unprecedented peace and happiness. The actual greatness of a leader is often known after he remits his office. It is more than a decade that His Majesty the Fourth Druk Gyalpo has stepped down, but He is as inspiring and charismatic as ever. Let us count the blessings he showered upon us, and pray for His long life.

His Majesty, the Fourth Druk Gyalpo was a great law giver, culminating in the framing of the Constitution of Kingdom of Bhutan, and ushered many other legal and judicial reforms. As we follow His legal legacies and build on the edifice of the Rule of Law laid down by Him, the Bhutan National Legal Institute is happy to bring out the 12th volume of Bhutan Law Review, the country's first law journal initiated by Her Royal Highness, Ashi Sonam Dechan Wangchuck, the President of the Institute, coinciding with His 64th birth anniversary.

We pledge our commitment to improve access to justice and enhance public trust and confidence in the judiciary through the dissemination of laws, promotion of legal scholarship and empowerment of the people with the legal and judicial education; in keeping with His wish for an effective justice services to the people.

Content

Preface

When we talk of successful organizations and great nations, we actually talk about the competent and committed people who man those institutions and countries. Building on the successive contributions of our leaders, we have developed an impartial, independent and competent judiciary. Learning never ends, and the cycle of learning, unlearning and re-learning repeats. The continuous learning and education for the judges is crucial, being a learned profession. The judges are the spring wells of justice, who must be equipped with the modern judicial craft and competence to interpret laws and uphold and administer justice fairly and independently as per laws. His Majesty the King has commanded that we must perpetually learn and remain informed and competent, at least in our respective professions to contribute towards nation building; and guide and coach our subordinates in their intellectual pursuits and growth.

Due to the gravity of the responsibilities and the power judges wield, of all the people who hold public offices, the judges in particular must be competent, empathic, mindful and emotionally intelligent. The professional competency entails continuous upscaling of the skills and re-skilling with the changing times. Therefore, of the several roles judges play, the roles of a learner is important. This makes the roles of continuing judicial education and professional development very important in keeping the judges and the judicial officials read and ready in the fast-changing intellectual landscape.

Not only that the judges must have inclination and passion to perform judicial duties but must have the requisite judicial temperament, compassion and patriotic zeal to serve the nation. One of the best ways to ensure judicial competence is through a transparent, objective and competitive selection processes. However, experiences in other countries show that even the best candidates do not come equipped with the necessary skills for performing the roles of judges. This called for the need for judicial induction and orientation programs; and continuing judicial education to prepare the judicial officials for their jobs.

However, even when the continuing judicial education came, there was question as to whether it should be mandatory or optional. Some judges initially considered mandatory continuing education extremely insulting and unnecessary. Despite these concerns, judicial education has made numerous advances in the last few years worldwide. Judicial training and research institutes, and judicial colleges have been established in many countries, although they vary in form and content.

In the Bhutanese context, the *Bhutan National Legal Institute* is an organization primarily charged with the mandate of promoting judicial education in the country. The professional judges took over the judiciary only at the turn of the 21st century. Prior to that the lay judges came from diverse backgrounds who mostly picked up the judicial skills on the job, through trial and errors. Until recently, there was no systematic and institutionalized judicial induction programs for the judicial recruits. They were placed at the different courts and learnt by observing the judges in their work. There is now a regular judicial induction and orientation programs for the new recruits; as well as for the judges when they take up higher responsibilities on promotions and elevations.

Despite being in formative stage, the Institute is assessing and identifying judicial training needs, incorporating innovative judicial training methods, developing innovative training pedagogies, and building relevant institutional linkages. A series of trainings, workshops, lecture and seminars are being organized for the judges and judicial personnel every year. In addition, the Institute also caters to the legal needs of the allied and other government agencies in consultative and training areas.

If there is one person who may be credited with sowing the seeds of judicial education in Bhutan, the name of Her Royal Highness, the Founder and the President of *Bhutan National Legal Institute* comes automatically in our mind. She has conceived the idea of *Bhutan Law Review* in 2010 while She was serving as the Judicial Officer at the High Court, then the highest court in the Kingdom; even before She founded and established the Institute in 2011. As soon as the Institution was established, she initiated the *Judges Book Club* – creating a forum for the intellectual exchange for the judges and judicial personnel as a part of continuing judicial education and professional development. She then took the legal education to the schools to create awareness of law and legal and judicial career amongst our youth right from their school days. Today there are 44 School Law Clubs in the

country and the student members are growing up as dutiful and law-abiding citizens with the enhanced awareness of their rights and duties.

With the institutionalization of the Mediation (*Nangkha Nangdrig)* of civil disputes in the community nation-wide, Her Royal Highness and the *Bhutan National Legal Institute* have become household names. The *National Mediation Reports* show that more than 4000 cases are weaned off the adversarial adjudication system annually with the mutual benefit to the people and state – in terms of saving judicial resources and preserving peace and harmony in the country. Yet, what may escape public knowledge is the institutionalization of the Court-Annexed Mediation (CAM) – a major judicial reform in enhancing access to justice. The CAM plugs the long-felt lacuna in the judicial system of lack of in-house judicial mediators when people opted to mediate their cases for win-win outcomes, instead of contesting protracted litigations with the inevitable win-lose results. The CAM provides another alternative forum to attempt non-adversarial dispute resolution with the assistance of the judicial mediators, in addition to community mediation services and commercial out-of-court settlement of disputes in the urban areas.

A noteworthy development in the national legal landscape is the historic confluence of all justice sectors under the umbrella of national justice sector. Corresponding to the *United Nations Sustainable Development Goals 2030* - Goal 16 (Peace, Justice and Strong Institutions), a separate *National Key Results Area* (NKRA 16 - *Justice Sector Institutions Strengthened*) in the country's national plan (12th Five Year Plan 2018 – 2023) has been created. Based on this, under the patronage of Her Royal Highness, Hon. President of the Institute, the Gross National Happiness Commission (Planning Commission of the Royal Government of Bhutan) with the assistance of the United Nations Development Programme has developed *Justice Sector Strategic Plan* (2019- 2023), which has for the first time in the country brought the justice sector institutions together, viz., *Bhutan National Legal Institute*; *Royal Courts of Justice*; *Royal Bhutan Police*; *Anti-Corruption Commission*; the *Office of the Attorney General*; *the Bar Council of Bhutan; Jigme Singye Wangchuck School of Law*; *Bhutan Alternative Dispute Resolution Centre*. This national strategy is expected to prevent duplication of works and pilferages of resources. It is expected to lead to increased collaboration, cooperation and coordination, and enhanced transparency and inter-institutional checks and balances between and among the justice sectors agencies and actors – to promote rule of law in the country and enhance delivery of justice services to the people.

At the judicial diplomacy front, the *Bhutan National Legal Institute* under the guidance of the Hon. President of the Institute and the leadership of Hon. Chief Justice of Bhutan signed a five year (17 August 2019 – 16 August 2024) *Memorandum of Understanding* (MoU) with the judiciary of India (National Judicial Academy, Bhopal), represented by H.E. Ms. Ruchira Kamboj, Ambassador of India to Bhutan). What is significant is that the historic document was signed in the presence of the highest political leaders of the world's two most friendly countries – H.E. Mr. Narendra Modi, Prime Minister of the Republic of India and Dr. Lotay Tshering, Prime Minister of the Kingdom of Bhutan. While this document is aimed at facilitating mutual exchange of judicial resources and experiences between the two countries, it will result in unproportionate benefit to the Bhutanese judiciary in the form of immersion in the trainings and study visits programs to India by our judges and judicial officials in the next few years, and the document may be renewed perpetually.

The *Bhutan Law Review* is a means of advancing the continuing judicial education of the members of the Bhutanese Bench and the Bar. It affords a platform for the academically inclined judicial officials to indulge in reading and writing and hone their research skills; to engage in academic discourses and see their thoughts and words in print. We are happy to be able to place the 12th volume of the country's only law journal in your hand, on time. We hope it is worth your time; and as always, we crave your considered and constructive feedback for its improvement.

As always, it has not been easy to persuade our judges and lawyers to put on their thinking caps and put their knowledge and experiences in writing. We ascribe this mainly to our verbal culture and the discomfort of expressing our thoughts in a foreign language. Based mainly on the theme of legal and judicial education, we have compiled an assortment of materials on subjects such as law and Buddhism, law and compassion, procedural reforms, criminal laws, Mediation and international laws contributed by our writers. We have also received contributions from foreign scholars, giving us glimpse of what they made of our laws and legal practices during their cursory contacts with our laws and the legal system.

The Exposition of Constitutional Kuthangs

The Constitution of Kingdom of Bhutan is the root and foundation of all laws in our country. *The Constitution* is the most profound achievement of generations of endeavor and service. It embodies, strengthens and secures the blessings of liberty, justice and tranquility to enhance happiness and wellbeing of the Bhutanese people. The *Constitution* is a testament to selfless endeavors of our Kings to achieve security, tranquility and happiness of the Bhutanese people. The *Constitution* has been the foundation for a strong democratic culture put in place by our selfless leaders. The *Constitution of the Kingdom of Bhutan* has strengthened the wellbeing of the present and secured the interests of the future of Bhutan.

As a tribute to His Majesty the Fourth Druk Gyalpo on his 60th 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 and mirrors the noble aspirations, the deep significance and the purpose that the sacred document embodies. The *Bhutan National Legal Institute* aspires to embrace the profound wisdom and values of it in the *Bhutan Law Review* - illustrating the vision of His Majesty the King for His People.

Article 5 – Environment

1. Every Bhutanese is a trustee of the Kingdom's natural resources and environment for the benefit of the present and future generations and it is the fundamental duty of every citizen to contribute to the protection of the natural environment, conservation of the rich biodiversity of Bhutan and prevention of all forms of ecological degradation including noise, visual and physical pollution through the adoption and support of environment friendly practices and policies.

2. The Royal Government shall:

(a) Protect, conserve and improve the pristine environment and safeguard the biodiversity of the country;

(b) Prevent pollution and ecological degradation;

(c) Secure ecologically balanced sustainable development while promoting justifiable economic and social development; and

(d) Ensure a safe and healthy environment.

3. The Government shall ensure that, in order to conserve the country's natural resources and to prevent degradation of the ecosystem, a minimum of sixty percent of Bhutan's total land shall be maintained under forest cover for all time.

4. Parliament may enact environmental legislation to ensure sustainable use of natural resources and maintain intergenerational equity and reaffirm the sovereign rights of the State over its own biological resources.

5. Parliament may, by law, declare any part of the country to be a National Park, Wildlife Reserve, Nature Reserve, Protected Forest, Biosphere Reserve, Critical Watershed and such other categories meriting protection.

Bhutan is endowed with rich natural resources and biodiversity. Conservation of environment is one of the pillars of Bhutan's development philosophy of '*Gross National Happiness*'. Bhutan bagged the "*Champions of the Earth Award, 2004 – 2005"* in recognition of the efforts of His Majesty the Fourth Druk Gyalpo to conserve the environment.

In the *Treatise of World Life: The Ruler's Ornament* states:

Wholesome water bodies like lakes, hills, cliffs and trees;
The dwelling abodes of local guardian deities;
Let them not deteriorate even by a slight degree;
But conserve them as natural scenery on display.

The Constitution of the Kingdom of Bhutan stipulates that every Bhutanese is a trustee of the Kingdom's natural resources and environment for the benefit of the present and future generations. It is the fundamental duty of every citizen to contribute to the protection of the natural environment and the rich biodiversity of Bhutan. The Royal Government of Bhutan is mandated to protect and conserve the pristine environment and safeguard the biodiversity of Bhutan to prevent pollution and ecological degradation. This is to ensure an ecologically balanced sustainable development and build a safe and healthy environment.

The *Constitution* places strong emphasis on the protection of the environment. It outlines the responsibilities of the people and the government to protect and conserve the environment and safeguard Bhutan's rich wild life. Environment conservation is safeguarded as an integral part of nation's policies. This innovative and unique constitutional approach may serve as a model for other constitutions. Article 5 of the Constitution incorporates the doctrine of 'inter-generational equity or the doctrine of trust'. We are mandated to maintain a minimum of sixty percent of our country's total land under forest cover for all time; through sustainable use of natural resources. This reflects our strong national commitment to environmental conservation.

This affirms the firm Bhutanese belief that:

Water, oceans, mountains, cliffs and wonderful trees;
Abound with citadels of gods and deities;
Every tree, rock and ground;
Are by humans and non-humans abound;
Such beauty, such splendor echoes the voice;
It is our duty never to rejoice;
But preserve the environment;
As if they are an ornament.

The Contemporary Legal Education: Infusing it with the Moral and Ethical Values[1]

Introduction

Spiritually, it is said that the *"Law of the Gods"* controls the earth. In the same manner, the concept of *"Rule of Law"* separates the human society from the world of the animals. The profound concept of the *"Rule of Law"* stems from the minds of persons that are sharpened by training and experience. Today, legal professionals have become an important agent of social change and invariably a cardinal holder of principles of justice. It can be agreed that a role of a lawyer uniquely fits to the leadership needed in today's democratic societies. The skill of legal professionals in solving disputes among people can be turned to solution of disputes among the groups and become the sentinels of social engineering. It is right to say that legal profession is voice of progress and justice, a repository of ancient ideals and channels of peaceful change.

Law professionals today are called as *"social engineers"* who lubricate the cogwheels of the society through the machinery of the laws. Legal profession, with time, fuelled by legal education, has become the drivers of economic, political and social impulse. As rightly said, study of law promotes accuracy of expression and augment the faculties to reason supported by canons of value and ethics.

In any country, law is a cementing material of the society that reinforces communities and act as an essential medium of social change. Our laws

1 Contributed by H.E. Lyonpo Justice Tshering Wangchuk. The Article is the summary of H.E's Lecture delivered at the 11th Law Teachers Day Awards Function; and International Symposium on Prof. Madhava Menon's Contributions to Law '*Merging Modern and Contemporary Legal Education with Traditional Values and Ethics'* at the Rajiv Gandhi Convention Centre, Kovalam, Thiruvananthapuram, Kerala on Saturday 7 September 2019.

carry traditional and contemporary national values and ethics that are identified with culture and common direction. Laws transpire traditional values and ethics; any law devoid of its rooted history, and legal antecedents, would not have an effective legal force. In the past, legal education did not promote proficiency in country's history, political theory and national values. Legal education today is a bridge for *critical thinking* and *growth with traditional values and ethics*. It has become imperative that, in all education settings, including Law Schools to incorporate "*Legal education with values"*. In this Lecture, I share with you what I make of Legal Education, and urge one and all to infuse it with values and ethics.

Legal Education with Values

'Legal education with values' is defined by strategic teaching of basic normative values, ethics and moral ideals. Contemporary law schools are expected to produce *'Pericles and Plumbers, Lawyer Statesman and Legal Scriveners'*. The law schools are responsible to lay the foundations of legal culture and values. Significant legal reforms are only possible if only legal professionals learn and maintain the values, customs and mores significant to the society they live in. Many law schools feed the students with legal knowledge, legal skills, and legal judgment by infusing *'ethical habits of mind'* and *'ethical values'* in the pursuit of justice.

These values helps to build a strong sense of social responsibility in the students, thereby enhancing our future with an informed, concerned, responsible and caring; thereby shaping the posterity on the concepts of justice, fairness and human care. Legal education with values and ethics is a continuum, which begins with the socialisation of our students with those values that sustain our community and the nation. It is how we foster civic virtues such as integrity, courage, diligence and responsibility that ultimately result in peaceful coexistence of communities with increased community vitality. These beliefs will serve as an *undying lamp* - a *diya*, which is synonymous with knowledge and focus – to take legal education to greater heights. It will provide the champions of legal education, the opportunity to reflect on our commitments, note the gaps in our implementation and redouble our efforts to ensure a meaningful, progressive, and sustainable legal education in synergy with our traditional values, ethics, and the rapid sophistication of our societies.

Legal Education in India - Professor N.R. Madhava Menon's Legacies

In India, Prof. N.R. Madhava Menon tirelessly and passionately promoted legal education. He was a man of virtue, who respected knowledge, skills and talents. His impassioned attitude to legal education was a result of the urgent need for systemic reforms and his vast international experience. He established the National Law School of India University in Bangalore, the first modern Law School in India, with a five year integrated law programme. Drawing upon seemingly bottomless wisdom and patience, he tailored the best international practices to the Indian experience, and created India's first world-class law school. He then replicated the experiment, successfully, in Kolkata, Bhopal, and Kochi with the M.K. Nambiar Academy of Continuing Legal Education, India's first full time legal training centre designed to enhance the standards of law professionals.

Along the way, he served as a board member, executive, or consultant at virtually every law school and legal educational institution. It is no exaggeration to say that there is not a single law school in India – or indeed anywhere in South Asia – where Dr. Menon's presence, wise counsel, and influence are not felt. His legacies are an eternal lamp of knowledge - an aspiration for the scholastic and the scholarly.

We have to agree that Dr. Menon's shoes are too big to be filled by anyone. Although humanity cannot achieve divine perfection, we must continue to aspire for perfection. It is said that, *"What we want for our children is in actuality what we need or want for ourselves."* Therefore, how we teach must take precedence over what we teach; as what we teach is in a constant state of flux. There is need for a holistic learning experience for students of law – we must not only help them with acquiring substantive knowledge, but also develop their critical thinking skills and nurture their ability to articulate their thoughts effectively and efficiently.

The law schools must dedicate themselves and focus on creating quality citizens who are well versed in the knowledge of law, our values of loyalty and dedication, ethics and humility, life skills and the passion to lead our countries forward. It is important that we commit to educating a generation

of leaders and legal practitioners imbued in qualities of independence, integrity, wisdom, competence and the right attitude – who will face down our worst fears and achieve our best dreams.

It is needless to list the numerous contributions of Dr. Menon to the development of the *Rule of Law* in India and abroad. He transformed professional legal education in this part of the world; and it continues to impact the lives of nearly two billion human beings, for the better. The world is better for having met him, and it is poorer by his passing. It can be ascribed that *"We can never find another Madhava Menon."* - The world may never see the like of him again. But this also gives us a resolute foundation to offer a solemn pledge to work every day of our lives – to live up to the standards set up by him in the field of legal education. We can employ our talents, abilities, and resources as best as we can to commit our lives and fortunes to assure that, the world will, indeed, soon see the next Dr. Menon. And, if we are doing our jobs diligently, we will soon see many of them, all over our respective countries and around the world.

Legal Education in Bhutan – Jigme Singye School of Law

In Bhutan, I wear two equally important hats. First, I am the Chief Justice, where my constitutional role is to serve as the guardian of the *Constitution* and the final authority on its interpretation. This is a conservative and preservative role. But second, having been involved in the establishment of the Law School from its inception, I currently, serve as the Chairman of the Governing Council, of the first and only Law School in the Kingdom. In this capacity, I am asked to do precisely what Dr. Menon did – to draw upon my privileged position and notwithstanding my meagre international experience, provide the next generation of Bhutanese lawyers with an education that is, truly world class and at the same time, truly Bhutanese in essence – grounded in our culture, tradition and values of honesty, respect, courage, responsibility and compassion - to be the wind beneath their wings. The Jigme Singye Wangchuck School of Law is one of the youngest law schools in the world – we opened our doors to our first class of students only two years ago, and welcomed our third batch of undergraduate students last month.

Bhutan since its emergence as a nation state in 1627, established an independent judiciary, a legislature, and other appurtenances of a modern civil state in the 1950's during the reign of His Majesty the Third King. His Majesty the Fourth King himself graciously commanded that the Bhutanese people adopt a written *Constitution*, thereby, abolishing absolute monarchy and replacing it, peacefully and voluntarily, with a *Democratic Constitutional Monarchy* in 2008. The transition from a *Theocracy*, to *Absolute Monarchy*, and eventually to a *Democratic Constitutional Monarchy* has been smooth, deliberate and purposeful. Swami Vivekananda had said, *"Every nation has a message to deliver, a mission to fulfill, a destiny to reach."* Therefore, I firmly believe that Bhutan – under the leadership of our wise Kings, and our young, enlightened, and educated democratic leaders – has important things to share with the world. Things about the sustainability of the human and natural environment, about the importance of human connections, and above all about the impermanence of conflict and strife, and by contrast the importance of building a global society based on rule of law and our shared values. These are the foundations upon which, our wise King charged me to establish Bhutan's first Law School, and I respectfully, argue that this is the bedrock upon which humanity will find the solutions to the seemingly intractable crises that now challenge us with extinction. *Climate Change - Human Migration - Trade Wars - Nuclear War* - the insensitivity and racism of nations that do not see the forest for the trees. These are the challenges that face humanity. And each of them, according to the media, bears the potential to destroy the best dreams of humanity, built up over the last thousands of years.

The Law School in Bhutan, has eighteen faculty members, and sixty-three students – with a maximum of 25 students in each class, out of which 65.1% (41) women and 34.9% (22 men). The Law School aspires to provide legal education that reflects the new realities of globalization, exponential increase in the speed and sophistication of information technology and the blurring together of traditional categories of organizations and thought that include public and private; law, business and politics. The focus is on how to learn rather than what to learn, without losing sight of the core competencies and professional values that must always be at the heart of what it means to be a lawyer. This is the work to which we have harnessed our Law School, to challenge the young minds to find innovative solutions

and to over-come them through critical thinking – to do extraordinary things, which will impact generations to come. I am certain that – in some sense – it is the goal of every Law School, and every Law Professor around the world – to facilitate the actualization of potential, help develop the inner self, and bring out the best in every student.

Conclusion

Our communities and countries have strengthened and prospered through enduring values, pervasive customs, traditions and culture. For Buddhists - the dharma is that universal morality which protects the weak from the strong, which provides common standards and rules, and which safeguards and promotes growth of the individual. It is what makes liberty and equality - effective and a reality. India is fortunate to be the land where *Prince Siddhartha* became the *Gautama Buddha*, and from where the light of his spiritual message spread even to distant Bhutan in the high Himalayas. The Bhutanese people, as citizens of a deeply spiritual Buddhist nation, are fortunate to be the living medium of this great legacy.

Buddha's teachings have changed our society spiritually and transformed us by inculcating values firmly grounded in humanity. Every single teaching of *Lord Buddha* is special, for they are reflective of the most sincere human values of selflessness, goodwill and righteousness. In today's world, where each and every individual is seeking new understanding of reality, a new vision of the ideal community in their quest for acquisitive development and superior lives, - values of tolerance, kindness, solidarity, harmony, impermanence and compassion, must continue to guide us and our posterity to become good human beings, and broaden our abilities to contribute meaningfully to humanity.

His Majesty the King of Bhutan has constantly reminded us:

> *It is not a question of whether we have the capability to contribute meaningfully and to achieve success. The question is, will we make the choice, to stand up and take responsibility – will we choose to make a difference?*

'Byang Chub Lam Du Drenpi Khrims': The Procedural Reforms Ushered by the Civil and Criminal Procedure Code of Bhutan[1]

Introduction

Bhutan has a unique legal system which evolved from the values and ethos embedded in the country's rich culture, tradition and history. The introduction of temporal and spiritual dual polity and the promulgation of the first set of independent laws by *Zhabdrung Ngawang Namgyal* after his arrival in Bhutan in 1616 ushered peace and prosperity in the country. Secondly, the country retained its undiluted and indigenous tradition and culture through its self-imposed isolation even though the imperial rule came as near as India. Under the leadership of the successive monarchs, Bhutan gradually nurtured a unique hybrid legal system which integrates the elements of both common law and civil law systems galvanized by timeless Buddhist values and principles of compassion, non-violence and tolerance towards all sentient beings. The Bhutanese laws and the legal system are not punitive or retributive but tool for reformation of people for self-realization. Therefore, all laws in general and the procedural ones in particular (e.g. *Civil and Criminal Procedure Code* (CCPC) may be termed as the *'Byang Chub Lam Du yDrenpi Khrims'* the laws which will launch us on the path to enlightenment and liberation from the Samsara. This short article highlights the procedural reforms brought by the CCPC since 2001 and its impacts in enhancing access to justice and promotion of the *Rule of Law* in the country.

The Thrimzhung Chhenmo

The procedural law applied in an adversarial criminal trial is depicted in the *Raksha Mangcham* masked dance[2] which is performed during the annual religious festivals *(Tshechus)* in Bhutan. Despite several amendments and

1 Contributed by Justice (retd.) Sonam Tobgye.

2 'The Book of the Dead' – *Garud Puran*, dating back to the 8th century.

reforms over the years in the laws and legal system of Bhutan, the cardinal strand of the Buddhist principle of *Karma* (law of cause and effect) and the *natural justice* remain. In the past, the procedures for adjudication of the cases or the methods for resolving disputes were informal, arbitrary and not transparent; and differed from court to court in the country. 1957 was a turning point in the history of the Bhutanese legal system. It was around that time that the *National Assembly of Bhutan* under the leadership of His Majesty the late Third King, Jigme Dorji Wangchuck commenced codification of the Bhutanese laws - enactment of the *Thrimzhung Chhenmo*, (the highest law then), a seminal law of jurisprudential and constitutional significance. In fact it can be argued that a formal system of law and legal system was established with the enactment of the *Thrimzhung Chhenmo*. Clauses 1 and 2 of Chapter 11 of the *Thrimzhung Chhenmo* pertained to the duties and responsibilities of the judges – basically court procedures and jurisdictional issues. Bedsides, the title '*Thrimzhung Chhenmo'* was a path-breaking innovative departure from the use of the term such as '*Kathrim'* and '*Chayig*'[3] of *Zhabdrung's* laws and '*Khrims gnyis gsal ba'i me long*'[4] and '*Zhaelchay'* of the Tibetan laws. The *Thrimzhung Chhenmo* primarily codified our enduring culture, customs and traditions; and our unique and indigenous Bhutanese civilization.

In the late 1980s, His Majesty the Fourth *Druk Gyalpo* called for further reforms in the laws and judicial system - including a call for a professional judiciary, efficient system and effective judicial procedures; and enhanced accountability for judges and the judiciary in general. The enactment of *The Civil and Criminal Procedure Code of Bhutan* in 2001 saw migration of almost all the procedural provisions of laws from the *Thrimzhung Chhenmo*.[5]

The Civil and Criminal Procedure Code

The enactment of CCPC is a significant milestone. It ushered tremendous improvements in the judicial processes; and infused transparency and accountability in the legal system. Above all, it made the justice system more accessible, reduced undue delays, and ensured efficient and effective delivery of justice. It made courts user-friendly and accessible.

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3 The monastic rules are known as *bca'yig*.

4 'The Mirror of the Two Laws' (*Khrims gNyis gSal ba'i me long*) contains guidelines for judges. It is also called as the *zhal lce bco lnga*.

5 See *The Civil & Criminal Procedure Code of Bhutan, 2001*, Section 1.

There was lengthy debates on the CCPC in the parliament. The debates raged on continuously for more than two days. Since it was replete with legal terms, concepts and principles, the members of the *National Assembly of Bhutan* raised several queries and doubts; and sought exhaustive clarifications and justifications. Therefore, the CCPC is a repository of our accumulated wisdom, spiritual values and best practices. It also contains global best practices, academic and scholastic thoughts. It is a judicial tool to sift the truth from the falsities, render justice and engineer society. It seeks to protect rights, prevent arbitrary decisions and promote justice. The enactment of the CCPC is the culmination of the His Majesty the Fourth *Druk Gyalpo's* vision to ensure an efficient judicial process for an effective justice system.

What further sanctifies the CCPC is the facts that it incorporated words and expressions derived from the *Bka yGur* (the canonical Buddhist text). These words import profound meanings and significance as the right words guide the future of humanity, shape a nation, regulate the actions of people, and set the standards for their conduct.

The enactment of the CCPC brought about the following procedural reforms, amongst others:

1. Enhanced Access to Justice

The CCPC has improved access to justice and made the courts user-friendlier.[6] It made the system transparent, predictable and organized from filing of the petitions to the delivery of judgments. It simplified the procedures of registration and representation of the cases. The judicial procedures were simplified with no need for the assistance of the legal professionals. To enable the litigants to avail judicial services easily, more than 75 *Judicial Forms* were designed and placed on the Internet, which can be easily downloaded at almost no cost. Once you reach the court, there is

6 "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 all the world is the Law… The Law has no preferences. Without preference is the Law. So I must make my thought like the Law." *Dharmasangiti Sutra*

the *Registry* of the Court with a *Registrar* to help litigants clarify and register their cases and complaints.[7]

2. The Miscellaneous Hearing

As per section 32 of the CCPC, the Court is required to conduct *Miscellaneous Hearing* expeditiously before a case has been registered with the *Registry* of the Court. The *Miscellaneous Hearing* serves to achieve the following objectives:

(a) Make an initial determination whether sufficient legal cause exists to admit the case for proceedings according to the law;

(b) Hear the case within the prescribed period; and

(c) Give written reasons, if the petition is dismissed.

3. Assignment of Cases

Once the cases pass the *Miscellaneous Hearing* Stage and are admitted for adjudication as per the CCPC, in multi-Bench Courts with a Chief Judge, the cases are assigned to the *Bench* in seriatim. But this order is not followed if a judge has conflict of interests in the cases. *The Bench Book for the Judicial Processes* was drafted based on the CCPC. *The Bench Book for the Judicial Processes* is a guide for the judges and judicial officials to conduct trials, containing checklist of actions to be taken to prevent miscarriage of justice. According to the *Bench Book*, in the Supreme Court, the Chief Justice of Bhutan is the *Master of Roster*[8] and he allocates the *Appeal Petitions* in seriatim to the judges. Each judge is required to conduct miscellaneous hearing in his/her Courtroom and prepare and submit legal briefs to all the judges. The judges then meet in the Chief Justice's Conference Hall and discuss the case. A preliminary vote to either admit or dismiss the appeal is taken.[9] Similarly, in the High Court, the *Court Roster* is managed by the Chief Justice of the High Court; and in the case of District Court and Sub-District Court, it is overseen by the Chief Judge or the senior Judge.

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7 '*Thoedep*' was changed to '*Tsoedzin*' vide order number *Chhetho* (*Ka*-39) 98 dated 9 December 1998.

8 *'The Comparative Perspective On the Office of the Chief Justice in the Area of Oversight Authority'* introduced by Judge Wallace.

9 *The Enduring Constitution.*

4. Transparency and Accountability

In order to expedite the trial and to enhance transparency and accountability, the CCPC introduced appropriate hearing stages. The hearing stages ensure exhaustive submissions through systematic hearing to reduce repetition and delay. The stages of the judicial process encompass the following processes:

1) *Registration* of a complaint in the *Registry* of the Court
2) *Production* of the Parties before the judge
3) *Show Cause Hearing* as why actions should not be taken against a person
4) *Miscellaneous Hearing* to determine concrete cases or controversy
5) *Preliminary Hearing* for parties to tell their stories or vent their grievances
6) *Opening Statement* of the Petitioner to discharge the burden of allegations and claims[10]
7) *Defense Reply* to accept or deny the allegations and claims.
8) *Rebuttals* to filter the truth and identify the issues
9) *Submission of Evidence* to prove ones; claims and demands
10) *Examination and Re-Examination* of the Witnesses to verify the truth
11) *Submission of the Independent Testimonies*
12) *Scrutiny of the Exhibits*
13) *Cross Examinations* of the opposing Witnesses
14) *Judicial Investigations* based on the need and parties' requests[11]
15) *Closing Statements* of the Parties
16) Pronouncement of the decision and rendering of the *Judgments*.

5. The Hearing Calendar

Once the case has been registered and admitted for adjudication, the hearings are conducted uninterruptedly as per the *Hearing Calender*. The

10 *Tsoepa-la Mrepa sum; (Ngayel, Chhigyal, Pangpo)*

11 *Tagzhib Sum; (Diwa nag la tagpa, Regpa tsa la tagpa, Tshorwa Zhug la tagpa)*

litigants are informed in advance the dates and time of hearing schedules based on the *Hearing Calendar*. The stages of hearings are systematically observed to provide a checklist for timely submission of arguments and the relevant evidence, and avoid omission of important legal issues. It eliminates unnecessary delay, anxiety and manipulation through vested interests. Therefore, the system automatically controls evasive and delay tactics and prevents hassles to the litigants.

6. Criminal Procedure Reforms

In criminal cases, the procedural reforms ensured prompt and professional investigation, due process, fair trial and dispensation of justice expeditiously. In order to keep the streams of justice pure, to see that trials and inquiries are fairly conducted, and that arrests and searches are properly made and lawful remedies are readily available, and that unnecessary delays are eliminated, the CCPC enshrined the *Due Process of Law*. This ensure that proper procedures are followed for the issues of warrant of arrest, production before a judge, remand to police custody or release on bail and payment of compensation. The CCPC ensured that the trials are conducted without undue delay.[12] The review of an appeal by the Supreme Court is based on the Bhutanese experiences, the American *Writ of Certiorari* and the *Indian Leave and Special Leave of Appeal* system.[13]

The CCPC brought tremendous relief to both the dispenser and the consumer of justice. With the transparent procedures, the judges could not prolong the hearings and delay the cases indefinitely, and the people could not blame the judiciary. Above all, the exhaustive hearings, opportunities to argue and submit in writings satisfied; which was backed by the reasoned judgments copies of which were given to the parties for appeals to the higher courts. To ensure understanding and compliance, the CCPC was disseminated nation-wide. The *Jabmis* (legal counsels, mostly para-legal service providers then) received thorough grounding on the CCPC.

Many people both within and outside the country appreciated the enactment of the CCPC as the potent and timely tool to secure justice

12 See Section 125 of *The Judicial Service Act of Bhutan, 2007*.

13 See Part 5 – Appeals in the Supreme Court - *Preliminary Examination* of the *Appeal Petition*.

in the country. Mr. Hamid Gaham, on behalf of the *United Nations High Commissioner for Human Rights* quoted His Majesty the Fourth King who said "Ensuring Justice is one of the most important *Kidu* (welfare) for the people. The judiciary must therefore ensure that the Bhutanese people receive fair, speedy, inexpensive and expeditious justice whenever they need to take recourse to Law."[14] Similarly, Mr. Louis Joinet, Chairman of the *United Nations Working Group* UNHRC on 4 April 2001 said that, "You have undertaken many reforms and especially the one which is in my view the most important, the reform of your training system, under Your Excellency's guidance, in partnership with the *High Commissioner for Human Rights*, Ms. Mary Robinson." The Hon. Members of the *National Assembly of Bhutan* commended the judiciary for its initiative in conducting dissemination programs on the CCPC. During these workshops, the functioning of the judiciary and the benefits of the CCPC were explained to the people.[15]

On 26 January 2019, Leigh Toomey of the *United Nations Working Group* told *Kuensel* that the system of presenting detainees to the courts within 24 hours was commendable, "We consider this to be a positive practice because this is rarely done in other countries, and this is being done regularly in Bhutan."

The Civil and Criminal Procedure Code, is a sacred document which supports right of access to justice[16], the fundamental rights, the due process of law,[17] fair trial and rule of law[18] as provided by the *Constitution*. His Majesty the King mentioned:

> *It is said that the failure of justice persecutes an individual, but the lack of adherence to rule of law persecutes an entire nation. Rule of law brings about discipline in people and order in society. If there is order in society, there will be peace and trust amongst the people.*

14 15 June 1998.
15 2 August 2002.
16 Article 21, section 1 of the *Constitution.*
17 Article 7, section 1 of the *Constitution.*
18 Article 21, section 1 of the *Constitution.*

Conclusion

The CCPC codified and consolidated the hitherto dispersed and customary power and practices of the judges and the judiciary of Bhutan. Sprinkled with the constitutional and jurisprudential provisions, the CCPC crystalized and delineated the judicial domain of the country, which some members of the parliament viewed with suspicion and fear. There were doubts and opposition from the Executive and the Legislative branches of the government. The *National Assembly of Bhutan* did tweak the initial drafts; as well as inserted some innovative provisions. However, the *Speaker* of the *House* sensed the importance and urgency of the CCPC for the dispensation of justice to the people and promotion of *Rule of Law* in the country.

The CCPC is not merely a law that stipulates the procedural rules to render the legal proceedings effective, but it is the reflection of the essence of justice in the country. It also echoes our national ethos. Many related reforms are implicit in the CCPC. It ensures private rights, public justice and secures public confidence. Procedural laws protect natural rights and provide avenues to search for truth and justice. It has survived a few amendments in its 19 years of service for the cause of justice. While the changes and developments are welcome, ill-considered, impulsive amendments should not scuttle the pursuit of justice. At the same time, it should not encourage judicial complacency, arrogance and whimsical application of laws. Let us have substantive laws, the procedural justice and constitutional laws, which are predictable and certain with normative values to honor. May this law in particular and all other Bhutanese laws in general be the enlightened laws – laws which launch and lead us to liberation and Buddhahood - *'Byang Chub Lam Du Drenpi Khrims.'*

Law and Buddhism: Lessons from the Legal Order of Gyalpo Melongdong[1]

Introduction

Monarchy was the popular form of political organization during the time of *Lord Buddha*. Kingship was essential to organize and maintain an ordered society. The Legal Order of *Gyalpo Melongdong* attempts to narrate the words of *Buddha* based on *Kangyur-Duel Wa* with particular reference to *Gyalpo Melongdong's* (*Sanskrit - Adasamukho*) Royal Court of Justice and its dispute resolution system.[2] The methods of dispute resolution and the decisions rendered in the different cases sheds interesting light on how *Buddhism and Law* overlap in the Royal Court of King *Melongdong*. One cannot deny that the provisions reflected in our procedural, substantive and the constitutional laws revolve pivot around Buddhist philosophy. The Buddha's doctrinal treatise was originally translated from Sanskrit into *Choekey*. It consists of *Duel Wa* or *Vinaya* (rules governing the *Sangha*); *Dho* or Sutras; *Brgued* or Tantras; and *Nyeonpa* or *Abidhidharma)*. The *Vinaya Pitaka* or *Duel Wa* is the original translation of the words of *Buddha* from Sanskrit into the *Choekey*.

This Paper examines the methods of dispute resolution and dispensation of justice by *Gyalpo Melongdong*. It tries to relate the legal concepts enunciated by the King to the modern legal principles in the Western jurisprudence. I have primarily referred the original words of *Buddha* as reflected in *"Gyalwai Kangyur Yidzhin Norbu"* which narrates the cases decided by *Gyalpo Melongdong* also known as *Thrimdragpa*. These narratives are confined within the *Sangha* and other religious practitioners; and are not easily accessible to the secular scholars.[3]

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1 Contributed by Lungten Dubgyur. A summary of this article was published in *Kuensel* on 25 November 2018.

2 *Gyalpo Melongdong* was the son of an Indian king *Gawoo*, who was said to be the descendent of *'Mangpo Kurwai Gyalpo'* or '*Samathan Rajan.'*

3 *'Gyalwai Kangyur Yiddzhin Norbu'* Dharma Manglam Press, Dharma Publishing, U.S.A. (2012) at pp. 677 – 708.

Sources of Conflicts in Buddhism

Buddha pointed out six fundamental causes of conflicts that cause sufferings:

1. Being hateful and grudging;
2. Being contemptuous and aggressive;
3. Being envious and miserly;
4. Being fraudulent and hypocritical;
5. Having mean desires and wrong opinions; and
6. Holding with tenacity to one's own dogmatic opinion and having difficulty in letting go of one's own mistaken opinion.

Therefore, the highly potent source of conflict is due to dogmatic clinging to views, opinions and ideologies which may be religious dogmas, political ideologies, moral opinions, philosophical theories and strong attachments to views by people.[4] The very source of conflict as pointed out by *Buddha* has to do with potent natural conflicts that stem from core human nature, while the sources of conflict in the contemporary context have become more pronounced due to complex and interconnected nature of society. The interconnectivity among individuals, groups, organizations (such as political) and the global *netizens* (such as the social media) produce emerging conflicts and pose jurisdictional challenges to resolve such conflicts.

The *Vinaya* provides the monk body or the *Sangha* a *Code of Law* and methods of dispute resolution. It is strictly followed by the Buddhist communities and practitioners since they are the very words of the historical *Buddha* himself. The chapter on the origin of the laws and the resolution of the disputes by *Gyalpo Melongdong* which was narrated by *Buddha* to the disciples elucidates fascinating legal principles such as- *"contributory victimization"*, *"negligence of the parties"*, and *"circumstances beyond one's control"*. In addition

4 For details see, Dr. P. D. Premasisi, *'Buddhist Response to Social Conflict: Some Practical Buddhist Suggestion for the Resolution of the Problem of Social Conflict'* Buddhism and World Crisis, the 12th of International Buddhist Conference on the *United Nations Day of Vesak*, 28 – 30 May 2015, Thailand at pp. 13 - 22.

to the principles of *"right or wrong"* or *"decision based on merits," Gyalpo Melongdong* also propounded other principles such as *"both the parties were at fault"*; *"both the parties were right"*; *"both the parties were neither right nor wrong"*, as the following cases will show.

Gyalpo Melongdong and his Judgments

Gyalpo Melongdong's disputes resolution system can be gauged from his judgments in the following five cases:

1. *The Case pertaining to the Hiring of an Ox;*
2. *The Case pertaining to the Fallen Axe of a Carpenter;*
3. *The Case pertaining to the Runaway Horse;*
4. *The Case pertaining to the Death of a Child in a Bar Shop; and*
5. *The Case pertaining to the Death of Husband while Weaving Cloth.*

In all these cases, *Euguchen* or *Eigpachen*[5], the accused, is the sole defendant against the different parties. In the *First Case*, the defendant had hired an Ox from his neighbor. But he returned the Ox while the owner was busy eating his meal. The owner saw his Ox being harnessed in the usual place but the defendant had not informed that the Ox was duly returned. Later the Ox broke loose and was lost. The owner claimed restitution of his Ox.

In the *Second Case*, *Euguchen* wanted to cross the river but he could not fathom its depth. Therefore, he solicited the help of the Carpenter to assess the depth of the river. The Carpenter was carrying a load of wood on his back; with an Axe clutched in his mouth. When the Carpenter opened his mouth to answer the defendant, the Axe fell into the river and it was lost in the strong current. He blamed *Euguchen* for the loss of his precious tool and asked for its replacement.

5 *Euguchen* or *Eigpachen*. The original text in *Kanjur* refers the main accused by the first name, while other commentaries on Buddha's teaching refer to the accused by the second name. For the purpose of this paper, both names are refereed interchangeably.

In the *Third Case*, *Euguchen* met the owner of a fleeing horse, who was chasing it; the owner solicited the defendant's help to stop it. The defendant tried to stop the runaway horse by throwing a stone. However, the stone hit the horse and died. The owner claimed restitution of the his horse.

In the *Fourth Case*, *Euguchen* visited a bar shop run by a lady who had a child sleeping in a corner of the room. The child was fully covered by blankets. In an inebriated state, *Euguchen* accidentally sat on the child, who suffocated and died. The lady demanded restitution of her child.

The plaintiffs in the cases above charged the defendant before the court of *Gyalpo Melongdong*. The defendant was summoned and ushered into the court for the adjudication of the cases. Due to fear of punishment for his wrongs, *Euguchen* attempted to escape by jumping over the boundary wall of the court. However, the defendant landed directly on a man who was weaving cloth on the other side of the wall, who died due to the impact. The wife of the man claimed restitution of her deceased husband, which was the *Fifth Case* before the Court of *Gyalpo Melongdong*.

Legal Principles enunciated by *Gyalpo Melongdong*

1. 'Equal Fault' Principle

In the *First Case*, after hearing the arguments exhaustively from the parties, *Gyalpo Melongdong* ordered *Euguchen's* tongue to be cut off for his failure to inform the owner while the Ox was returned. Similarly, the Ox's owner's eyes were ordered to be removed for having seen the Ox being harnessed but having failed to instruct the defendant to secure the Ox properly. Fearing his punishment, the owner submitted that he would not pursue the case since he had also committed mistake; and that he does not want to suffer the loss of his eyesight as well as his Ox and that *Euguchen*'s tongue need not be cut off. The King dismissed the cases as desired by the petitioner. This case demonstrates the application of the accountability for the respective faults committed by the parties. This Buddhist legal principle is implicit in the *"equal fault principle"* or *"in pari delicto"* or *"et partea in culpa"* of the modern legal system.

The *"Equal fault Principle"* is also known as *"comparative fault"* or referred as *"proportionate responsibilities"* or *"comparative fault doctrine"* in the Western jurisprudence. This principle allows the courts to assess damages and liabilities in motor vehicle accident cases; where both the parties are often to be blamed equally for the accidents and injuries.

This fault-based doctrine is used by the courts for the enforcement of the contracts through the systematic assessment of the liabilities and faults of the parties. However, it may be noted that contractual obligations are often enforced based on the strict liability principle.[6]

2. 'Both are Not at Fault' Principle

In the *Second Case,* it was adjudged that *Euguchen* could always solicit and ask help from others. However, he should have been mindful that the carpenter could not have opened his mouth while clutching his Axe in the mouth unless he released his Axe. Therefore, *Euguchen's* tongue was ordered to be cut off. Equally, the Carpenter was not bound to answer the defendant, knowing that he was clutching an Axe in his mouth in the middle of a torrential river. Therefore, the King ordered two of his teeth to be removed. However, the Carpenter requested the King that he did not want to be deprived of his teeth in addition to losing his precious Axe. He also requested *Euguchen* to be released, as he was also not at fault. This legal principle can be construed equivalent to *"not at fault principle"* or *"et non sint in culpa"*.

3. 'Merit of the Cases' Principle

In the *Third Case*, the owner requested *Euguchen* to stop his fleeing horse. *Euguchen* while trying to stop the horse hit it with a stone and killed it. It was adjudged that since the owner himself solicited the help, his tongue should be cut off. Similarly, *Euguchen's* hand must be cut off for using disproportionate force to stop the horse. However, the owner submitted

6 See Eric A. Posner, 'Fault in Contract Law,' *Michigan Law Review* Vol. 107, No. 8; available at https://www.jstor.org/stable/40380336?seq=1#page_scan_tab_contents

that he may be spared of losing his tongue as he has also lost his horse. He also requested the King to spare *Euguchen* from losing his hand, as it was his own fault to solicit his help. This legal principle can be construed as equivalent to *"case on merits"* or *"ex causa meritis"* principles.

4. 'Contributory Negligence' Principle

In the *Fourth Case, Euguchen* accidentally sat on the sleeping child and killed him. He did not know that the child was sleeping in a corner fully covered in blankets. The King adjudged that the bartender should have foreseen the risk to the child's safety. She should have rested the child in a safer place or in a place easily visible to the customers. Equally, *Euguchen* should have been careful when sitting. Therefore, *Euguchen* was told to marry the bartender lady. However, the lady submitted that *Euguchen* was not solely responsible for the negligence. She pleaded not to be married off to *Euguchen*. He was also released. This legal principle is known as *"Contributory Negligence"* where the offender alone may not be held solely accountable for a fault that the victim has some degree of participation. The equivalent legal principle in Latin is *"res ipsa loquitur"* or *"volenti non fit injuria"*.

5. 'Criminal Intention or the *mens rea*' Principle

In the *Fifth Case*, *Euguchen* was adjudged to have harbored no ill intention to cause the death during his attempt to escape the justice. Nevertheless, the King ordered the defendant to serve as the husband of the deceased's wife. However, she requested the King that *Euguchen* be spared from marrying her. This case is the basis of the Buddhist legal principle of upholding justice where any wrongdoing must be accompanied with *"guilty mind"* or *"intent"* called as *"mens rea"*.

The legal principles enunciated in the legal order of *Gyalpo Melongdong* are enshrined in the various provisions of *Thrimzhung Chhenmo* (Supreme Laws) as well as the *Penal Code of Bhutan*.

Conclusion

Many religious texts and *Gyalwai Kanjur* record that the *Buddha* himself has presided over thousands of cases during his lifetime in the process of which Buddhist jurisprudence was generated. The narrative of *Gyalpo Melongdong's* decisions as cited in this Article encompass and draw on several legal principles that are applied by the modern courts. Buddhism holds individuals accountable for their actions and crimes committed. Obedience to rules (*Vinaya*) enables the *Sangha* to make spiritual progress as well as maintain peace in the society through a dispute resolution system. There are seven legal principles in Buddhist Philosophy:

1. *No crime or penalty without law*;
2. *Protection for insanity or mental disorder*;
3. *Differentiation between an intentional act and negligence*;
4. *Degree of offences*;
5. *Crimes and their circumstances (complete investigation);*
6. *Equality of individuals despite ranks; and*
7. *Decisions based on consensus if not with majority*.[7]

These profound and timeless seven legal principles prescribed in the *Vinaya* are the basis of modern criminology and jurisprudence. The principles of laws based on which the Royal Court of King *Melongdong* rendered judgments in the five cases above basically echo the oft-repeated principles that *"no guilty shall escape"* and *"no innocent should suffer."* The subject matters and the issues in the cases may have become complex, but almost similar legal principles are used today based on the aggravating, mitigating and contributory negligent contexts and situations. Buddhism as a rational religion has served as edifice to several legal principles based on reason, logics and accountability for one's conducts or actions – the law of *Karma*. Further research in this area may unearth the strong connection which exist between the law and Buddhism. It is amazing what Buddha devised some 2500 years ago, we are grappling to understand in the 21st century.

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7 For details see, Puzul, P K *'What the Vinayas Can Tell Us about Law'* Buddhism and Law: An Introduction, Rebecca Redwood French and Mark A. Nathan (eds.) Cambridge Uni. Press, 2014 at pp. 46 - 61.

'Court Rooms to Class Rooms': Nurturing Learned Judges and Emotionally Intelligent Courts through Continuing Judicial Education[1]

Introduction

The Kingdom of Bhutan is a *Democratic Constitutional Monarchy*.[2] The people of Bhutan have deep and abiding faith in the judiciary as the guardians of *Constitution* and the *Rule of Law*. The modern judiciary of Bhutan since its inception in 1960s has played a crucial role in preparing the ground for nurturing democratic culture and values. Not only was the judiciary an active participant in the drafting of the *Constitution*, but over the eleven years, it has provided a pivot around which the changes and development revolved in the country; it was a sentinel under whose gaze the nation transitioned peacefully to a democracy, witnessing three new governments passing on the power of governance smoothly. The judiciary not only helped the nation in realizing the vision of justice and peace set out in the *Constitution,* but ensured that all the laws enacted by the parliament and the judicial precedents set by the courts are in consonant with the *Constitution*.

As is the norm, the *Constitution*, the highest law of any country,[3] and the ultimate tool and the fountain of justice allocates substantial provisions to the judiciary, an epitome of justice and *Rule of Law*. Ours, a 21st century document is no exception. In addition to rightly designating the Supreme Court as the guardian of the *Constitution*[4] and its final arbiter, the Article 21 requires the State to secure operation of the judiciary and the legal system in a manner which perpetually inspires the trust and the confidence of the people. That entails composition of people who man the judiciary to be of high caliber both in terms of academic excellence as well moral uprightness. In addition, of the 18 constitutional post-holders, 14 are in the

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1 Contributed by Lobzang Rinzin Yargay.

2 See Article 1 Section 2 of the *Constitution of Kingdom of Bhutan, 2008*.

3 See Article 1 Section 9 states that "This Constitution is the Supreme Law of the State."

4 See Article 1 Section 11 of the *Constitution of Kingdom of Bhutan, 2008*.

appellate judiciary.[5] This further requires that not only competent people are recruited but they keep continuously learning and be trained, thereby making a case for the need of the continuing judicial education at all levels in the judiciary.[6]

His Majesty the King in His Royal Address to the judges said that "We should neither tolerate disregard for laws; nor the wrongful application of the laws."[7] The later part of the Royal remark, the intolerance of the ignorance of the laws or the "wrongful application of the laws" imputes good knowledge of the laws on the part of the judges, amongst other. This requires judges to be good in their profession of knowing and applying laws. The question is, are the good judges born, ordained by fate; or are they made through learning? Judicial education is relatively new, but it is becoming integral to the standing of the judiciary and offers an appropriate means of providing accountability without violating independence.

We have largely been trained on the processes of verifying the facts, determining and applying the law to the facts to reach a judgement. Judicial officers control the parties and maintain court decorum, without adequately considering the concerns, needs and fears of the litigants who come to courts. We are often not mindful that courts can be intimidating places for the ordinary people, unaccustomed to the complexities of laws and operation of courts and the legal system.[8] The concept of court excellence requires our courts as service providers to be emotionally intelligent, therapeutic and problem-solving in their approaches. The judicial officials are required to be aware of how their actions in courts - including trials, sentencing, bail applications, appeals and tribunals can either impede or advance justice system outcomes.[9] Judicial education plays an important

5 See Article 31 of the *Constitution of Kingdom of Bhutan, 2008*.

6 See Goldbach, T S (2016) "From the Court to the Classroom: Judges' Work in International Judicial Education," *Cornell International Law Journal*: Vol. 49: Issue 3, Article 3.

7 Royal Address to the judges during the 19th *Annual National Judicial Conference* held on 11 June 2010

8 See Moorhead & D. Cowan, Judgecraft: An Introduction (2007) *Social & Legal Studies* 16(3).

9 See Spencer P, 'Legal Studies: Therapeutic Jurisprudence in the Mainstream' (2014) 39(4) Alternative Law Journal.

role in enhancing the professionalism of the judiciary and promoting the *Rule of Law*.

This Article highlights the gravity of the judicial responsibilities and the need for continuous judicial education and learning new judicial skills to discharge the onerous responsibilities fully. It explores the technical issues involved in educating judges, the educational theory to the practice of judging and identifies distinctive characteristics of judges as learners. It moots the concepts of emotionally intelligent, therapeutic jurisprudence and problem-solving courts – the roles it needs to play to engineer a fair, just and a democratic society.

The Social Context Judging

The judiciary is an important public institution which must reflect social accountability and values – after all, it exist for the people in the society. Courts cannot and may not apply or interpret laws in an insular manner, devoid of emotional intelligence and oblivious of the social context. Disregard for the social context judging leads to judiciaries being criticized for the failure to reflect social values in their judgments and being out of touch with the real world.[10] The continuing judicial education has an important emerging role in supporting the courts to reflect changing social attitudes and values, and aiding the courts in performing this role effectively. Thus, the progressive judiciaries have recognized an imperative to re-caste their roles as formative social institutions, embracing new paradigms, to become more accountable and improve service delivery.[11] The judicial education in supporting the courts to assume and exercise their leadership role are all the more important today. The judgments need to reflect social values and the judges need to assume a leadership role in promoting and protecting them.[12]

It is also important today to sensitize the judiciary about the socio-economic realities that exist in the society; in order to dispel the common

10 See Mason A, The State of the Judicature, address to the 28th Australian Legal Convention, Hobart, 30 September 1993, at 24.

11 See King M S, 'What can Mainstream Courts Learn from Problem-Solving Courts" (2007) 32 Alternative Law Journal 91. King MS, 'Problem-solving Court Judging, Therapeutic Jurisprudence and Transformational Leadership' (2008) 17 Journal of Judicial Administration 155.

12 See King, M S and Batagol B, 'Enforcer, Manager or Leader? The Judicial Role in Family Violence Courts' (2010) 33 International Journal of Law and Psychiatry 406.

myth that judicial decisions are based on inflexible laws and procedures. It is now established that the duty of a judge is not confined to delivering judicial decisions alone but entails a bigger challenge of serving the process of justice as well. We need to encourage our judiciary to not just follow a technocratic approach, but a humane one in consonance with the constitutional values.[13]

In the West, people complain of gender bias and cultural insensitivity.[14] In Bhutan, the judiciary is often criticized of creating 'multiple laws in one country' – mainly due to lack of uniformity in the interpretation and applications of laws by the different courts in the similar cases.[15] Consequently, in the West, this has led to introduction of judicial education on gender and ethnic awareness, due to the changing roles of women in western society and to the increasing recognition of plurality in communities. In Bhutan, we need to create forums for the judges to engage in fruitful exchanges of information and experiences of judges serving in the different parts of the country, regularly. We also need to raise social awareness on the intrinsic or factual dissimilarities in the cases despite their extrinsic or apparent similarity; and the inherent multiple perceptions and interpretation of the similar cases by the different judges, coming from different education and ethnic backgrounds. Uniformity may also be achieved more rapidly if the judgments are compiled and published widely, especially by the appellate courts to be followed as precedents by the trial courts.

13 See King, M S, 'Reflections on ADR, Judging and Non-Adversarial Justice: Parallels and Future Developments' (2012) 22 Journal of Judicial Administration 76.

14 See Campbell D, 'Judicial Education Program on Gender Equality', Western Judicial Education Centre, Canada; also see Mahoney K and Martin S, Equality and Judicial Neutrality, Carswell: Toronto (1987); and Cartwright S (Dame Silvia), "Judicial Studies in New Zealand's District Courts," Journal of Judicial Administration, 1993, 2, 162-170.

15 See *Kuensel,* October 12, 2019. *Of Appeal and of Differing Judgments – A Misconception http://www.kuenselonline.com/of-appeal-and-of-differing-judgment-a-misconception.*

Emotionally Intelligent Courts

Though it has no direct common law or civil law influence, the Bhutanese lawyers and judges by and large are trained in and used to adversarial concepts and approach to the law. Their experience is deepened by the dramatic portrayal of court cases in popular literature and the media. This is reinforced by an adversarial disposal of the cases on successive appeals involving contentious analysis of the facts and laws.[16]

We have not been taught nor we learned the role of emotions in the practice of law, giving a dispassionate approach to the legal practice and judging. The teaching of interpersonal skills has also been largely lacking in the law schools. According to the new concept of therapeutic jurisprudence, legal and judicial education should be more comprehensive, and judicial officials should possess emotional intelligence and conduct themselves more empathically. Interpersonal skills such as the ability to listen, to be sensitive to the emotions of others, to express empathy, to be aware of body language, to be able to communicate effectively and sensitively with others are important skills that assist in a therapeutic legal and judicial practice. They enable both lawyers and judicial officers to promote respect, which in turn promotes litigant satisfaction and respect for the justice system.[17]

The awareness of the impact of court and other legal processes on the wellbeing of the litigants and consumers of justice should be important aspects of the education of judicial officers and judges. Emotionally intelligent judges and lawyers are said to be able to take a creative, holistic, problem-solving approach. Counselling and negotiation skills and an awareness of the broad range of options available to resolve disputes are important judicial skills. This will also enable the judges to give more reasoned judgments – and in today's context, empathic and mindful judgments.[18]

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16 Chedup K. 'Evolution of Criminal Justice System in Bhutan'. *Bhutan Law Review* Vol. 8 November 2017.

17 See King M S, 'Therapeutic Jurisprudence in Australia: New Directions in Courts, Legal Practice, Research and Legal Education' (2006) 15 Journal of Judicial Administration 129.

18 See Spencer P, 'Legal Studies: Therapeutic Jurisprudence in the Mainstream' (2014) 39(4) Alternative Law Journal.

Judicial Education Movement

The judgeship is a learned profession. Much lies at stake in the hands of the judges, who have the last say in deciding the matters at hand. They wield tremendous power, which has lasting impact on the people, institutions and countries. Therefore, obviously people want to repose that power and faith in the hands of only very learned, mindful and compassionate people. Unfortunately, law schools often do not train judges, and the law graduates rarely prepare for the judicial offices they might hold one day. Therefore, judicial education is vital to equip our judges with the necessary skills of adjudication and dispute resolution skills.[19]

Judicial trainings guide judges to write judgments and orders that are concise but reasoned, reader-friendly to the parties and the appellate courts – an essential component of access to justice. The decisions should also be worded clearly to make them easier for the people to understand. The objective of judicial trainings is to enable our judicial officers to acquaint them with the latest developments in technology; and to make it easier for them to deal with cases in the emerging areas like cybercrimes and to appreciate the nuances of electronic evidence.[20]

Initially, the suggestion of introducing continuing judicial education was an anathema to the judiciary in the common law system. For instance, Lord Hailsham of the U.K. opposed and attacked judicial education as the 'ignorant clamor' when it was suggested that the judges should be made to undergo specialized trainings:[21]

> *I also regard with a degree of indifference verging on contempt the criticism of judges that demands for them a type of training which renders them more like assessors*

19 See Hudzik J K, 'The Continuing Education of Judges and Court Personnel,' Judicial Education Network,1989, 5; also see Berger WE, 'School for Judges', *Federal Rules Decisions*, 1964.

20 See Strong S I, 'Judicial Education and International Courts: A Proposal Whose Time Has Come'? (February 21, 2018). University of Missouri School of Law Legal Studies Research Paper No. 2018-13.

21 See Lord Hailsham, *Law Society's Gazette*, 28, Aug 1985, 2335; see also 'Judicial Appointments - The Lord Chancellor's Policies and Procedures,' London: Lord Chancellor's Department, 1986.

> *or witnesses than judges of fact and law… The judge's function is to listen intelligently and patiently to evidence and argument ... to evaluate the reliability and relevance of oral testimony…and finally to reach a conclusion based on an accurate knowledge of law and practice ... The capacity of being a judge is acquired in the course of practicing the law.*

In Australia, Justice Samuels argued that there was no need for judicial education on the grounds that judicial appointment based on merit should obviate any such need:[22]

> *The best way of maintaining judicial competency is to appoint reasonably competent judges, who already know enough to embark on their task with tolerable efficiency. If it is recognized that a large proportion of new appointees cannot perform competently without prior instruction, then the system of selection has failed and basic training is little more than a means of propping it up.*

However, gradually, a consensus emerged among judges in Australia, United States, Canada and England, which recognized the benefits of continuing education. The value of judicial education was finally endorsed in 1993 by the Chief Justice of Australia, marking its formal recognition at the highest echelon of the Australian judiciary. In commenting on participation in judicial education, Sir Anthony Mason noted:[23]

> *I do not think judicial education should be confined to the discussion of legal principles, judicial activities and court administration. Judicial education should extend to aspects of the interaction between law and society ... The need for judicial independence is no argument against the desirability of judges becoming better informed.*

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22 See Samuels G, 'Judicial Competency: How Can It Be Maintained,' *Australian Law Journal*, 1980.

23 See Mason A (Sir Anthony), Transcript of Interview, *The Law Report*, ABC Radio, 17 May 1994. Also see Mason A, 'The State of the Judicature,' address to the 28th Australian Legal Convention, Hobart, 30 September 1993.

Most recently, the Chief Justice has provided leadership in the introduction of orientation training for new appointees to judicial office, including justices of superior courts of record:[24]

> *[In the past] new judges were expected somehow to acquire almost overnight the requisite knowledge of how to be a judge. Perhaps it was thought that judicial know-how was absorbed by a process of osmosis... One of the myths of our legal culture was that a barrister by dint of his or her long experience as an advocate in the courts was fully equipped to conduct a trial in any jurisdiction.*

However, the Chief Justice Sir Anthony Mason also cautioned that:[25]

> *We must take good care to ensure that under the guise of judicial education, judges are not subject to indoctrination or attempts by interest groups and pressure groups to influence judicial decision-making in favour of such a group ... I don't think that you need to send judges to classes in order to educate them about the community in which they live.*

The key to reconciling the educational dilemma of indoctrination versus independence is provided by Justice Nicholson, who relates the need to provide increased accountability to the issue of continuing judicial education:[26]

> *Judicial education is now an accepted part of judicial life in many countries ... Judicial independence requires that the judicial branch is accountable for its competency and the proposition is now accepted as beyond debate.*

This recognition of the relationship between judicial education and independence is critical to the process of professionalization of the judiciary, having regard to the fundamental doctrinal importance of

24 Ibid

25 Ibid

26 See Nicholson R D, 'Judicial Independence and Accountability: can they co-exist?' *Australian Law Journal*, 1993.

independence. Justice Nicholson is not alone in identifying this relationship. Indeed, in Canada, the consolidation of judicial independence is formally acknowledged at a policy level as a rationale for continuing education.[27]

It is observed that even the developed judiciaries have until now almost exclusively relied upon the selection of the 'gifted amateurs', the self-education of judges and the acquisition of the necessary knowledge by informal consultation with colleagues. It was believed that there is no better training for judicial work than active practice as advocates and judges.[28] The need for the judicial orientation was first recognised by the United States Chief Justice Warren Berger in 1964, and by Justice Michael Kirby in Australia in 1980s. The latter is quoted as saying:[29]

> *It is assumed that years of practice as a barrister is the necessary and sufficient qualification for judicial office. So it has been for hundreds of years. I believe we could do better ... we need a national (judicial training) institute.*

In 1987 Justice Kennedy joined Justice Kirby to advocate a more formalized approach to judicial education. He argued that the transition from advocacy to adjudication; and from trial courts to appellate courts were substantial and abrupt. He opined for a need for assistance to be made available for newly appointed magistrates and trial judges to improve the general level of knowledge of substantive law on the part of new appointees; as well as to inform them of possible solutions to particular problems which they might encounter, and of which they might not have had previous experience.[30]

This approach was endorsed in 1991 by Sir Ivor Richardson of the New Zealand Court of Appeal, who argued that judges can no longer depend almost entirely on self-education. A more systematic and professional

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27 See Seibert-Fohr A, 'Judicial Independence: The Normativity of an Evolving Transnational Principle,' in A. Seibert-Fohr (ed.), *Judicial Independence in Transition*, Berlin: Springer 2012.

28 See Shetreet S, 'Who Will Judge: Reflections on the Process and Standards of Judicial Selection', *Australian Law Journal*, 1987; also see Gibbs H, 'The Appointment & Removal of Judges,' *Federal Law Review*, September 1987.

29 See Kirby M D, 'The Judges,' *The Boyer Lectures*, Sydney: ABC, 1983.

30 See Kennedy G A, 'Training for Judges?' *University of New South Wales Law Journal* 1987.

approach is needed. Richardson argued that the reservoir of knowledge and social experience of judges needs to be supplemented by a formalized educational program. Formal judicial education programs are essential for gaining information and insights; stimulating awareness of changing social and economic perspectives and values; and generally of enabling the judges to keep abreast of all those facets of judicial work in changing times.[31]

Most recently in a seminal review of the need for judicial training in Australia, Justice Wood of the Supreme Court of New South Wales justified judicial education - specifically orientation, in terms of the prevention of error. He believed that avoidable errors in the conduct of trials, whether civil or criminal, involve considerable wastage of direct costs to the parties and the community. He said that the indirect costs due to lack of judicial education in terms of delayed lists, the social and emotional harm to defendants, prisoners and litigants are heavy.[32]

Similarly, Justice Nicholson of the Supreme Court of Western Australia, has now explicitly articulated the importance of continuing education to the judiciary as a profession. Judicial education is now an accepted part of judicial life in many countries. Judicial independence requires that the judicial branch is accountable for its competency. Most recently in 1994, the Chief Justice of the High Court of Australia, Sir Anthony Mason, has indicated that he was in favor of judicial orientation training on the basis that it would "ease the path" of newly appointed judges.[33]

In Bhutan, the seeds of judicial education has been sown since the 1990s with the beginning of the induction of professional lawyers and judges; with the introduction of *National Legal Course* (precursor of the current *Post-Graduate Diploma in National Law*). The establishment of the *Bhutan National Legal Institute* is a prominent milestone in the promotion of the continuing judicial education. Not only that the people of high caliber are

31 See Richardson I, 'Changing Needs for Judicial Decision-Making', *Journal of Judicial Administration*, 1991.

32 See Wood J, 'The Prospects for a National Judicial Orientation Programme in Australia', *Journal of Judicial Administration*, 1993.

33 See Nicholson R D, 'Judicial Independence and Accountability: can they co-exist?' *Australian Law Journal*, 1993. Also see Mason A, *The State of the Judicature*, address to the 28th Australian Legal Convention, Hobart, 30 September 1993.

recruited into the judiciary but are continuously trained by the Institute during the service.[34] This is expected to create a team of highly skilled judicial officers, who are able to respond to the challenges of judging in the 21st century democratic Bhutan. The Institute is engaged in creating a culture of lifelong learning and reflective practice improving judicial practice and organizational performance, which in turn reduces the cost of justice.[35]

In general, there is as yet no mandatory continuing judicial education, except in the United States. In the United States, judicial education is an integral part of the judicial system. In Australia, the continuing judicial education is not mandatory. Indeed, the formalized and structured continuing judicial education is minimal other than in the New South Wales, where education is voluntary. The continuing judicial education is not mandatory in the U.K., Canada and New Zealand. The mandatory program is anathema to the continuing professional education, since the motivation is essential for meaningful learning. Voluntariness is all the more important for judicial education whose mission extends beyond the domain of basic competence to promote professional artistry.[36]

The voluntary, judge-led independent character of continuing education is of considerable importance. It highlights the importance of judges owning their own education programme and playing a decisive role in policy making. It also preserves judicial independence and prevents the risk of indoctrination. It also means that the judges should be the masters of their own learning; and the best arbiter of their learning needs. They see any notion of external prescription as anathema.[37]

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34 See Tobgye S, 'Judges and Judging in Democratic Bhutan'. *Bhutan Law Review*, Vol.9 February 2018.

35 Yargay L R, 'The Master of Punishment of the Lord of Justice.' *Bhutan Law Review* Vol.9 November 2017.

36 See Armytage L, 'Judicial Orientation - Six Factors Influencing Programme Development.' International Bar Association, 25 Biennial Conference, Melbourne, 9-14 October 1994.

37 Ibid

The Content of the Judicial Education

It is generally agreed that the good judges are made rather than ordained by fate; and they make themselves good through learning rather than being taught. Similarly, lawyers do not become good judges overnight, there is no royal road to learning. The primary purpose of judicial education is to enhance judicial competence; assist new appointees make a smooth transition to judicial office through the judicial education and training. The judicial programs focus on developing the knowledge, skills and attitudes required for judging the cases in particular and other interpersonal skills in general. Since the judges of the appellate courts are appointed based on their pre-existing professional merit as sitting judges, the trainings usually do not address substantive aspects of the law. The main goals of the judicial training programs are to build on existing levels of experience to:[38]

1. *Develop a judicial perspective through promoting knowledge and understanding of the role of judicial officers in the administration of justice;*
2. *Consolidate and develop the skills of judging, and techniques of problem solving;*
3. *Promote a judicial disposition relating to the attitudes, values, ethics and conduct appropriate to judicial office;*
4. *Encourage and provide an opportunity for participants to review and critically reflect on their judicial experience;*
5. *Provide a framework for collegial interaction and the exchange of experience;*
6. *Consolidate the experience of appointees in a number of fundamental judging skills. These include court craft, judicial management, decision-making, sentencing and the assessment of damages;*
7. *Develop judicial disposition relating to equality before the law, specifically gender, race and cultural awareness, and conduct and ethics; and*

38 See Catlin D W, 'Michigan's Magic Touch in Educating Judges,' *The Judges' Journal*, 1986. Also see Berger W E, 'School for Judges,' *Federal Rules Decisions*, 1964.

8. *Draw attention on specialist substantive issues such as DNA, cyber laws and selected forensic aspects of criminal justice, and dilemmas in evidence law and practice.*

Judicial Education as an Agent of Change

Education is an agent of change. The continuing education equips the judiciary individually and institutionally to cope with the problems and challenges confronting the courts. This ability to learn, change and develop is very crucial for the judges. Judges are charged with the responsibilities of resolving complex disputes. Much as they are deified, in reality, far from being perfect, judges are humans, who are fallible. Contrary to public perceptions and expectations, judges cannot and do not possess all the technical knowledge needed to decide all cases; and solve all problems under the sun. Therefore, judges are challenged to keep learning perpetually and equip and re-equip themselves with the skills and strategies to solve problems and deliver justice. In addition, courts are formative institution in society to uphold standards and to provide the value system; which was previously provided at home and through the moral and spiritual teachings.[39]

In the U.S.A. for instance, while the judges come from a relatively homogeneous group - middle class, white, males, the clients of the justice system increasingly comprise people with different ethnicities and experiences. Therefore, judicial education has an important role to play in helping the courts respond to the challenges brought before them. However, simply training judges in the courtroom procedures or updating them on recent court decisions is not enough. The educational programs must focus on helping judges to develop skills they need in order to meet the complex demands placed on them.[40]

In relation to the development of judicial education, Catlin, the head of Michigan Judicial Institute, has observed:[41]

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39 See Kennedy G A, 'Training for Judges?' *University of New South Wales Law Journal* 1987.

40 See Catlin D W, 'An Empiric Study of Judges' Reasons for Participation in CPE', *The Justice System Journal*, 1982.

41 See Catlin D W, 'The Relationship between Selected Characteristics of Judges and

Lawyers don't become good judges by the wave of a magic wand. Not even the best lawyers. To reappear behind the bench as a skilled jurist is a tricky manoeuvre. Going from adversary to adjudicator means changing one's attitude, learning and using new skills, and in some cases severing old ties. In many jurisdictions, judges must learn their new roles by the seat of their pants. In Michigan though, both new and veteran judges are trained extensively.

The Training Modules

The judicial training programs are based on adult educational theory modified appropriately to meet the learning needs of the judges. The design of both the program as a whole, and of individual sessions, promotes active, participatory involvement, calling for the application and exchange of participants' experience, and encouraging reflection and self-critique.[42] Information is imparted primarily through preliminary readings in order to allow sessions to focus on the application of theory to practice, skills development, problem-solving and reflections. The instructional design of sessions varies from informal lectures, discussions group exercises and reporting models.[43]

The National Judicial Education Strategy of India developed by the *National Judicial Academy*, Bhopal is fashioned along this line. It views continuing education as a process of creating solutions for strengthening the administration of justice. There is no conventional teaching-preaching or training. There is no teachers or trainers and no trainees and students. The Academy only facilitates learning by bringing judges together in a common

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their Reasons for Participating in Continuing Professional Education'. Unpublished: Michigan State University, 1981.

42 See Cross K P, 'Adults as Learners.' San Francisco: Jossey-Bass, 1981; and Knowles M S, 'The Modern Practice of Adult Education: From Pedagogy to Andragogy.' Chicago: Follett, 1980.

43 See Tobin A G, 'Criteria for the Design of Legal Training Programs.' *Journal of Professional Legal Education*, 1987; also see Gold N, 'Towards Training for Competence: The British Columbia Professional Legal Training and Program'. *Journal of Professional Legal Education*, 1983; and Hudzik JK, 'The Continuing Education of Judges and Court Personnel.' Judicial Education Network.

platform from across the country. The judges jointly identify the major obstacles facing the administration of justice and develop appropriate solutions for overcoming these obstacles and solving problems through active participation, interactive sessions, self-directed, experiential and andragogic methods. [44]

The *European Judicial Training Network* adopted the nine judicial training principles. The principles elucidate key principles and strategies relating to the nature of judicial training, the importance of initial training, the need of regular and continuous trainings and the integral nature of trainings in daily work. The principles also address the dominion of national training institutions regarding the content and delivery of training. They clarify who should deliver the raining and stress the need for modern training techniques as well as express the need for funding and support from the authorities. The principles are used by Europe's judiciary as a foundation and source of inspiration in managing their judicial training needs. These judicial training principles are helping to improve judicial training across Europe. The nine judicial training principles are: [45]

1. *Judicial training is a multidisciplinary and practical type of training, essentially intended for the transmission of professional techniques and values complementary to legal education.*

2. *All judges and prosecutors should receive initial training before or on their appointment.*

3. *All judges and prosecutors should have the right to regular continuous training after appointment and throughout their careers and it is their responsibility to undertake it. Every Member State should put in place systems that ensure judges and prosecutors are able to exercise this right and responsibility.*

4. *Training is part of the normal working life of a judge and a prosecutor. All judges and prosecutors should have time to undertake training as part of the normal working time, unless it exceptionally jeopardizes the service of justice.*

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44 Available at http://www.nja.nic.in/nje.html

45 Available at http://www.ejtn.eu/PageFiles/15004/Judicial%20Training%20Principles_EN.pdf

5. *In accordance with the principles of judicial independence the design, content and delivery of judicial training are exclusively for national institutions responsible for judicial training to determine.*

6. *Training should primarily be delivered by judges and prosecutors who have been previously trained for this purpose.*

7. *Active and modern educational techniques should be given primacy in judicial training.*

8. *Member States should provide national institutions responsible for judicial training with sufficient funding and other resources to achieve their aims and objectives.*

9. *The highest judicial authorities should support judicial training.*

Judges as Adult Learners

In general, the educational strategy to educate judges rest on foundations of adult learning theory. The training curriculum must however be specifically designed to cater the specific training requirements of the different judges who exhibit characteristic styles and practices as learners.[46] The adult learning is characterized by being autonomous, self-directed, building on personal experience and the immediacy of application in problem solving. Participation in continuing education is usually a purposive activity to prepare for a new job or improve present job abilities.[47]

Education is a formalized process by which people learn. Explanations of how learning takes place have been assessed through various theoretical and clinical means. Within this understanding, it is argued that any paradigm of adult education should be seen primarily as a process of facilitation based on self-directed learning, where the educator plays the role of facilitator in a process centered on the learners, rather than as an authoritarian model of teaching where the educator directs a learning process which focuses on the subject.[48]

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46 Available at http://www.iojt.org/~/media/Microsites/Files/IOJT/Microsite/Judges-as-Learners-Reflections-on-Principle-Practice.ashx

47 See Kolb & Fry, 'Towards an Applied Theory of Experiential Learning', in Theories of Group Processes (ed Cooper CL), New York: Wiley, 1975.

48 See Knox A B, 'Adult Development & Learning: A Handbook on Individual Growth and Competence in the Adult Years for Education and the Helping Professions', San

Facilitators assist adults to attain a state of self-actualisation or to become fully functioning persons. Developing in adults a sense of their personal power and self-worth is seen as a fundamental purpose of all education and training efforts. Only if such a sense of individual empowerment is realised will adults possess the emotional strength to challenge behaviors, values and beliefs. The effective facilitation means that learners will be challenged to examine their previously held values, beliefs and behaviors, and will be confronted with those, which they may not wish to consider. In this sense, the mission of continuing education is to engage learners in the continuous critical analysis of the assumptions, common sense, knowledge and conventional behaviors.[49]

It is argued that facilitated learning provides a cogent philosophic outlook of empowering the adult learner within any formalised approach to education. This is highly compatible with the preferred self-directed learning practices of judges and, perhaps more importantly, the doctrinal imperative to preserve judicial independence within the education process. Facilitated learning provides a philosophically compelling approach to judicial education and postulates a dual answer to the nature - nurture debate: first, it asserts that good judges can be educated and not just born; second, it highlights that learning rather than teaching is the most important element in that education process.[50]

Judges as Professional Learners

The process of merit selection determines appointment to judicial office and establishes a particular threshold of pre-existing competencies in legal knowledge and skills. Consequently, judges as learners possess high levels of pre-existing professional competence. In addition, the distinctive nature of judicial tenure, specifically its security and lack of promotional

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Francisco: Jossey-Bass, 1977; Also see Knox AB, 'Interests and Adult Education,' *Journal of Learning Disability*, 1968; and Tough A, 'Why Adults Learn: A Study of the Major Reasons for Beginning and Continuing a Learning Project. Monographs in Adult Education' (No 3). Toronto: Ontario Institute for Studies in Education, 1968.

49 See Knox A B, 'Interests and Adult Education,' *Journal of Learning Disability*, 1968; also see Tough A, 'Why Adults Learn: A Study of the Major Reasons for Beginning and Continuing a Learning Project.' Monographs in Adult Education (No 3). Toronto: Ontario Institute for Studies in Education, 1968.

50 See Vranken J, 'Exciting Times for Legal Scholarship' (2012) *Law and Method* (February).

opportunity, affect individual judges' motivation to learn and place them in a different position to other professionals.[51]

Judges as learners are distinctive. The learning characteristics, needs, practices, preferences and constraints of judges are different from other adult learners generally. These distinctive features arise from the process and criteria of judicial appointment, and the nature of tenure; judges' preferred learning styles and practices; doctrinal constraints, the formative nature of the judicial role and the environment surrounding judicial office; and judges' needs and reasons for participating in continuing education. Therefore, since the judges as professionals possess certain characteristics as learners, these should be acknowledged in the development of any program.[52]

Judges exhibit preferred learning styles and utilize preferred learning practices developed over the course of their careers. They tend to be autonomous, entirely self-directed and exhibit an intensely short-term problem orientation in their preferred learning practices. The preferred learning styles of judges and lawyers tend to be 'left brained,' that is, logical, analytical, problem-solving, controlled, conservative and organisational. Judges, like all professionals, rely on a repertoire of practical, non-abstract knowledge or know-how as the basis of their expertise. Judicial problem-solving, however, involves a special form of artistry in that these problems are always ill-structured, solutions are inconclusive and important features of the problem become apparent only as the situation unfolds. Expert judges bring to bear their own implicit theories on situations - personal perspectives and values developed from prior experience; and this influences how they look at the particular case before them. [53]

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51 See Knox A B, 'Interests and Adult Education,' *Journal of Learning Disabili*ty, 1968; also see Maslow A H, 'Motivation and Personality,' New York: Harper & Row, 1954.

52 See Tough A, 'Why Adults Learn: A Study of the Major Reasons for Beginning and Continuing a Learning Project.' Monographs in Adult Education (No 3). Toronto: Ontario Institute for Studies in Education, 1968.

53 See Cervero R M, *Effective Continuing Education for Professionals*, San Francisco: Jossey-Bass, 1988; also see Brookfield SD, 'Understanding and Facilitating Adult Learning,' San Francisco: Jossey-Bass, 1986, 283; Kolb & Fry, 'owards an Applied Theory of Experiential Learning' in *Theories of Group Processes* (Ed Cooper CL), New York: Wiley, 1975; and Tyler RW, *Basic Principles of Curriculum and Instruction*. Chicago: University of

Therefore, the challenge for the judicial educator is to be able to integrate knowledge acquired from judicial practice with principles and theories to facilitate the best application of judgment. The formative nature of the judicial role can create a discomfort for some judges participating in continuing learning under conditions which could possibly be seen to erode the authority of their role. Both considerations contribute to the need for an independent and discrete process of education.[54]

Motivations for Learning

There are significant differences between judges and other professionals in their motivations and perceived needs for continuing education. The appointment to judicial office and the environment surrounding judicial tenure created educational needs distinct from other professionals. These distinctive features related in particular to the motivational factors in continuing learning where personal benefits, professional advancement and job security were ranked significantly lower by judges than by other professionals such as physicians and veterinarians. This is because judges perceive themselves as public officials and thus they behave differently from professionals in the private sector. [55]

Judges may participate to develop new skills in order to be more competent, but not to increase their income; thus, the development of competence, in the case of the judge, must be a reward itself. The lack of importance of job security, professional advancement and personal benefits have serious implications for the purposes of planning education programmes. It is observed that for judges the concept of judicial competence is a factor much broader than professional service. Moreover, judges operate in an environment where there is a lack of any distinctly identifiable patient or client relationship.[56]

Chicago Press, 1949.

54 See Berger W E, 'School for Judges,' *Federal Rules Decisions*, 1964. also see McCabe HH, 'California's Approach to Judicial Education,' *Judicature*, 1967 and Murray FK, *Judicial Education: A Guide To State And National Programs, Foundation for Women Judges*: Washington DC, 1986.

55 Catlin D W, 'The Relationship between Selected Characteristics of Judges and their Reasons for Participating in Continuing Professional Education: Michigan State University, 1981.

56 Ibid

These elements are distinguishing features which have significant implications for educators in terms of both the content and the process of any programme of continuing judicial education. They also significantly affect the application of educational theory to judges. Principal among these is the need to recognise the intrinsically aspirational nature of continuing judicial education which determines the mission of judicial education as extending beyond the conventional domain of technical competence. In view of these distinctive features, there is a need for educators to develop a specific model of judicial education which extends the foundations of adult and professional education, and goes beyond training for functional competencies, to pursue professional artistry and promote active self-analysis and critical reflection.[57]

Educational Evaluation

As in any activity, evaluation is essential to judicial education. Evaluation measures the quality of the learning process for the individual judges. More importantly, it measures the impact of continuing education on judicial performance and provides the means to demonstrate the judiciary's concern for the development of competence. Thus, the evaluation integrates the pursuit of competence and a means of ensuring social accountability. The nature of the evaluation process varies depending on which purpose is being met. The external accountability to funding bodies such as the government which requires greater reliance on objective outcomes. The internal accountability is more concerned with the qualitative learning process.[58]

However, the systematic evaluation is minimal. Most courts do not usually even attempt to measure learning or knowledge gain, to determine if participants change their behavior on the job, and if the changes improve their performance. *Judicial Studies Board*, the body charged with educating

57 Cervero R, 'A Factor Analytic Study of Physicians' Reasons for Participation in Continuing Education'. *Journal of Medical Education*, 1981. Armytage L, 'Towards a Charter of Continuing Judicial Education: The New South Wales Experience,' *Commonwealth Judicial Journal*, 1991. Armytage L, 'The Need for Continuing Judicial Education,' *University of New South Wales Law Journal,* 1993.

58 See Kirkpatrick D L, 'Evaluating Training Programs,' Madison, Wis.: *American Society of Training and Development*, 1975.

and training judges in Britain, for instance said, "the efficacy of judicial studies cannot be measured directly. The Board cannot take hold of a judge and make him better. It would be unrealistic and impertinent to try."[59]

Conclusion

Judicial studies indicate that most young judicial officials are often ill-equipped with the personal and professional skills to cope with challenges of the judicial career. Therefore, there is need for continuing judicial education to ensure that they are properly equipped for the challenges associated with the judicial duties. The continuing judicial education has been a late comer due to its perceived adverse impact on the judicial independence, even though specialists in judicial education have long recognized that education can improve the quality of judicial performance.[60] Besides, the continuing judicial education was criticized of being largely limited to the higher courts.

Judges increasingly encounter increasingly complex modern disputes which call for informed and intelligent analysis and disposal. Moreover, what judges say in their judgments and how they decide the disputes impact society. They set trends, forge paths and engineer the society and civilization. Moreover, in the democratic societies judges are public servants; and the courts the service providers who deal with ordinary people and their idiosyncrasies. Therefore, the knowledge of the judicial officers and their emotional intelligence skills play a crucial role in improving access to justice and strengthening the public trust and confidence in the judiciary. Our judges are highly qualified. What we need to do is to capitalize on these university tools we are equipped with to solve the real-life practical problems brought before us, with the help of enlightened laws and the therapeutic procedures. Above all, we need to be ready to return to the classrooms from the courtrooms to learn and be enlightened.

Judicial education is fairly new in the common law tradition. It was started

59 See Hudzik J K & Wakeley J H, 'Evaluating Court Training Programs', *Judicature,* 1981, 64.

60 See Strong S I, 'Judicial Education and International Courts: A Proposal Whose Time Has Come?' (February 21, 2018). *University of Missouri School of Law Legal Studies Research Paper No. 2018*.

in the United States in the mid-1960s. Britain and Canada started it a decade later. The momentum has gathered with the Australia establishing the *Australian Institute of Judicial Administration* and the *Judicial Commission of New South Wales*. Now it is generally agreed that the judicial education is an integral part of any legal system. Making and interpreting laws is fraught with challenges. In this context, judicial education and training play a crucial role towards improving judicial skills and capacities of the judges and other functionaries in the justice delivery system.

The *Bhutan National Legal Institute* has, since its establishment in 2011, spared no effort in endeavoring to improve and enhance the judicial education in Bhutan. In addition to conducting education and training programs for judicial officers and other functionaries in the justice delivery system, the Institute has also promoted publication of legal literature to provide forums for intellectual discourse for enrichment of existing scholarship; as well as for providing a platform to the legal luminaries to highlight the challenges that lie ahead in the justice delivery system.

The continuing judicial education is gradually gaining momentum in the country. It is not only helping in enhancing the professional competency of the judicial officials but the incorporation of continuing judicial education is an integral part of institutional response to public criticism of the courts. It is also helping in resisting pressures to impose external standards on the judiciary.[61]

61 See Catlin D W, 'Michigan's Magic Touch in Educating Judges,' *The Judges' Journal*, 1986. Also see, Kennedy GA, 'Training for Judges?' *University of New South Wales Law Journal* 1987.; and Berger WE, 'School for Judges,' *Federal Rules Decisions*, 1964.

The Penal Code of Bhutan: Analysing the Use of Force to Protect Property[1]

Introduction

Bhutan has always been guided by ideals of enlightened laws to protect its citizens, communities and the society. Her laws are aimed at perpetuating good and chaste actions and correct those who have gone wrong. This has epitomized the legal principle that *"guilty do not escape"* and the *"innocent do not suffer"*, securing justice for the present and future generations. To ensure that Bhutanese society is founded on the *Rule of Law* and promote conditions for peace and happiness, the *Penal Code of Bhutan* endeavors to guide and facilitate the Royal Courts of Justice to ordain the pure streams of criminal justice in the country. While the view captured by the *Penal Code* is wide, the present Article intends to discuss on the "*Use of Force to Protect Property"* with the following example:

> *One late night, Mr. Dorji, a farmer in Eastern Bhutan, hears a sound near the ground floor of his two-storied house, which contains his entire supply of grains and farming tools. On investigation, Mr. Dorji sees Mr. Sonam walking near the back of his house holding a flaming torch. Mr. Dorji and Mr. Sonam have had a longstanding family feud. A sudden change of wind direction causes Mr. Dorji to smell petrol. Fearing that Mr. Sonam is about to set fire to his house, Mr. Dorji charges at Mr. Sonam and strikes him with a piece of firewood. The firewood lands on Mr. Sonam's shoulder, causing a bad bruise. In actual fact, Mr. Sonam was searching for his wallet, which he thought he might have dropped earlier that day when he had gone to Mr. Dorji's house to argue with him. The smell of petrol came from a leak in a small container that Mr. Sonam carried to refuel his torch.*

On these facts, Mr. Dorji could be charged under section 158 of the *Penal Code of Bhutan 2004* which states that a *"defendant shall be guilty of the offence*

1 Contributed by Professor Stanley Meng Heong Yeo.

of battery, if the defendant purposely uses physical force of an adverse nature on another person." Should this occur, Mr. Dorji could plead the defence of justification of use of force to protect property provided under section 100 of the *Penal Code*, called as the *"use of force"* defence. The question is: "Can Mr. Dorji be acquitted of battery on the basis of this defence"? This Article will seek to answer this question. In answering this, it is important to discuss the elements of *"use of force"* defence to protect property. The Article will critically evaluate these elements, and identify some possible defects in the law and suggest an appropriate approach. By revisiting the hypothetical case of Mr. Dorji and Mr. Sonam to see how the law operates and consider whether it achieves a fair and just result. At the end, we will consider the legal position should Mr. Dorji have applied fatal force and killed Mr. Sonam instead of just badly bruising his shoulder.

The Elements of Use of Force to Protect Property

The *Penal Code of Bhutan 2004* provides with the justificatory defence of *"use of force"* to protect the property as:

> *A defendant shall have the defence of justification, when the defendant uses force to protect property and believes that the force is immediately necessary to prevent or terminate a trespass or from unlawful carrying away of the property, provided that the property is, or is believed to be, in the defendant's possession or in the possession of another person for whose protection the defendant acts and the force used is no greater than that which is necessary.*

This provision, together with several other provisions on the matter, specify that the following elements must be present for the defence to succeed:

1) The defendant (**D**) must have encountered a trespass[2] or unlawful carrying away of property by **X** (the offender) as reflected under section 100 of the *Penal Code of Bhutan 2004*;

2 Section 237 of the *Bhutan Penal Code 2004* reads: "*A defendant is guilty of the offence of trespass, if the defendant intentionally enters or remains on others property or in a building, occupied structure, or separately secured or occupied portion of a building or structure with the knowledge that the defendant is not or no longer licensed or privileged to enter or remain thereto."*

2) The property is or believed to be in **D**'s possession or in the possession of another for whose protection **D** acts;

3) **D** uses force to protect property by preventing or terminating a trespass or from unlawful carrying away of property;

4) **D** honestly believes that such force is immediately necessary;

5) The force used is no greater than that which is necessary;

6) **D** must first request **X** to desist from interference with the property unless to do so would be dangerous to **D** or another person, or there is risk of substantial harm to the property before the request can be made;

7) **D** is not obliged to retreat from an abode or place of work unless **D** was the initial trespasser or **D** is attacked in **D**'s workplace by another person.

In addition to the above elements, there are following exclusions:

1. The *"use of force"* defence is unavailable when **D** was reckless or negligent in appraising the necessity for such use of force;

2. The defence of *"use of force"* is unavailable to **D** who was reckless or negligent in creating a risk of injury to a third (innocent) person.

In common with the law of many other legal systems, the rationale underlying the use of force in protection of property is general principle that prevention of injury to people takes precedence over prevention of unlawful interference with property. This accords with the view that the value of bodily integrity surpasses the value of property. The defence element that most clearly embodies this principle is that *"the force used is no greater than that which is necessary."*[3]

In the same spirit is the element that **D** must have firstly requested **X** to desist before **D** can use force against her or him.[4] Accordingly, **D** must have given **X** the opportunity to stop interfering with the property, and if **X** complied, **D** is no longer permitted to use force against **X**. There is also

3 The fifth element in the above list.

4 The sixth element in the above list.

the element that the interference of property must be of such nature that it was *"immediately necessary"* for **D** to use force against **X.**[5] Consequently, if there was time for **D** to rely on their non-harmful means of protecting their property against **X**'s unlawful interference, he or she should do so rather than use force against **X.**

Although the laws largely favours protecting the people from injury over protecting property from unlawful interference, there are nonetheless some elements of the *"use of force"* defence which favour **D** harming a person who is seeking to interfere with **D**'s property. One of these is that **D** need only honestly and genuinely believe that the force he or she had used against **X** was immediately necessary to protect the property against unlawful interference.[6] As such, **D**'s belief need not be based on reasonable grounds. Another element favoring **D**'s use of force is that **D** is entitled to stand her or his ground against **X** and is not legally required to retreat, except in certain limited circumstances.[7]

Critique and Application of the Law

The above outline of the elements of the *"use of force"* defence to protect property shows that the law seeks to strike a balance between, on one hand, the need to protect people against being injured and, on the other, the need to give the possessors of property the right to defend it from unlawful interference by others. The *Penal Code* appears to have ensured this balance rather well. However, there are two matters that appear to be problematic to this author, and which are deserving of the Legislature's attention.

The first of these matters concerns the defendant's belief as to the force being immediately necessary to protect his property. That such a belief need only to be honest with more, seems to have been a deliberate decision of the drafters of the *Penal Code*. This is borne out by comparing S.100 with the following general opening provision on the defence of justification in the *Code:*

> *Subject to the provisions of this chapter, a defendant shall have the defence of justification, when the defendant in good faith engages in a*

5 The fourth element in the above list.
6 The fourth element in the above list.
7 The seventh element in the above list.

> *conduct that the defendant reasonably believed was necessary to prevent a harm or crime to oneself or to another person and the harm or crime sought to be prevented by the conduct is greater than that sought to be prevented by the law defining the offence charged.*

It is observed that this provision refers to the defendant having *"reasonably believed"* that his conduct was necessary to prevent harm or a crime. However, that requirement is subject to the justification as an *"affirmative defence"*, of which the *"use of force"* defence belongs. Consequently, the requirement under section100 that **D**'s belief need only be honest supersedes that of *"reasonable belief"* found in section 89. This may be well and good but for the fact that there is another provision, which casts doubt on whether, the belief under section100 need only be honest. That provision is section 90, which reads in part:

> *When a defendant is.....**negligent**..... appraising the necessity for such conduct, the justifications afforded by this Penal Code are unavailable as a defence.*[8]

Negligence is defined in section 57 of the *Penal Code* as **D**'s *"failure to perceive [a substantial and justifiable risk which] constitute a deviation from the standard of care of a reasonable person in the defendant's situation."* Applied to section 90, it amounts to saying that if a reasonable person in **D**'s situation would not have believed that the use of force was necessary to protect his or her property, the defence is unavailable to him or her. In other words, **D**'s belief must have been *reasonable,* in line with section 89, the general opening provisions on defences of justification in the *Penal Code*. There is thus an apparent inconsistency among the provisions regarding whether **D**'s belief need only be honest, or must it be based on reasonable grounds. The following comment by Lyonpo Sonam Tobgye, former Chief Justice of Bhutan, is apposite:

> *"Therefore laws should be drafted in the manner that it is harmonious with other laws to eliminate contradictions and disparities. Ambiguity and disparity breeds controversies"*[9]

8 Bold added.

9 *"The Blessings of Enlightened Laws- A Foundation for Peace and Happiness"*, 2019 XI *Bhutan Law Review* 4 at 13-14.

Whether **D**'s belief should be purely subjective (an honest belief alone) or partially objective (a belief based on reasonable grounds) has been the subject of debate in many legal systems. Those systems such as Australia[10] and England[11] favouring a purely subjective belief place emphasis on **D**'s right to protect property over unlawful interference of their property. This right is manifested by empowering **D** to use force, which, *as **D** personally sees it*, is needed to protect their property over unlawful interference. As against this position are legal systems such as Canada[12] and India[13] where **D**'s right to use force to protect property is more circumspect by requiring their belief in the need to use of force, to be based how *a reasonable person sees it*. It is beyond the scope of this Article to engage in an in-depth discussion in support of one position over the other. That said, some brief observations would be made a little later when we come to consider the hypothetical cases involving Mr. Dorji and Mr. Sonam.

The second problematic matter concerns the exclusion of the *"use of force"* defence by virtue of section 113, which states:

> *Wherein a defendant is justified under this Penal Code in using force upon a person but the defendant recklessly or negligently injures or creates a risk of injury to a third person, the justifications afforded by this Penal Code are unavailable.*

This provision is borrowed largely from its counterparts in the *US Model Penal Code*, which reads:

> *When an actor is justifiable under section 3.03 to 3.08*[14] *in using force upon or towards the person of another but recklessly or negligently injures or creates a risk of injury to innocent persons, the justification afforded by those sections is unavailable* ***in a prosecution for such recklessness or negligence towards innocent persons.***[15]

10 For example, s. 418 of the *Crimes Act 1900* (New South Wales, Australia).
11 *Criminal Damage Act 1971* (UK) s.5.
12 *Criminal Code 1985*, s.35.
13 *Indian Penal Code 1860*, s.97 r/w s.105.
14 These are the provisions on the use of force, including to protect property.
15 Bold added.

It is observed that the concluding bolded words of the provisions are missing from section 113 of the *Bhutan Penal Code*. Without those words, the *Bhutan Penal Code* denies the *"use of force"* defence whenever the defendant has been reckless or negligent in injuring or creating a risk of involving Mr. Dorji and Mr. Sonam, there was another villager accompanying Mr. Sonam. Should there be risk of injury to a third (innocent) person. For example, let us assume that in our hypothetical case involving Mr. Dorji and Mr. Sonam, there was another villager accompanying Mr. Sonam. Should there have been a risk of injury to that villager when Mr. Dorji rushed to strike Mr. Sonam s.113 would apply to deny him of the *"use of force"* defence altogether with respect to any one he might have injured or risked injuring while defending his property. That would include Mr. Sonam, the source of the threat. By contrast, under the *US Code*, Mr. Dorji will be able to plead that defence against a charge of injuring Mr. Sonam.

However, depending on the circumstances of the case, Mr. Dorji could be denied that defence in relation to a charge of recklessly or negligently creating a risk of injuring a villager.[16] As it stands, the *Penal Code* is unsatisfactory for denying rights to defend one's property against an unlawful interference *whenever* the defensive action creates a risk of injury to innocent persons who happen to be in the vicinity. This defect in the law could be readily rectified amending section 113 to include the concluding words of *US Code* provision.

Leaving aside the problem created by section 113, it would be helpful at this juncture to test the elements of the *"use of force"* defence by considering whether Mr. Dorji could successfully plead the defence in answer to the charge of battering Mr. Sonam. On the facts, Mr. Dorji had encountered Mr. Sonam trespassing his property. Mr. Dorji could contend that he honestly believed that his battering Mr. Sonam on the shoulder was immediately necessary because he has seen Mr. Sonam with a flaming torch, had smelt petrol, and had a longstanding feud with Mr. Sonam. Mr. Dorji could claim that he did not have time to take any alternative non-harmful action to protect his house from being set alight by Mr. Sonam. These same facts could explain why Mr. Dorji did not first request Mr. Sonam to desist before hitting him, as there was risk that Mr. Sonam could set alight the house before the request could be made.

16 The offence could be assault or reckless endangerment under.s.156 and s.160 respectively

Also the law permits Mr. Dorji to stand his ground against Mr. Sonam and not to retreat from him. Furthermore, Mr. Dorji had hit Mr. Sonam on his shoulder (as opposed to vulnerable part of the body such as the head), which amounted to *"no greater force than was necessary."* Mr. Dorji could contend that such force was required to stop Mr. Sonam from setting the house alight. All told, it appears that Mr. Dorji would have fairly good chance of successfully relying on the *"use of force"* defence in answer to the charge of battery against him.

Earlier on, the issue as to whether the defendant's belief concerning the *use of force* need only be honest, or should be based on reasonable grounds. An honest belief could mean that defence might succeed if Mr. Dorji was, say, intoxicated when he saw Mr. Sonam, which caused him to perceive Mr. Sonam as more of a threat than a sober person would have in the circumstances. Similarly, an honest belief could result in the defence succeeding even if the defendant's belief was due to their being hot headed, anxious or timorous, which caused them to regard a threat as more serious than it actually would have been to a reasonable person. *The New York Court of Appeal* has expressed concern over this legal position by opining that to base self-defence solely on the defendant's subjective belief *"would allow citizens to set their own standards for the permissible use of force and risk acquitting individuals who use violence no matter how aberrational or bizarre [their] thought patterns."*[17]

Should the Legislature share this same concern over the *"honest belief"* position contained in section100 of the *Penal Code of Bhutan,* it could amend that provision to require the defendant's belief to be reasonable. This amendment would prevent the defendant's abnormal thought patterns from affecting his or her belief concerning the need to use force to protect property.

The Use of Deadly Force in Protection of Property

In this final part, we will inquire whether the *Penal Code of Bhutan* empowers a defendant to use fatal force to protect property and, if it does not, whether the law is correct not to do so. An examination of the provisions

17 *People v. Goetz (1986)* 497 N.E. 2d 41 at para 50.

on *"use of force"* strongly suggests that the law disallows the use of fatal force in defence of property. One reason is that, while there is a specific provision, namely section 98 empowering the use of fatal force in defence of the person, there is no equivalent with respect to defence of property. Another reason is that section100, the primary provision on the use of force to protect property, requires the force to be *"no greater than that which is necessary."* As noted previously, in prioritizing, the interests sought to be protected by the penal law, that of prevailing injury to a human being takes precedence over preventing unlawful interference with property. This would be especially true where the injury is fatal. Therefore, when applied section 100, the use of fatal force can be never necessary to prevent unlawful interference with property.

While this position seems irreproachable, there are nonetheless some legal systems, which do recognize the right to use fatal force to protect property in very limited circumstances.[18] These circumstances nearly always involve the protection of one's home or dwelling, echoing the adage that a *" man's [sic] home is his castle."* The idea underlying this viewpoint is that people should be able to feel completely safe and secure in relation to their own home. Accordingly, penal law, should grant occupiers the right to use fatal force, if necessary, to protect their own homes from unlawful interference. Of course an important qualification to this right is that the circumstances must have been in such as to make it really necessary to use of fatal force in defence of the home. While this is likely to be a rare occurrence, that is no reason for the law to deny the use of fatal force to protect one's own home under any circumstances.

Two *Penal Codes*, which adopt this viewpoint, may be briefly presented here. Under the *US Model Penal Code*, section 3.06 (3)(d) states:

(i) *The person against whom the force is used is attempting to dispossess him of his dwelling otherwise than under a claim of right to its possession; or*

(ii) *The person against whom the force is used is attempting to commit or consummate arson, burglary, robbery or other felonious theft or property destruction and either:*

18 For a comparative study, see Stanley Yeo *'Killing in Defence of Property'* (2010) 36 *Commonwealth Law Bulletin* 281.

(A) Has employed or threatened deadly force against or in the presence of the actor; or

(B) The use of force other than deadly force to prevent the commission or the consummation of the crime would expose the actor or another in his presence to substantial danger of serious bodily injury.

Sub-clause (i) clearly provides for the right of an occupier to use fatal force against being dispossessed of their own dwelling, except where the occupier knows that the dispossesor is doing so under a claim of right. Sub-clause (ii) permits the use of fatal force in specified circumstances involving a combination of an unlawful interference with property coupled with a threat to the person. We shall revisit the clause below:

The second *Penal Code* recognising a right to use fatal force to protect one's home is the *Indian Penal Code*, the relevant provisions of which reads:

> *The right of private defence of property extends, under the restrictions mentioned in section 99, to the voluntary causing of death or of any other harm to the wrong-doer, if the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right, be an offence of any of the descriptions hereinafter enumerated, namely:*
>
> *First - Robbery;*
>
> *Secondly - Housebreaking by night;*
>
> *Thirdly - Mischief by fire committed on any building, tent or vessel, which building, tent or vessel is used as a human dwelling, or as a place for the custody of property;*
>
> *Fourthly - Theft, mischief, or house-trespass, under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised.*

For the purpose of our present discussion, the relevant offences where use of fatal force is permissible in defence of a dwelling house are (secondly) house breaking by night; (thirdly) mischief by fire on a structure constituting a human dwelling. The other sub-clauses comprise a combination of a threat to property and to the person. These are akin to sub-clause (ii) of the *US Model Penal Code* provision noted earlier.

Whether the *Bhutan Penal Code s*hould follow the *US* and *Indian Penal Codes* to give occupiers the right to use fatal force to protect their homes is highly controversial matter. One might venture to suggest that in Bhutan, the taking of human life is too great a cost in return for protecting one's home. Should this be the case, it would still be worthwhile for the Legislature to seriously consider whether the *Bhutan Penal Code* should adopt those provisions in the *US Code* and the *Indian Penal Code* where the use of fatal force is permissible against an intruder who threatens one's home as well as the personal safety of its occupants.

Conclusion

Having carefully examined the provisions of the *Penal Code* on the use of force to protect property, it may be concluded that they are generally in good working order and produce fair and just outcomes. The provisions achieve this by having some elements of the defence, which restricts the use of force that injures people, and balances these against other elements, which permit people to use force to prevent unlawful interference with their property.

This Article has drawn attention to three matters, which are deserving of the Legislature's attention. The first is whether the defendant's belief concerning the need to use force to protect property should be based on reasonable grounds. Secondly, it is submitted that the exclusion of the *"use of force"* defence under section 113 of the *Bhutan Penal Code, 2004* should be restricted to prosecutions of the defendant for being reckless or negligent towards innocent third persons. And thirdly, the Legislature should consider whether to give occupiers the right to use deadly force against a trespasser who has threatened both their homes and their persons.

The Significance of Donag Thrims of Punakha Dzong[1]

Introduction

This July, Lecturer Rinzin Wangdi from the Jigme Singye Wangchuck School of Law and I published a translation[2] of the *Legal Edict* mounted on black slates at the Punakha *Dzong Chung*. First, we had been told that this text was nothing more than a summary of the *Legal Code* of 1729, which has been integrated in the *Lhoi Choejhung* of Tenzin Choegyal[3] and translated into English by the late Michael Aris.[4] However, on closer examination it became apparent that the *Edict* at the Punakha *Dzong* is different from the *Legal Code* of 1729, particularly its first part. In the second part we indeed find numerous overlaps of the two texts.

During our translation project we faced various difficulties. The first question was which version of the text should serve as starting point for our translation. As the flash flood of 6 October 1994 had damaged the original slates, direct access to the original version had become impossible. The copy of the *Edict* currently displayed at Punakha *Dzong* is partly different from another copy engraved on a copper plate at the Supreme Court of Bhutan. Thus, our intention was to track down the original slates. Several colleagues from the Jigme Singye Wangchuck School of Law and other helping hands set out in search of the slates, but without any success. Thus, we are grateful to the former Chief Justice of Bhutan, Lyonpo Sonam Tobgye, who provided us with a text copied by monks directly from the damaged slates right after the flood.

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1 Contributed by Professor Michaela Windischgraetz.

2 Windischgraetz, M & Wangdi R, *The Black-Slate Edict of Punakha Dzong. A Legal Code attributed to Zhabs-drungs Ngag-dbang rnam-rgyal, the Founder of Bhutan*. Thimphu 2019.

3 *bsTan-'dzin chos-rgyal***,** *Lho'i chos 'byung 'phro mthud 'jam mgon smon mtha'i 'phreng ba*. Thimphu: KMT Publisher, 2004.

4 Aris M, *Sources for the History of Bhutan*. Delhi: Motilal Banarsidass, by arrangements with „Arbeitskreis für Tibetische und Buddhistische Studien, Universität Wien," 2009.

The First *Constitution of Bhutan*

The next intricate question concerned the authorship of the *Legal Edict*. Various hypotheses have been made.[5] Dasho Sangay Dorji refers to oral sources, according to which the slates were commissioned by the 13th *Desi* Sherab Wangchuk (1697-1765).[6] This seems convincing as oral history is a reliable source in Bhutan and because the title used at the end of the inscription, *"Choejey",* indeed hints to Sherab Wangchuk. Nevertheless, the inscription appears to contain at least in its core an original *Legal Edict* authored by *Zhabdrung Ngawang Namgyal* himself. The first sentence of the inscription announces the publication of a *Legal Code* of the *Drukpa Rinpoche Ngawang Namgyal*. The subsequent text is written in the first person *(Ngoed),* purporting the authorship to the *Zhabdrung*.

Turning to the content of the inscription, a first insight into the content of the text shows that it can be called Bhutan´s first *Constitution*. If we understand by the *"Constitution"* of a state an outline of the basic organizational and ideological principles and laws of a society, then the slate inscription can be understood as the first *Constitution* of Bhutan. The core intention of the inscription becomes especially clear in its first part, which is fundamentally different from the *Legal Code* of 1729. It serves the legitimation of the rule of the *Zhabdrung* and of *Palden Drukpa* in Bhutan. In this first part of the text we also get a basic overview about the administration of Bhutan at that time.

The second part of the inscription enumerates obligations of various groups of the population, above all of officials and civil servants. Today, many of these regulations would be called anti-corruption regulations. The structure of the text follows the naming of different population groups. No one shall be omitted, everyone in the state has to obey specific rules applicable to him: officials as well as religious persons and ordinary citizens, the latter being primarily addressed as taxpayers. This structure

5 E.g. Ardussi suggests that the *Zhabdrung*'s *Civil Law Code* was carved by the [1st] *Desi* on slate panels mounted on the wall of the *Dzong Chung* at Punakha, in about 1652, in 'The Traditional Institutions of Governance in Bhutan Before 1907 and their Modification with the Coming of the Monarchy', *Druk Journal 2016*.

6 Dorji S, *´Brug gi sde srid khri rabs rim byon gyi mdzad rnam deb ther dpyod ldan dgyes pa'i do shal*. Thimphu: The Centre for Bhutan Studies and GNH, 2017: 237.

expresses a claim to comprehensive sovereignty over all beings living in the state. This claim to sovereignty is, by the way, even more comprehensive than Western style legal orders would claim today: the addressees of the *Legal Edict* are not only human beings, but also gods and demons. The biographers of *Zhabdrung* from the 17th and 18th century reported that specially sent messengers laid out *Zhabdrung's* law together with offerings on passes, crossroads and river banks.

Constructing Legitimacy

The main intention of the text is to legitimize the dominion of the *Zhabdrung* and *Palden Drukpa* in the newly founded state of Bhutan. This is done by appealing to the divine rule of his predecessor *Songtsen Gampo* of the Tibetan imperial period (605?-649 A.D.). The text does this by using various metaphors. *Zhabdrung* equates himself as a *Choegyal* to the previous *Choegyal Songtsen Gampo*, who as a *"religious ruler"* combined the roles of a religious and a secular lawgiver. The title of the *Legal Edict* also has to be seen in this context: The *Edict* is called *"Sergi Nyashing"*; *"The Golden Yoke",* a title that has its precedents in the centuries' old tradition of Tibetan texts on law and state. It is a classical metaphor describing Tibet's judicial system as a *"golden yoke"* that leads the subjects to liberation. Thus, for example the *dBa' bzhed*[7] reports that *Vairocana* addressed the king and assured him, *"you stay at the top as a precious golden yoke."* Using this title deliberately, stresses the intention of equating the Punakha inscription to the laws of the Tibetan Empire.

But why should a newly established power refer to the founder of a neighboring state, with which there was massive political tension and several military clashes? For a proper understanding we have to consider the crucial concept of the actions of *Buddhas* and *Bodhisattvas* in the world. The inscription says, *"It is the essence of the Buddhas and Bodhisattvas to exist and work in the world through skillful means"*. So does the *Bodhisattva of Compassion – Chenrezig*, who is generally regarded as the protector of Tibet and is

7 The original version of this text, which contains a history of the establishment of Buddhism in Tibet, is traditionally attributed to *sBa/dBa' gSal-snang* and is believed to have been written in the 9th century. See Pasang Wangdu & Hildegard Diemberger, *dBa' bzhed. The Royal Narrative Concerning the Bringing of the Buddhas Doctrine to Tibet*. Wien: Verlag der Österreichischen Akademie der Wissenschaften. 2000.

of central importance in the entire Tibetan cultural area. Accordingly, *Chenrezig* manifests again and again in rulers and hierarchs of the Tibetan-Buddhist cultural area, so he manifested in *Songtsen Gampo* as well as in *Drukpa* hierarchs like *Zhabdrung Ngawang Namgyal*. As such an incarnation of *Chenrezig*, *Zhabdrung* enacted the law. Thus, with a proper understanding, it is the *Bodhisattva Chenrezig*, not a worldly leader, who governs the country, using skillful means in order to lead all sentient beings of the country to enlightenment. Therefore, rather than the poorly fitting term of *"theocracy"* the term *"bodhisattvacracy"* has been coined.[8]

The inscription uses further metaphors in order to equate the newly established Bhutanese state to that of *Songtsen Gampo*. Thus, the goal of the *Drukpa* rule in Bhutan is to *"to bring benefit and happiness to all beings of the country"*. Happiness as the purpose of law was mentioned already in the earliest historical sources of the Tibetan imperial period. The *Old Tibetan Chronicle*[9] states that during the reign of *Songtsen Gampo "governance was just and everyone was happy."* With the modern Bhutanese concept of *Gross National Happiness* we see this tradition, which has existed for over a thousand years, still being continued.

The inscription emphasizes an additional goal of the *Zhabdrung's* rule in Bhutan: The *Zhabdrung* proclaims the law in his role of refuge for the *"savage"* and *"uncivilized"* people of *Lhomon khazhi*. Stressing the necessity of bringing knowledge and culture to the country complements this. Monks have to be educated and tested on the texts they studied as well as craftsmen have to be trained in their skills and rewarded for excellent work. With the image of introducing law and culture to an uncivilized people, the author of the inscription again refers to the centuries' old tradition of seeing *Songtsen Gampo* as the one who civilized the Tibetan people, introducing Buddhism and law as well as cultural techniques like writing. The introduction of law and political order has always been viewed as essential values of a Tibetan ruler. Buddhist historiographers considered

8 Seyfort-Ruegg, David, Ordre *spirituel et ordre temporel dans la pensée bouddhique de l'Inde et du Tibet*. College de France, Paris 1995.

9 *The Old Tibetan Chronicle* is one of the most important documents recovered from the Mogao cave 17 in Dunhuang, probably compiled in the 9th century C.E.

law, like writing, to be a necessary prerequisite for civilizing or *"taming"* Tibet through Buddhism.[10]

Through the equation of the newly founded state of Bhutan with the governance of *Songtsen Gampo*, the Punakha *Edict* follows classical Tibetan-Buddhist political theory, according to which divine rulers must govern following the just traditions of their ancestors. This kind of legitimation through appeal to precedent was particularly affected by imputing the laws or mandates of a current ruler to a recognized and authoritative predecessor like *Songtsen Gampo*.[11] In that vein, *Zhabdrung* announces in the introduction of the Punakha *Edict* that he is going to proclaim the laws for Bhutan on the basis of the *Six Great Laws* formulated by *Songtsen Gampo*.

Early Administration

As mentioned before, the first part of the inscription deals with the structure of state administration. First, the text mentions the Tibetan administration at the time of *Songtsen Gampo*, as it can be seen from the Tibetan imperial law of *Khri rtse 'bum bzher*. The law of *Khri rtse 'bum bzher* enumerates three kinds of ministers and seven officials.[12] In the following, the inscription equates the Bhutanese administration to the ancient Tibetan one. This could not be done easily, because the ranks of administration in *Lhomon khazhi* were quite different from those mentioned in *Songtsen Gampo's* Law. Bhutanese historical sources rather depict the following system of Bhutanese civil administration: Below the *Desi* as the highest civil authority in the country, the most important offices were those of the three *Chila* of Paro, Trongsa and Dagana as well as the *Dzongpon* of Punakha, Thimphu and Wangdue Phodrang; additionally the position of a *State Chief of Protocol* is mentioned. [13] Particular evidence of the early administration of the *Drukpa* state can be gained from the biography of the 13th *Desi* Sherab Wangchuk,[14] which gives an account of mass donations to officials and

10 Dotson B, *Administration and Law in the Tibetan Empire: The Section on Law and State and its Old Tibetan Antecedents*. Ph.D. Thesis, Oxford, 2006: 11.

11 Dotson, 2006: 10.

12 The denomination of the 7th *dPon-po* is unclear and varies in the different sources.

13 Phuntsho K, *The History of Bhutan, 2016*: 258.

14 *rJe Yon-tan mtha'-yas* & *Kun-dga' rgya-mtsho, rJe yon tan mtha' yas dang kun dga' rgya mtshos mdzad pa'i chos rje'i shes rab dbang phyug gi dge ba'i cho da rab tu gsal ba'i gtam mu tid do shal zhes bya ba gzhugs so*.

the people on the occasion of the enthronement ceremonies for *Zhabdrung Jigme Drakpa* (1725-1761) in 1747. The lists of gifts provide an overview of the ranks of administration that existed during that period of time. The list of state functionaries is headed by nine *Kalyon*, followed by 20 high-ranking officials of the two governing centers of Punakha and Tashichhoedzong. Ardussi and Karma Ura point to the generally accepted interpretation that the nine *Kalyon* included the six principal *Dzongpon* together with the *Zhung Droenyer* and two others who were likely to have been the *Depai Zimpon* and *Zhung Kalyon*.[15] Various lower ranks are mentioned,[16] but none of them correspond to the officials mentioned in *Songtsen Gampo's* Law.

Nevertheless, the author of the inscription equates the officials of the Bhutanese administration to the functions found in Tibetan imperial law. The facts existing in Bhutan shows that the *Kalyon* act within the sphere of competence of an imperial Tibetan *Gunglon* and are thus responsible for the external affairs of the country. Officials like *Soelpon*, *Zimpon* and *Drungyig* act within the sphere of competence of an imperial Tibetan *Nanglon,* responsible for internal affairs. Higher and lower *mGron-gnyer* act in the sphere of competence of an imperial Tibetan *bKa'-yo-gal 'chos-ba'i blon-po*, responsible for deciding lawsuits. *Dzongpon* and government representatives were seen in the sphere of competence of a *Yulpon*, responsible for governing their respective region. The Bhutanese *Nyerpa* acted within the competence of an imperial Tibetan *Nganpon*, a fee official, responsible for the storing of grains, gold and silver. In the sphere of competence of an imperial Tibetan *Magpon*, whose duty was to defeat the enemy, the inscription mentions again *Droenyer* and various military officials like *Dingpon*. Bhutanese *Tapon* acted in the sphere of competence of an imperial Tibetan *Chibpon*, who was responsible for the conditions of the travel roads. *Norpon* acted in the sphere of competence of an imperial Tibetan *Phrupon*, responsible for the herds and *Sherpon* in the sphere of competence of an imperial Tibetan *Drangpon*, also responsible for deciding lawsuits.

15 Ardussi, J & Ura K, *Population and Governance in mid-18th Century Bhutan*, as Revealed in the Enthronement Record of *Thugs-sprul 'Jigs med grags pa* I (1725-1761). *Journal of Bhutan Studies*, Volume 2, 2000: 40, 41.

16 See for the list and explanations Ardussi & Karma Ura, 2000: 40.

At the end of the equation, the inscription stresses that in Bhutan, different from Tibet, the responsibility for all these various competencies lies with the *Dzongpon*. Thus, the responsibility for the various administrative tasks below the *Desi* was regionally concentrated in the person of the *Dzongpon* and not split on several authorities according to different subject matters.

Duties of Civil Servants

In the second part of the Punakha *Edict*, the parallelization of the Bhutanese state order with the ancient Tibetan one continues with catalogues of duties for all population groups, although these are quite cryptic concerning the times of *Songtsen Gampo*. Here, the Bhutanese text simply copies lists of duties that the 16th century Tibetan historian *Pawo Tsugla Threngwa*[17], the main reference for the Punakha inscription, lists in his history. Important, however, are the Bhutanese lists of duties, which are no longer formalistic at all, but rather give us an interesting insight into Bhutanese reality.

In the following, I would like to highlight some of these regulatory schemes, starting with regulations for civil servants. A central concern is regulation that one would call anti-corruption regulation today:

"As it is undesirable to fall under the influence of partiality and corruption, whatever goods there are, they shall not be given senselessly to one's own relatives, attendants, factions among others. Unless it is beneficial for the teachings like reverence for the *Sangha* or gifts for the public." Partisanship and corruption were and still are undesirable. Partisanship was one of Bhutan's major political problems. Again and again civil war-like conditions prevailed and threatened the country to fall apart. Thus, as a solution of that problem the Punakha *Edict* suggests, that valuables shall be given to the monastic community and thus be used for spreading the *Dharma* instead of giving it to one's kin with the intention of creating networks of loyalty.

Accumulation of wealth within the officials was seen as equally undesirable. The inscription gives us an interesting insight into the allocation of resources to officials of various ranks. Beginning with the highest ranks,

17 *dPa'-bo gTsug-lag phreng-ba*, *Dam pa'i chos kyi 'khor lo bsgyur ba rnams kyi byung ba gsal bar byed pa mkhas pa'i dga' ston*. Beijing: *Mi-rigs dpe-skrun khang*, 1985.

namely the *household guards (Zimgag)* of the Ruler, who get eight *bodyguards (Garpas)* and eight pack horses, lower officials get decreasingly less: "The three great *Chila*[18] and the three *Dzongpon* of the residences, upper, lower and mutual[19] get four *bodyguards* and four horses each. Below them, the class of *Dzongpon* gets three *bodyguards* and horses each. Ordinary representatives get one bodyguard and one horse, more is not assigned". Furthermore, the inscription clearly states:

> *It is not allowed to accumulate wealth: this has to be observed by all ranks, high and low.*

Thus, officials should not enrich themselves, especially not by exploiting the population. The author of the *Legal Edict* was aware that particularly travel movements by officials meant a burden and even threat for the population. Thus, the *Edict* makes it clear that officials shall not travel unnecessarily. During the travels, they were not allowed to levy more than grass tax for their horses and wood tax for fire. Government officials had to refrain from any kind of deceitful behavior towards the population like demanding free board and lodging from the subjects. It was prohibited to force people to sell their goods at extortionate rates and to take the subjects' turquoise, horses and copper vessels in forced exchange under the pretext of business. Punishment should not be imposed out of greed under some trivial pretext. From these regulations one can infer the practices and behavior of officials, especially at times when the central authority of the state was not functioning well.

Dispute Settlement

Modern lawyers might be particularly interested in regulations concerning dispute settlement and something we would call procedural law. It is clear that mediation of conflicts in the villages by renowned persons as *Barmi* was the central feature of dispute settlement in Bhutan. In the Punakha inscription we find some rules directed to government officials who engaged in dispute settlement. The inscription again refers to the laws of the Tibetan imperial period distinguishing three procedural situations,

18 These are the Paro *Ponlop*, Trongsa *Ponlop* and Daga *Ponlop*.

19 These are the *Dzongpon* of Punakha, Wangdue Phodrang and Thimphu.

which demand different kinds of judgments. These rules give wide leeway to an adequate solution of each conflict by mainly setting the ethical basis for giving judgment.

The first rule, explained in the "Law created at the request of *Dolon*" *(Dolon Zhu Chey Ki Thrim)*, refers to the attitude of the judge towards both the complainant and the defendant. The mighty one shall not be *"favored"* and the person of lower status shall not feel *"downhearted."* Thus, especially if the parties of a lawsuit are of different social status, the judge has to act fairly and impartially. The second rule for deciding cases, taken from the "General law created by the great governors*" (Wangchen Chey Ki Thrim)* applies to cases in which both parties are at fault. *Pawo Tsugla Threngwa*, who is cited in the Punakha *Edict*, re-narrates a story from the *Jātaka* tales, when both the Brahmin *Dandin (Eugpachen)* as well as a householder, from whom *Dandin* had borrowed an Ox, were at fault. At the occasion of returning the Ox, *Dandin* did not inform the householder that he had put the Ox in the householder´s enclosure. The householder on his part, though having observed the Ox being returned, did not tether the Ox up. Thus, the responsibility for the fact that the Ox went astray was seen with both of them and King *Me-lung-dong* decided appropriate punishments for each of them.[20] The third rule for deciding cases, applicable to situations where both parties are right, is demonstrated in the internal law of the revenue collectors (*Khap So Nang Pai Thrim*).[21] The newborn son of a householder fell into the river and was swallowed by a fish. Another householder, from a village downstream, butchered the fish, rescued the boy and raised him. As the first householder discovered that the boy was still alive and was being raised by another family, he started to dispute and asked the king to render a decision. The king decided that both of them should raise the boy in turns and both shall find a wife for him. If one family raises their offspring, it shall get the name of the other family. If a boy, who is raised by one family, later becomes a monk, he shall be known as a monk of the second family. Thus, the decision shall lead to the happiness of all three of them. This story gives an example of a creative solution to a conflict in

20 Whether the kinds of punishment – cutting out the tongue for not having informed the householder and chopping off the hand for not having fastened the Ox – are really adequate shall not be discussed here.

21 *dPa'-bo gTsug-lag phreng-ba, mKhas pa'i dga' ston*, 194.

which none of involved parties had done anything wrong. Both parties have somehow invested in the child – genetically, emotionally and financially. The decision considers this, and furthermore creates a solution where not only both of the litigants but also a third person become *"happy."* We can only guess who that third person might be. Some have suggested that it could be the judge.[22] However, it is more probable that the sentence alludes to the boy and perhaps furthermore to the community involved in these complicated situations that were rendered happy by the decision of the judge. The third rule regards cases where a larger part of the community is affected by a conflict. It thus reflects an important feature of traditional dispute resolution where the process of conflict solving aims at restoring harmony within the whole community.

Tax Concerns

As one can see from above, the Punakha *Code* is not a *Criminal* or *Civil Code*. Rather, it is primarily concerned with matters we would today classify as public law. When the *Edict* addresses commoners the main interest is to regulate tax issues. Matters of civil law like concluding contracts, marriage and divorce apparently were of no great interest to the state. Admittedly, we do find some regulations about the legal transfer of estates as well as of inheritance, but only insofar as they affect taxation matters. Money, goods and work had to be effected in order to support the monastic establishments, the state officials and infrastructure projects like the building of *Dzongs*, temples, bridges, roads to name a few. As the central feature of the Bhutanese tax system was the payment of taxes in kind *(Loen Threl),* the Punakha inscription restrains the payment of taxes in money *(Kam Threl)*. Thus, only old people, who do not have servants or children to do the farm work, shall pay dry tax as long as they live. After they had passed away, a relative had to be found who could take over the tax estate and eventually engage in the production of goods for the state. It was an eminent concern of the state that no taxable estate remains without owner. Should this nevertheless be the case, a substitute taxpayer had to be found by all means. As a suitable measure to that end, we find the regulation that

22 Dotson (2006: 348) referring to *Dung-dkar bLo-bzang 'phrin-las. Bod rig pa'i tshig mdzod chen mo*. Beijing: *Krung-go mi-rigs dpe-skrun khang*, 2002: 300.

"when a man and a woman stay in the monastery as a couple, they shall be placed as substitute tax-payers". They were given an abandoned tax estate to live there as a family engaging in agriculture. Summarizing, the inscription states that one shall not live in a village without paying taxes.

Written and Unwritten Law

If we compare the Punakha inscription or the *Legal Code* of 1729 with today's modern *Legal Order* we realize that in the 17th and 18th century only a few legal concerns were recorded in writing. If we consider the social circumstances, the reason for this becomes clear. Apart from the monks in the monasteries, people were mostly illiterate and lived far away from centers like Punakha as herders and farmers. It would have made little sense to lay down in writing rules for people unfamiliar with reading. In order to understand the importance of the Punakha inscription, we need to take into account where and in which form it was enacted: It was mounted within Punakha *Dzong*, opposite of the main entrance, being a highly visible act for the inhabitants and visitors of the *Dzong*. Its very presence and its location demonstrate the importance of law and fair governance in Bhutan. According to the location of the inscription its addressees are primarily government officials of all ranks and it deals with their behavior and duties. A considerable part of these regulations contains ethical guidelines, deeply rooted in Buddhist law and philosophy. As an example, the five fundamental laws (*pañcaśīla), (Ten Thrim Nga)*, which form the basic ethical rules for lay followers of Buddhism as laid down in the sutras, shall be mentioned. They contain the rules of not killing, not stealing, not lying, no sexual misconduct and not drinking or – at least – being moderate in drinking alcohol. Also the ten unvirtuous deeds *(Mi Gyewa Chu)* and the sixteen pure rules of human conduct *(Michoe Tsang Ma Chudrug)* are cited. Contrary to that, apart from some fundamental rules of criminal law, the legal affairs of common people in their daily lives were regulated by unwritten, customary law.

Conclusion

The *Donag Thrim* encapsulates the laws propounded by *Zhabdrung Ngawang Namgyal* that was inscribed at the Punakha *Dzong Chung*. The *Legal Code* of 1729 was neither a *Criminal* nor a *Civil Code*. The *Code* is considered as the first *Constitution* of Bhutan elaborating the early administration of Bhutanese polity, settlement of disputes, and enshrining the duties of the civil servants, who were expected to serve with responsibility, dedication and allegiance. The *Legal Code*, which is called as the *Legal Code* of the *Dharma Raja* was aimed at bringing benefit and happiness to the people. The *Code* shows us how *Zhabdrung Rinpoche* secured the Bhutanese nation state and ensconced it with duties of the common people, introducing the ideals of equality and a system of just judicial thought in early Bhutanese theocracy. It has enunciated legal principles echoing the deep legal principles of the *Vinaya* Buddhist texts, embodying laws based on Buddhist principles and egalitarian concepts.

'Neither the Deer is Killed; nor the Tiger Goes Hungry': A View of Bhutan's Customary Dispute Resolution System through Mediation[1]

Introduction

The '*Nangkha Nangdrig'* system or the resolution of disputes through mediation is not a new concept for the Bhutanese people. It is a traditional method of dispute resolution. It fits the natural way of Buddhist life. Bhutan is called *Druk Yul* – 'the land of the Thunder Dragon'. For most of its existence, Bhutan has been closed off to the outsiders. Sandwiched between India and China, its borders are guarded by the Himalayan mountains which make the country rather inaccessible. The peaceful country has cautiously opened its borders to tourists since 1974, solely under strict conditions and only through a handful of recognized travel organizations. Bhutan is being modernized for sure, but in a very gradual way, ensuring that Bhutanese people only gain the benefits of modern civilization, whilst avoiding the disadvantages. Bhutanese people are careful to protect their nature and culture. The smoking is prohibited and people wear their national dresses.

In this short Article, I try to appreciate the effective and informal dispute resolution system existing in Bhutan; and how the *Nangkha Nangdrig* system complements the principle of *Gross National Happiness* (GNH) by treading the Middle Path.

The Gross National Happiness

Mediation fits perfectly with the idea of GNH for which Bhutan has become famous. It is not just the economic gain that is crucial to the prosperity and well-being; but the pursuit of balance of material wealth and spiritual values. This notion of GNH was introduced in 1972 by the fourth King of Bhutan, and since then the growth is measured on the basis of equitable economic development, environmental protection,

1 Contributed by Erica van der Leeuw.

preservation of culture and good governance. The wellbeing of the people takes precedence over the economic prosperity at all costs.[2] Legal regulations and the establishment of courts and lawyers are relatively new in Bhutan.[3] Alternative Dispute Resolution (ADR) is a fundamental part of the legal system, and a method that is deeply rooted in Bhutanese culture.[4] It is not considered culturally appropriate to approach courts for trivial differences and disputes. Neighbors frown upon the frivolous disputes or the disputing parties patch up over social meals and drinks in the presence of elderly members of the community whose words are regarded and respected for social harmony.[5]

Valuing Relationship and Social Harmony

The commercial mediation is increasing in the urban centers of the country. A limited number of mediations services are rendered by the commercial mediators, mainly lawyers and para-legal service providers, on issues such as real estates and contractual obligations in construction industry. Most mediation take place in rural areas and deal with matters that involve issues such crop damages, irrigation water, child custody, etc. Traditionally, people sought the guidance of village leaders in resolving conflicts, typically learned priests or a secular authority like a village chief, a retired soldier or a civil servant: someone who is widely respected because of age, experience and sense of justice.[6]

This form of conflict mediation is called '*Nangkha Nangdrig'* - healing conflicts in a confidential setting. It is widely used, especially after the *Bhutan National Legal Institute* reformed and strengthened it by imparting professional mediation skills to the community and local government leaders. For the rural population who live inter-dependent life in close-knit

2 See Yargay, L R 'Mediation: Treading the Middle Path in Dispute Resolution for Community Vitality and Gross National Happiness'. *Bhutan Law Review*. Vol. 11, Spring 2019.

3 See Tobgye, S 'Judges and Judging in Democratic Bhutan,' *Bhutan Law Review*, Vol. 9, February 2018.

4 See Case, J H 'The Law and Happiness in Bhutan', *Harvard Law Bulletin*, Spring 2017.

5 See above note 2.

6 See Needup, P '*Nangkha Nangdrig* (Mediation): A Panacea for Dispute Resolution in Bhutan.' *Bhutan Law Review*, Vol. 11, Spring 2019.

societies, community and good relationships are of the utmost importance. If you are arguing about irrigation, ownership of cattle or damage caused by a cow, you have a lot to gain by maintaining a good relationship with your neighbors. In rural areas, people help each other from the religious rituals to farm hands to child births. People turn their back on those who continue to argue or start litigation. This can lead to people being troubled by unresolved conflicts for generations. The Buddhist attitudes of compassion and mutual tolerance also reinforce the focus on balanced relationships. Buddhism is the prevailing religion and to most of the population the "Middle Way" is the second nature.[7] The pursuit of harmony is paramount. They insist on finding a win-win solution and compromise if necessary, rather than picking a fight and ruining the relationship. As the Bhutanese saying goes: "Neither the deer is killed, nor the tiger goes hungry," the deer can save its own skin by offering the tiger a different meal. 'Neither the stick is broken, nor the snake gets killed,' roughly means the same thing: to drive away the snake with a gentle tap. There is no need to deal a lethal blow and run the risk of breaking the stick; as well as killing the snake. If you settle for a little less, a better and lasting solution will present itself.[8]

Out-of-Court Settlement

Mediation is mainly used for the resolution of civil disputes. For large business disputes, for example in construction, arbitration is popular. If and when disputes reach court, it is mandatory for the courts to remind the parties if they want to resolve their disputes out of courts. In fact, the courts are required to allow the parties to withdraw their cases at any stages of the hearing before the judgments are passed and allow the parties to resolve the cases out of courts if they desire. In the absence of in-house court mediators, the parties go and find mediators out of the court and return with the settlement agreement if the mediation was successful. If the mediation is unsuccessful, the court will deal with the case as per laws.[9]

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7 See above note 2.

8 See Yargay, L R 'Mediation in Bhutan: 'Saving Faces and Raising Heads', *Bhutan Law Review*, Vol. 4. November 2015.

9 See Section 150 of the *Civil and Crimianl Procedure Code of Bhutan, 2001*

Court-Annexed Mediation

The latest development in the field of ADR in Bhutan is the introduction of *Court-Annexed Mediation*. This concerns cases that are already registered with the court. Sometimes during the trial it becomes clear that mediation could help solve the case. The judge with the request and consent of the parties refers the cases to the judicial mediators and limits him/herself to monitor the progress of the mediation. The adjudication of the case is suspended during the mediation.[10] This is what we also do in the Netherlands.

The challenge for Bhutan lies in preventing this internal mediation to become a pull factor. It should not lead to a situation where people say, 'We'll just go to court; mediation will always remain an option, since the courts offers it too.' The introduction of the *Court-Annexed Mediation* system is intended to reduce the number of cases, which need to be dealt by the judges. With that goal in mind, a great deal is also invested in the quality of local or the community mediation.[11]

Mediation Skills Capacity Building

At the initiation of the president of the *Bhutan National Legal Institute*, Her Royal Highness Princess Ashi Sonam Dechan Wangchuck, the Institute has been training lawyers, mediators and local authorities in mediation skills since 2012. Reasons are three-fold - to secure the quality of traditional mediation, promote standardization of the process; as well preserve and strengthen social harmony by preventing the people from approaching the courts for adversarial win-lose outcomes.[12]

Is it 6 or 9 or both?

Seven different colors make the beautiful rainbow. For variety's sake, it is good for each and every single one of us in the world are different; but

10 See Yargay, L R and Chedup, S 'The Court-Annexed Mediation: Enhancing Access to Justice through In-House Court Mediation Services in Bhutan', Bhutan *Law Review*. Vol. 10, Fall 2018.

11 Ibid

12 See Tenzin, 'Amicable Resolution of Community Disputes - Appraisal of the Impact and the State of Mediation (Nangkha Nanghdrig) Trainings.' *Bhutan Law Review* Vol.8, November 2017.

what is not desirable is that each one of us perceive or view things, matters and issues differently – giving causes for differences and disputes, due to multiple and partial perceptions. To my amusement, I recognize one of the illustrations used in the training in Bhutan from my own mediation training in the Netherlands: "Is it a 6 or a 9, or both"? Additionally, the Bhutanese trainers often show the trainees a banknote: from their side it shows a fortress, but the trainees see the king. Only when you turn the note around, take on a different perspective, you see the other side - a view that is just as true as your own. Thus presents a holistic or three hundred sixty degree view of the problems to be solved together.[13]

Conclusion

A Bhutanese mediator does not use offices or flip charts, he simply visits people and sits on the floor, just like them. Confidentiality is key and the discussions proceeds informally - exploring, understanding interests, coming up with potential solutions, and making agreements. In the rural countryside involving minor issues, the agreements are not necessarily put down on paper. You just come to mutually agreeable solutions, say sorry and patch up over glass of wine or tea – restoring the relationship and social harmony in the community. More so than in Western culture, Bhutanese cultural values involve respect and upholding your fellowmen's self-esteem – restoring the respect and dignity of the person who was hurt.[14] However, not every mediation succeeds, not even in Buddhist Bhutan. I found it fascinating to step into the shoes of colleagues on the other side of the world and to discover that we share many similarities in the mediation of disputes.

13 See Chedup, K 'Nangkha Nangdrig – To Resolve Internally and Amicably'. *Bhutan Law Review* Vol.1, 2013.

14 See above note 7; also See 'Paralegals hone Mediation Skills', available at www.kuenselonline.com.

Ensuring Fair Trial and Effective Justice: Examining the Right to Representation in Criminal Cases in Australia and Bhutan[1]

Introduction

The right to counsel in Bhutan is both an undeniable and inalienable fundamental right under Article 7 Section 21 of the *Constitution of Kingdom of Bhutan 2008 (Constitution)* and a statutory right under Section 33 of the *Civil and Criminal Procedure Code of Bhutan 2001 (CCPCB)*. This right entitles a person with discretion to appear in person or be represented by a Bhutanese legal counsel of his or her choice before a court. Where one needs counsel but cannot afford it, the state may arguably be mandated to provide one or pay their legal expenses.[2] While certain fund is reportedly allocated by the state for the purpose, it is reported to be lying still with no intended beneficiaries coming forward.[3] The speculation into reasons for unutilised budget ranges from the absence of a clear procedure and a specific agency to administer it to lack of public awareness of it.[4] Following deliberation, the *National Council*, the Upper House, is reported to have sent its resolutions on legal aid to the government.[5] There is no report on whether the *National Assembly*, the Lower House, deliberated on this issue.

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1 Contributed by Karma Tshering.

2 *CCPCB s 34*. See Jamyang Sherub, *Legal Aid in Bhutan - Background Paper for Legal Aid Symposium 27-28 October* 2014 (26 April 2017) <http://www.unct.org.bt/legalaid/doc/Background%20paper%20on%20Legal%20aid%20in%20Bhutan%20FINAL2.pdf> and Sonam Tobgye, *The Constitution of Bhutan: Principles and Philosophies* (Supreme Court of Bhutan, 2015) 165-166, 181. See also Karma Tshering, 'Administration of Criminal Justice in Bhutan – From the Right to Counsel Perspective' (2017) *LAWASIA Journal,* 1.

3 Damcho Zam, 'No takers for cost-free legal aid service', *Kuenselonline* (Thimphu), 31 March 2016. See Tashi Dema, 'NC discusses providing legal aid service to indigent person', *Kuenselonline*, 25 November 2017 and Tashi Dema, 'NC sends resolutions on legal aid services to government', *Kuenselonline,* 29 November 2017.

4 Zam and Dema, n 2.

5 Tashi Dema, 'NC sends resolutions on legal aid services to government', *Kuenselonline,* 29 November 2017.

Meanwhile, self-representation remains a common yet overlooked phenomenon in Bhutan.[6] With no functioning legal aid system, including the public defense system, many accused may find themselves with not much option than to appear in person. While they will always be prosecuted by the competent representative of state prosecution agency, namely, the Royal Bhutan Police or the Office of Attorney General, as the case may be, they may or may not have skills and knowledge required to defend charges filed against them. The criminal defendants are often not qualified legal practitioners. The imbalance between the prosecution and defense inevitably raises doubt as to whether the courts can ensure a fair trial in the absence of legal representation.[7] In the absence of a consistent and appropriate response to the phenomenon of self-representation by criminal defendants, improving (and ensuring) fair trial may be difficult. Self Representing Litigant (SLR) may not receive a fair trial. Against this backdrop, undoubtedly, legal representation and other forms of assistance provided by the courts may help to ensure a fair trial to a litigant, particularly SRLs. However, the extent of representation and court interventions as is appropriate and necessary to ensure a fair trial for an SRL is not clear. There is little scholarly discussion about the concept of a fair trial in Bhutan. One exception is Dubgyur *J*'s Book '*A Handbook on Criminal Procedure*'.[8] Dubgyur *J* provides a general discussion of some aspects of a fair trial contained in the procedural law but does not clarify how the fairness of a trial is or would be evaluated in the Bhutanese context.

This article seeks to define and develop criteria for a fair trial in Bhutan through an examination of the right to legal representation as an aspect of a fair trial and the inherent ensuing duty of the court to ensure it. Comparative reference to the conception of a fair trial in Australia is made to explicate its meaning with a special assessment of laws and practices in Bhutan. It explores some questions surrounding what is a fair trial, whose

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6 Sherub J, *Legal Aid in Bhutan- Background Paper for Legal Aid Symposium 27-28 October* 2014 (26 April 2017) <http://www.unct.org.bt/legalaid/doc/Background%20paper%20on%20Legal%20aid%20in%20Bhutan%20FINAL2.pdf>.

7 Faulks *J*, *Self-represented litigants: Tackling the challenge. In Managing People in Court Conference,* (21 May 2017) < https://njca.com.au/wp-content/uploads/2013/07/Justice-Faulks.pdf>.

8 Dubgyur L, *Criminal Justice in Bhutan: A handbook on Criminal Procedure* (Research Division, High Court, 1st ed, 2006).

interests the fair trial right seeks to protect, the relationship between a fair trial and legal representation, and the duty of the court to ensure fair trial vis-à-vis SRLs. It also examines the inquisitorial powers that the courts in Bhutan can exercise to ensure a fair trial. Based on the comparative assessment, this article identifies a gap in the literature and information about the fair trial and SRLs in Bhutan. It highlights the need for further research on the issue of SRLs and the scope of court intervention to protect the right to legal representation of SRLs as an aspect of their right to a fair trial.

Defining Fair Trial

A. Australia

In the common law system, the principle of fair trial evolved through case law over time. In Australia, *Dietrich v the Queen*[9] has been described as the most symbolic and powerful legal case of the 20th century concerning fair trial rights.[10] The Court in *Dietrich* held that the right to a fair trial is a central pillar of the Australian criminal justice system.[11] In the context of the right to counsel as an aspect of a fair trial, the Court held that the availability of legal representation is a precondition for a fair trial on serious charges. The majority held that:

> *[A]n application for an adjournment or a stay by an indigent accused charged with a serious offence, who through no fault on his or her part, is unable to obtain legal representation, the trial ... Should be adjourned, postponed or stayed until legal representation is available. If … application … is refused and, by reason of the lack of representation of the accused, the resulting trial is not a fair one, any conviction of the accused must be quashed by an appellate court for the reason that there has been a miscarriage of justice in that the accused has been convicted without a fair trial.*[12]

The *Dietrich* ruling, however, identifies no specific requirements of a fair trial at common law except that a person must not be convicted of an

9 *Dietrich v The Queen* (1992) 177 CLR 292.

10 Gans J et al, *Criminal Process and Human Rights* (The Federation Press, 2011) 377.

11 *Dietrich v The Queen* (1992) 177 CLR 292, Mason *CJ* and McHugh *J*, 298.

12 Ibid 315.

offence unless the trial is 'a fair trial according to law'[13] or 'a fair trial.'[14] It is a common law right 'manifested in the rules of law and of practice designed to regulate the course of the trial.'[15] The nature of the right is negative – a right not to be tried unfairly rather than a right to a fair trial.[16] It is a safeguard to prevent innocent people from being convicted of crimes.[17] This implies that 'where there is only the common law 'right,' a defendant cannot insist a trial be conducted in a particular way,'[18] but he or she should be able to seek to appeal in accordance with appeal statutes or seek a stay of the proceeding if the resulting trial is unfair. As such, the right to a fair trial that includes the right to counsel is subject to the *Dietrich* conditions contained in the majority ruling mentioned above.[19]

In jurisdictions of the Australian Capital Territory (ACT) and Victoria, there are human rights statutes. In these jurisdictions, the right to a fair trial is not only a common law right but also a statutory right guaranteed under a statute.[20] Their respective human rights statutes provide a list of specific fair trial prerequisites[21] in addition to common law requirements. The human rights legislation in ACT and Victoria specifically provides for minimum fair trial rights guarantees in criminal proceedings.

13 Ibid Gaudron *J,* 362.

14 Ibid Deane *J,* 326

15 Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws – Final Report*, Report No 129 (2015), 221 [8.12].

16 *Jago v District Court of New South Wales* (1989) 168 CLR 23. Also See *Dietrich v The Queen* (1992) 177 CLR 292, 299 and Jeremy Gans et al, above n 9, 378.

17 Australian Law Reform Commission, above n 14, 220 [8.2].

18 Gans J et al, above n 9, 378.

19 *Dietrich v The Queen* (1992) 177 CLR 292, Mason *CJ* and McHugh *J*, 315. The detail explanation of *Dietrich* conditions for the minimum approach to legal representation (as to indigence of the accused, serious charges, no-fault, and exceptional circumstances) is beyond the scope of this article.

20 The other States also have both common law and statutes. For example, *The Criminal Code 1899* (Qld) s 616 contains some protections relating to appearance and fair conduct, including the right to counsel.

21 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 24-26 and *Human Rights Act 2004* (ACT) ss 21-22.

Section 22 of the *Human Rights Act 2004* (ACT) states that:

> 22 Rights in Criminal Proceedings
>
> (1) …
>
> (2) Anyone charged with a criminal offence is entitled to the following guarantees, equally with everyone else:
>
> (a) to be told promptly and in detail, in a language that he or she understands, about the nature and reason for the charge;
>
> (b) to have adequate time and facilities to prepare his or her defence and to communicate with lawyers or advisors chosen by him or her;
>
> (c) to be tried without unreasonable delay;
>
> (d) to be tried in person, and to defend himself or herself personally, or through legal assistance chosen by him or her;
>
> (e) to be told, if he or she does not have legal assistance, about the right to legal assistance chosen by him or her;
>
> (f) to have legal assistance provided to him or her, if the interests of justice require that the assistance be provided, and to have the legal assistance provided without payment if he or she cannot afford to pay for the assistance;
>
> (g) to examine prosecution witnesses, or have them examined, and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as prosecution witnesses;
>
> (h) to have the free assistance of an interpreter if he or she cannot understand or speak the language used in court;
>
> (i) not to be compelled to testify against himself or herself or to confess guilt.[22]

22 *Human Rights Act 2004* (ACT) s 22.

Similarly, section 25 of the *Charter of Human Rights and Responsibilities Act 2006 (Vic) (Human Rights Charter)* states that:

> 25. Rights in Criminal Proceedings
>
> (1) …
>
> (2) A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees –
>
> > (a) to be informed promptly and in detail of the nature and reason for the charge in a language or, if necessary, a type of communication that he or she speaks or understands; and
> >
> > (b) to have adequate time and facilities to prepare his or her defence and to communicate with a lawyer or advisor chosen by him or her; and
> >
> > (c) to be tried without unreasonable delay; and
> >
> > (d) to be tried in person, and to defend himself or herself personally or through legal assistance chosen by him or her or, if eligible, through legal aid provided by Victoria Legal Aid under the *Legal Aid Act 1978*; and
> >
> > (e) to be told, if he or she does not have legal assistance, about the right, if eligible, to legal aid under the *Legal Aid Act 1978*; and
> >
> > (f) to have legal aid provided if the interests of justice require it, without any costs payable by him or her if he or she meets the eligibility criteria set out in the *Legal Aid Act 1978*; and
> >
> > (g) to examine, or have examined, witnesses against him or her, unless otherwise provided for by law; and
> >
> > (h) to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses for the prosecution; and

> (i) to have the free assistance of an interpreter if he or she cannot understand or speak English; and
>
> (j) to have the free assistance of assistants and specialised communication tools and technology if he or she has communication or speech difficulties that require such assistance; and
>
> (k) not to be compelled to testify against himself or herself or to confess guilt.[23]

The rights protected under the above provisions affect both the hearing of any charge as it may arise as well as how an accused is treated during the pre-trial stage.[24] The provisions cited above recognize many aspects or ingredients of a fair trial. Of this, the article considers the right to legal representation as a (central) aspect of a fair trial. It is a right which is not only essential during the pre-trial stage but also during the trial, and as such, seen as central to the right to a fair trial.[25] In the context of a right to legal representation, these provisions provide three guarantees. First, an accused is entitled to be present during the trial or defend himself or herself, or be represented by counsel of his or her choice. Second, an accused is entitled to be told of his or her right to legal assistance of his or her choice if he or she does not have one. Third, an accused must be provided legal counsel without having to pay for it if he or she lacks sufficient funds and where the interests of justice require.

The conception of a fair trial in the Australian jurisdiction of Victoria was considered in the case of *R v Williams.*[26] King *J* held that both common law and sections 24 and 25 of the *Human Rights Charter* are important considerations in determining what would constitute a fair hearing in respect of a criminal trial.[27] Her Honour held that fixing or adjourning

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23 The *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 15.

24 *R v Williams* [2007] VSC 2, King *J*, 42.

25 Asher Flynn, Jacqueline Hodgson, Jude McCulloch and Bronwyn Naylor, 'Legal Aid and Legal Representation: Redefining the Right to a Fair Trial' (2016) (Vol. 40) *Melbourne University of Law Review*, 207, 209.

26 *R v Williams* [2007] VSC 2, King *J*, 54-55, cited in Jeremy Gans et al, above n 9, 380.

27 Ibid King *J*, 54. Note while s 25 *Charter of Human Rights and Responsibilities Act 2006*

a trial date should be up to the discretion of court as it has obligation 'to act judicially and balance a number of factors, including but not limited to, matters such as the availability of counsel, the availability of witnesses and the proper availability and allocation of court time.'[28] In this case, the time required to adjourn the proceeding was unreasonably long, thereby, defeating the very purpose of the procedural law requirement for the trial to commence on time. There were three witnesses, who already made their statements, undergoing custodial sentences in exceptionally difficult situations. There was a co-offender who would have undergone more than three years in custody by the next date of trial. The interests of the community and justice required evidence to be given without undue delay so that the witnesses could recall the event clearly and to be given before they become fearful of giving it, and that the matter is determined so that there is finality to the process of criminal law. In view of these reasons, the Court held that even if the accused was said to have a right to a particular counsel under the statute, unavailability of a particular counsel or counsel of choice within a reasonable time was not an appropriate basis for an adjournment, and in any case adjourning the trial for at least six months was not in the interests of justice when the trial was able to proceed.[29]

The relevance of the *Human Rights Charter* was more specifically considered in the case of *Gary v DPP,*[30] though in the context of bail. In this case, the accused, who was charged with some offences, was refused bail by a magistrate under a bail law that provided that a person under a relevant charge should not be released on bail except where continued detention is not justified. The accused argued before the Supreme Court that his detention was not justified given the charges. He argued that even if he were to be found guilty, there was the risk that he might spend more time on remand than under sentence. In this case, none of the party based their arguments on the *Human Rights Charter.* However, the Court held that the provisions of the *Human Rights Charter* were highly relevant, and in this

(Vic) is extracted above, s 24 relevantly sets out the right of a person charged with a criminal offence to have the charge dealt with by a competent, independent and impartial court.

28 Ibid 50.

29 Ibid 58-69.

30 [2008] VSC 4.

case concerning the question of bail. The Court held that the continued detention of the accused was not justified as it breached his right to be tried without unreasonable delay.

In Australia, whether at common law or under human rights statutes, the elemental features of a fair trial are also related to the fundamental attributes of a court.[31] To be able to ensure a fair trial or for a fair trial to be possible, a court should not only be an open, impartial and independent adjudicator but also be an interventionist adjudicator, able to intervene into proceedings whenever necessary to ensure procedural fairness.

In the words of Brennan J, the content to the concept of a fair trial is rather a body of judicial decisions, as what is fair has been subject to continual refinement and continues as 'the onward march to the unattainable end of perfect justice.'[32] However, common law holds that the concept of a fair trial cannot possibly be formulated exhaustively or comprehensively in advance. The courts cannot remain static in its role to ensure fair trial right and fair administration of criminal justice. It must accordingly evolve because ultimately the court must decide whether in all circumstances a trial should proceed and if an accused without counsel will have a fair trial.[33]

B. Bhutan

The *Constitution* and *CCPCB* provide laws relating to the right to a fair trial in Bhutan. However, these laws contain no specific mention of the phrase 'fair trial,' and therefore, it is not precisely defined. It is not identified as a specific right under one provision, rather the principles that constitute the right to a fair trial are scattered throughout several provisions. As such, analysis of this right is complex and potentially confusing. Nevertheless, examining what a fair trial means at different stages of the criminal justice process might facilitate a proper understanding of the concept. Consequently, the minimum guarantees of a fair trial contained under the

31 *Wainohu v New South Wales* (2011) 243 CLR 181 cited in Australian Law Reform Commission, above n 14, 221 [8.21]. See also s 24 *Charter of Human Rights and Responsibilities Act 2006* (Vic).

32 *Jago v District Court of New South Wales* (1989) 168 CLR 23, 54.

33 *Dietrich v The Queen* (1992) 177 CLR 292, Toohey *J*, 357.

Bhutanese *Constitution* and *CCPCB* are delineated within the three major parts or stages of the criminal justice process, namely, pre-trial, trial and post-trial. This article focuses on the trial stage and especially on the relationship between legal representation, or lack of it, and a fair trial.

In Bhutan, at the pre-trial stage, the fair trial rights are argued to start as soon as a person's liberty and freedom is interfered with and until he or she is brought to a trial. It commences by protecting an alleged suspect from arbitrary arrest and detention.[34] If arrested before trial, it entitles the accused to know the reasons for arrest,[35] consult a legal counsel and prompt production before the judge.[36] Such procedural safeguards allow the suspect to challenge the lawfulness of the arrest and detention.[37] Even if arrest and detention are found legal, the fair trial right ensures that any further pre-trial detention is free of torture and the conditions are humane.[38] It includes the right to communicate with others during detention.[39] At this stage, the fair trial right aims to ensure a person maintains his or her fundamental right to life, liberty, and security of person. Unless as per the due process of the law, any act or omission that results in deprivation of these rights would be illegal[40] and unconstitutional.[41] These provisions ensure that no man is left to the 'state of nature'[42] of having to fear another but can live freely without being subjected to physical or psychological incarceration.[43] If the arrest or arrest warrant is not proper, a suspect or his legal counsel is entitled to assert a motion for improper arrest or arrest warrant.[44] Otherwise, the unfair and unlawful conduct of pre-trial processes involved in arresting, detaining, and bringing an accused to a trial, cannot render any resulting trial a fair one.

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34 *Constitution* a 7 ss 1 and 20 read with ss 158 and 164.5 of *CCPCB*.

35 *CCPCB* s 184.

36 Ibid s 188.1.

37 Ibid s 188.1.

38 *Constitution* a 7 s 17 read with *CCPCB* s 160.

39 Ibid a 7 s 19 read with *CCPCB* ss 7 and 184.1.

40 *CCPCB* s 158.

41 *Constitution* a 7 s 1.

42 J. C. Gaskin (ed) *Thomas Hobbes–Leviathan* (Oxford University Press, 1996) XIV: 84.

43 Sonam Tobgye, *The Constitution of Bhutan: Principles and Philosophies* (Supreme Court of Bhutan, 2015) 165.

44 *CCPCB* s 164.5.

At the trial stage, the fair trial right starts as soon as the alleged suspect is questioned by police and is charged. It ensures equal access to, and equality before,[45] an independent, impartial and competent tribunal established by law.[46] It requires that the hearings are conducted fairly and openly,[47] the presumption of innocence is accorded[48] and prompt notice of nature and reasons for criminal charges are rendered.[49] The trial should commence without unreasonable delay and without compromising the capacity of the accused to adequately prepare his or her defence.[50] The choice to defend oneself or through legal counsel,[51] and examine and cross-examine the witnesses[52] must be allowed. If he or she cannot understand the court language, an interpreter must be made available.[53] No defendant should be forced to testify against him/herself.[54]

At the post-trial stage, the fair trial right allows the accused the right to appeal[55] and mandates the court to observe certain other rules like the rule against double jeopardy[56] and compensation for miscarriage of justice.

Given the manner the laws in Bhutan seek to ensure fairness throughout the justice process, it is argued that a fair trial is a set of rights throughout the trial processes that form an over-arching principle which requires that the trials are conducted as per the law and the standard procedural rules of courts. A fair trial under the Bhutanese laws would be possible if hearings are conducted fairly, justly, and with procedural regularity by an impartial court or judge in addition to affording defendants' rights under

45 *Constitution* a 15 read with *CCPCB* s 3.
46 *CCPCB* s 4.
47 Ibid s 4.
48 *Constitution* a 7 s 16.
49 *CCPCB* s 184 read with s 187.
50 Ibid s 188.
51 *Constitution* a 7 s 21 read with *CCPCB* s 33.
52 *CCPCB* s 90.
53 The charge must be written in the language of court *Dzongkha* under section 187.1(c) of *CCPCB*. No provision of the law mandates the provision of an interpreter. But by practice, the court proceedings take place in Court language or languages known and understood by the parties to a case.
54 *CCPCB* ss 184.2-3.
55 Ibid ss 109-111.
56 Ibid s 206.

the law. The courts would need to ensure procedural fairness so that any trial is a fair one. This fairness obligation of the courts in Bhutan is argued to not only adhere to the requirements of the procedural law but also promote and further the attainment of the national objective or aspiration of happiness under the good governance pillar of the over-arching legal-theoretical approach of *Gross National Happiness* (GNH). Bhutan is a GNH state with a constitutional mandate to endeavour to attain GNH.[57] While a detailed analysis of GNH as a theoretical framework for studying fair trial and SRLs in Bhutan remains beyond the scope of this article, it does, however, argue that the GNH conception of fairness and fair trial as a key to happiness could more effectively address the interests of defendants and victims and their families and community and as well be in the interests of judicial officers in the fair administration of justice. Under this extensive interpretation and application, the conception of a fair trial could call for a more concerted approach to managing SRLs and ensuring them a fair trial through varying measures as are necessary - a much broader mandate and an approach to the fair administration of justice.

What is Fair and Fair for Whom?

A. Australia

Generally, what is fair may depend on the specific context or situation in which the concept is interpreted. In Australia, the concept of 'fair' or 'fairness' is not capable of a concise definition. The notion of fairness defies 'analytical definition … [n]or is it possible to catalogue in the abstract the occurrence outside or within the actual trial which will or may affect the overall trial to an extent that it can no longer properly be regarded as a fair one.'[58] The idea of fairness should be assessed on a case by case basis. The Court held that:

> *Putting to one side cases of actual or ostensible bias, the identification of what does or what does not remove the quality of fairness from an overall trial must proceed on a case by case basis and involve an undesirably, but unavoidably, large content of essentially intuitive judgment. The best that one can do is to formulate relevant general propositions and examples derived from past experience.*[59]

57 *Constitution, a 9 s 2.*

58 *Jago v District Court of New South Wales* (1989) 168 CLR 23, Deane *J*, 35.

59 Ibid Dean *J,* 35.

Similarly, Gaudron *J* in *Dietrich* observed:

> *… [W]hat is fair very often depends on the circumstances of the particular case. Moreover, notions of fairness are inevitably bound up with prevailing social values. It is because of these matters that the inherent powers of a court to prevent injustice are not confined within closed categories…. And it is because of those same matters that, save where clear categories have emerged, the inquiry as to what is fair must be particular and individual. And, just as what might be fair in one case might be unfair in another, so too what is considered fair at one time may, quite properly, be adjudged unfair at another.*[60]

In Australia, a fair trial does not require the trial to be perfect. Rather it requires a trial that does not involve the risk of improper conviction of an accused.[61] The requirement of fairness is held to be independent of and in addition to the requirement of legality.[62] It goes beyond the strict requirements of the law – a trial in strict conformity with the law may still be unfair.[63] For example, as Toohey *J* noted a trial would be unfair if a defendant lost a chance, that was otherwise fairly open, of acquittal.[64] Consequently, ensuring a fair trial does not only depend on administering the substantive law governing the matter in issue but also concerns whether there is or has been the occurrence of any procedural irregularities.[65] Fairness is the purpose of the procedural law.[66] Therefore, the trial judge has the necessary powers to avoid unfairness in all circumstances. For example, in Australia, although a defendant cannot ask the State to provide legal representation free of charge,[67] the Courts have the power to ensure that 'the accused receives the fairest possible trial in all circumstances.'[68]

60 *Dietrich v The Queen* (1992) 177 CLR 292, Gaudron *J*, 364. See also Toohey *J,* 353.
61 Ibid Gaudron *J*, 365.
62 Ibid Gaudron *J*, 362-3.
63 Ibid Dean *J*, 326.
64 Though its interpretation can depend on the facts of a case: Ibid Dean *J*, 356.
65 Ibid Toohey *J*, 353.
66 Ibid Brenanan *J*, 325.
67 *McInnis v The Queen* (1979) 143 CLR 311. See *Dietrich v The Queen* (1992) 177 CLR 292, Toohey *J*, 356.
68 *Dietrich v The Queen* (1992) 177 CLR 292, Dawson *J*, 349.

Conceptualising fair trial may also involve navigating competing interests. However, it is possible to infer from the definition and the list of minimum requirements of a fair trial under Australian law that the conception of fairness is very defendant-centric. The fair trial principles in criminal trials endeavour to ensure a suitable legal environment for the defendant as against the state represented by a competent and qualified counsel.[69] The rationale of this proposition is also found in the observation of the High Court of Australia in the case of *R v Caroll*.[70] The Court said that because a criminal trial constitutes deployment of state power against the individual accused, the rules for the conduct of the same must be implemented given two basic considerations, that: the State as a prosecutor has greater power and resources, and conviction if any is very serious.[71] The criminal justice system is founded on the society's recognition that some conduct is classified as criminal, the perpetrators are prosecuted to conviction and suffer just punishment. However, in certain cases, without safeguards, the power of the prosecution can also be used as an instrument of oppression. These are some values that the criminal law upheld.[72] Therefore, in cases of imbalance of power between the prosecution and accused, for example, in criminal cases involving SRLs, seriousness for an accused of conviction, use of prosecution as an instrument of tyranny, the court must, within its inherent jurisdiction, strike a balance to ensure a fair trial.

B. Bhutan

Chapter one of the *CCPCB* postulates the principles of the judiciary. The court must, amongst other things, ensure a person's right to a fair trial[73] without bias or perceived bias.[74] Any matter must be decided impartially and based on the facts of a case and per the rule of law.[75] Within these

69 Gans J et al, above n 9, 380.

70 *R v Caroll* (2002) HCA 55 cited in Jeremy Gans et al, above n 9, 380.

71 Although, later, the state versus individual-based formulation of a fair trial was remodelled to spread fairness rights to vulnerable witnesses and victims. For example, prevention of abusive and degrading cross-examination of rape victims: See Jeremy Gans et. al., above n 9.

72 *R v Caroll* (2002) HCA 55, 22.

73 *CCPCB* s 4.

74 Ibid s 6.

75 Ibid s 5.

broad principles of adjudication, it would be proper for the courts in Bhutan to adopt the measures necessary to ensure that every trial is a fair one.[76] However, there are no legal sources to guide the precise approach of Bhutanese courts towards ensuring fairness in Bhutan.

In Bhutan, it is argued, that fairness can similarly be interpreted as defendant-centric as in Australia. Any judicial intervention should attempt to balance the unequal arms of the prosecution and the defence and ensure the trial is a fair one. The 'interests of justice' objectives identified under the *CCPCB*, for example, cross-examining witnesses at the discretion of the court[77] and altering or adding any charge before the judgment is pronounced,[78] are some of the means available to the courts to ensure a fair trial. However, it is equally important that the courts must also ensure that in all cases, the cause of a fair trial must be balanced and neither of the parties should be allowed to abuse the Court's processes or incapacitate it from the timely adjudication of cases because even for the state, resources, including time, are not limitless.

Fair Trial and Legal Representation

A. Australia

In Australia, the right to access the court, legal advice, and communicate confidentially with a legal advisor, is considered crucial to a defendant's fair trial. It may be up to a criminal defendant whether to waive their right to legal representation. In cases where the right to legal representation is either refused or waived, the fairness may not necessarily depend on legal representation.[79]

Nevertheless, the High Court held that legal representation is generally essential to, and a precondition for, a fair trial of serious offences.[80] If

76 There are some inquisitorial powers which could facilitate the courts in ensuring fairness in Bhutan. These powers are discussed in the latter part of this article.

77 *CCPCB* s 90.3.

78 Ibid s 187.3.

79 A mere lack of representation would not render a trial unfair. See *McInnis v The Queen* (1979) 143 CLR 575 and *Dietrich v The Queen* (1992) 177 CLR 292, Dawson *J*, 343. See also *Gazeley v Grossetti* [No. 2] [2015] WASC 331, 109.

80 *Dietrich v The Queen* (1992) 177 CLR 292.

an indigent criminal defendant accused of a serious crime needs legal representation but cannot afford it, then legal representation may become a particular issue for a fair trial.[81] Unless there are exceptional circumstances, such trials should be stayed and should not be allowed to proceed without legal representation.[82] It would be in the interests of justice that representation is available, even if at the expense of the public.[83] There may be a possibility that the lack of representation might affect the outcome of the case and deprive the accused of a real possibility of an acquittal, in which case, a trial without it would be unfair.[84] Therefore, a lack of legal representation could render a trial defective or unfair and the appellate court would have to quash any resulting convictions.[85]

B. Bhutan

In Bhutan, as noted, there is rarely equality between the prosecution and the defence in criminal trials. This is primarily because criminal defendants are often unqualified and unrepresented. It is not always possible for defendants to have equal access to justice as they may not always have sufficient resources to finance legal counsel or have the competency to defend charges filed against them.

One way to bridge this disparity and bring about equality between the prosecution and the defence would be to ensure that legal representation, advice, and information are available to defendants both during the key pre-trial stage and during the trial.[86] At the pre-trial stage, arrest and detention should not impede access to legal advice. At the trial stage, a trial proceeding without legal representation may jeopardise a fair trial.[87]

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81 Without it, the accused is bound to face difficulties of not knowing how to establish his or her innocence and the trial procedure risk improper conviction of the accused – though a judge may make efforts to explain the procedures, issues and the law to help him or her: Ibid Gaudron *J*, 369.

82 Ibid.

83 Ibid Dawson *J*, 349.

84 Ibid Gaudron *J*, 375.

85 Ibid Mason *CJ* and McHugh *J*, 315.

86 Jeremy Gans et al, above n 9, 486.

87 *McInnis v The Queen* (1979) 143 CLR 575.

Both the Supreme Court and High Court in the first constitutional case of *The Opposition Leader v The Government*[88] observed that 'in the absence of any substantive law' a person unable to afford legal representation must be accorded with a certain level of legal aid to ensure fair representation, equality before the law and effective protection of law, and equal access to justice and rule of law.[89] The Courts held that without a certain level of legal aid, the accused may be in a disadvantaged situation in comparison with the State, and the court may not be able to serve equal justice, uphold the fundamental principle of a fair trial, and secure the interests of justice.[90] The Courts held that State funding for legal representation is a relevant issue in situations involving persons unable to bear the cost of a trial.[91] It held that the right to legal representation is central to ensuring a fair trial. While one can, at his or her discretion, appear in person before the court, the court must ensure that waiver of the right to counsel, is done competently and intelligently.[92]

However, both the statute and case law are not clear about what categories of cases the right to legal representation applies to and who is to be considered 'indigent.' The Court did not rule on what it means for a defendant to be 'competent and intelligent' to either waive his or her right to counsel or defend him/herself. There is also no legal source in Bhutan that details how courts should manage the waiver of the right to legal representation and trials involving SRLs.

Ensuring Fair Trial – The Duty of the Presiding Judge

A. Australia

The integrity of the justice system depends on more than just getting the correct outcome.[93] It must also ensure a fair outcome. It is an established principle that a presiding judge is obliged to ensure a fair trial. These fair trial obligations require that the court processes are open and adjudication is

88 *The Opposition Leader v The Government*, Judgment No. (Full Bench-10-100) dated 18/11/2010. This was upheld by the Supreme Court (*The Government of Bhutan v The Opposition Party*, Judgment No. SC (Hung-11-1) dated 24/02/2011.

89 Ibid 40.

90 Ibid 61.

91 Ibid 40.

92 Ibid.

93 Jeremy Gans et al, above n 9, 401.

independent and impartial because manifest judicial impartiality, neutrality, and independence are central to the judicial function and the public criminal trial,[94] and are the defining features of the exercise of judicial powers.[95] The fair trial also requires the court to respect the defendant's rights as the conception of the fair process becomes trial-centric once a trial proceeding commences. It is the stage of retrospective check on processes underlying evidence-gathering, investigation and prosecution decision-making.[96] During this stage, a defendant who claims he or she was wronged can challenge it and seek redress.[97] Therefore, as the right to a fair trial is a central pillar of the criminal justice system,[98] the requirement of fairness is intrinsic and inherent. For that matter, the Australian Courts have inherent power to ensure that criminal trials are fair.[99] Every judge in every criminal trial must, within the inherent power of the court, prevent unfairness in the trial.[100]

Consequently, in criminal trials, strict compliance with procedural requirements is paramount. Kirby *J* held that 'the peril of liberty and the risk to reputation have imposed on criminal trials over the centuries a rigorous discipline so that procedural requirements are strictly complied within the defence of the regularity of criminal process and the acceptability of its outcome.'[101]

Hence, at all times, the Court must prevent injustice in a legal proceeding and ensure justice is done in every case. The procedures followed should observe the principle of equality of arms. Every party to a case must be equally allowed to present his or her case without hindering the other. Ensuring procedural fairness to the parties can aid courts to avoid the risk of a miscarriage of justice because 'the procedure of the criminal courts is designed to produce as fair a trial as practicable on the circumstances of

94 *Gassy v R* (200) HCA 18.
95 *Ebner v Official Trustee in Bankruptcy* (2000) HCA 63.
96 Jeremy Gans et al, above n 9.
97 *Dietrich v The Queen* (1992) 177 CLR 292, Gaudron *J*, 363. See Jeremy Gans et al, above n 3, 405.
98 Ibid Mason CJ and McHugh J, 292.
99 Australian Law Reform Commission, above n 14, 221 [8.8].
100 *Dietrich v The Queen* (1992) 177 CLR 292, Gaudron *J*, 363.
101 *R v Birlut* (1995) 39 NSWLR 1, 5.

each case.'[102] As articulated by the Supreme Court of Victoria, a judge must within his or her inherent power ensure every trial is a fair one – 'every judge in every trial, both criminal and civil, has an overriding duty to ensure the trial is fair. A fair trial is the only trial a judge can judicially conduct. The duty is inherent in the rule of law and the judicial process.'[103]

On the other hand, ensuring fairness and impartiality at the same time may be complex and challenging. Judges have to eliminate any personal bias that might compromise the impartiality and neutrality of the judicial office. Like actual bias, the appearance of bias infringes the fundamental principles of impartiality. A reasonable apprehension by a dispassionate lay spectator that a judge might not impartially resolve the question that he or she is to decide would also infringe it. A judge must be free of any prejudgment or appearance of prejudgment or bias – justice must not only be done but seen to be done.[104] In some cases, apprehension of partiality can result from the slightest amount of involvement – for example, from comments or actions of the judge during the hearing that does not appropriately guide or assist parties.[105] However, while they are expected to be generally passive during the trial, the judge must supervise and control the trial process and remain attentive to the whole trial process to ensure fair trial through active case management. Consistently, Australian courts are required, within the inherent duty and power to ensure a fair trial, to apply the rules governing practice, procedure and evidence to ensure fair trial or stay the proceeding if doing so is not sufficient.[106] Judges must conduct trials fairly,[107] including exercising powers to exclude certain evidence under evidentiary rules that aim at creating fair processes[108] – a judicial obligation inherent in the rule of law as well as the judicial process.[109]

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102 *Dietrich v The Queen* (1992) 177 CLR 292, Brennan, *J*, 325.

103 *Tomasevic v Travaglini* (2007) 17 VSC 337. See also *Dietrich v The Queen* (1992) 177 CLR 292, Brennan *J,* 325.

104 *Ebner v Official Trustee in Bankruptcy* (2000) HCA 63, 3.

105 *Antoun* (2006) HCA 2.

106 *Dietrich v The Queen* (1992) 177 CLR 292, Gaudron *J*, 363.

107 Ibid.

108 For example, the evidence obtained through illegal and improper investigation can be excluded by the courts in its retroactive review of police misconduct: See Jeremy Gans et al, above n 9.

109 *Tomasevic v Travaglini,* (2007) 17 VSC 337.

B. Bhutan

In addition to the adversarial trial features, the courts in Bhutan have inquisitorial powers that can be exercised to ensure a fair trial. Some of the powers, relevant to examining the role of the court vis-à-vis SRLs, are contained in *CCPCB* and include maintaining equality between the SRL and the state's prosecuting authority, maintaining the principles of neutrality and impartiality, and ensuring a fair trial. These powers are outlined below.

In the absence of a clear authority on how, when and for what purpose these powers are to be exercised, it could be argued that the exercise of these powers under the *CCPCB* rests with the discretion of each court/judge vis-à-vis their mandate to ensure a fair trial.[110] Depending on the facts and circumstances of a case, a court might have to:[111]

1. Ensure that the right to plead in person or through a legal counsel of his or her choice is accorded, and waiver, if any, is done 'competently and intelligently,'[112]
2. Facilitate access to legal aid for the criminal defendants who require legal counsel but cannot afford, including the provision of a list of legal practitioners, in the interests of justice,[113]
3. Summon any person, including legal entities to appear and provide evidence or participate in a trial,[114]
4. Summon a witness to provide testimony deemed essential to the trial on its motion or at the request of a party and in pursuit of justice,[115]

110 *CCPCB* s 4.

111 The provisions that lay down some of the relevant inquisitorial powers of the courts are to be applied subject to the discretion of the court, and given the facts and circumstance of each case. Until there is a clear authority on how, when and for what purpose these powers are to be exercised, it could be argued, therefore, that the exercise of these powers rests with the discretion of each court/judge vis-à-vis their mandate to ensure a fair trial. Unless necessary, the court might not exercise those powers while adjudicating and administering justice.

112 *CCPCB* s 33.

113 Ibid s 34.

114 Ibid s 35.

115 Ibid s 36. See *the Evidence Act of Bhutan 2005* (Bhutan) (*Evidence Act*) s 69.

5. Stay or adjourn a trial proceeding 'for any other juridically valid reasons or purposes' as it determines,[116]
6. Clarify substantive or procedural legal issues during the preliminary hearing,[117]
7. Allow presenting evidence, including the right to subpoena witness and compel the production of physical evidence,[118]
8. Consider hearing and taking the independent testimony of a party to the case where necessary,[119]
9. Conduct judicial investigation, after the submission of evidence and hearing of the witness,[120] into any matter relevant to the proceeding,[121]
10. Appoint *Judicial Enquiry Committee* to perform any functions 'legally justified by the case and supported by the law,'[122]
11. Cross-examine,[123] and question[124] at its discretion and in pursuit of justice and equity, the witnesses of either party or those called by itself,
12. Alter or add to any charge, before the judgment is pronounced, to meet the ends of justice,[125]
13. Allow accused to adequately prepare his or her defence,[126]
14. Ensure defendants are mentally competent and understand the charges while waiving their right to trial by pleading guilty,[127] and demand explanation where an accused pleads guilty to all offences charged,[128] and

116 Ibid s 76.1(l).
117 Ibid s 81.1(b).
118 Ibid s 84.
119 Ibid s 86.
120 Ibid s 88.
121 Ibid s 88.1.
122 Ibid s 89.
123 Ibid s 90.3.
124 *Evidence Act* s 67.
125 *CCPCB* s 187.3.
126 Ibid s 188.
127 Ibid s 195.
128 Ibid s 195.2.

15. Verify that plea of guilty is made voluntarily and the admissions appear to be true and accept it only after hearing the views of the parties and the interest of the public in the effective administration of justice.[129]

As noted, there are no sources that suggest the extent and manner of how these inquisitorial powers are currently exercised or should be exercised by courts to ensure a fair trial. Undoubtedly, uniform and consistent exercise of these powers can help to maintain fairness in all trial proceedings, specifically trials involving SRLs. Though devising strategies to ensure fair trial may depend on the facts and circumstances of each case, without a minimum uniform and consistent approach, the courts may be inconsistent in the exercise of these powers. Therefore, as is discussed in forthcoming article, understanding the phenomenon of SRLs at the institutional level (including but not limited to, how often SRLs are an issue, how judges in Bhutan currently manage them and what more they could do within the current law) would be necessary to explore the strategies implemented and examine whether a model approach at the institutional level is relevant and necessary. This may help to identify a systematic approach to a fair trial, which in turn could contribute towards maintaining and enhancing public trust and confidence in the judiciary and also facilitate the generation of happiness among the participants of the criminal justice process, including judicial officers responsible for administering justice – the GNH element of administration of justice.

Fair Trial and SRLs

A. Australia

The phenomenon of SRLs and their effect on the trial process in Australia are much documented.[130] Based on knowledge developed about SRLs, the

129 Ibid s 195.4.

130 There are many sources. But some of the illustrative documentation of SRLs and their effect on the trial process includes, John Dewar, Barry W Smith and Cate Banks, 'Litigants in Person in the Family Court of Australia - A Report to the Family Court of Australia' *Research Report No. 20* (Family Court of Australia, 2000), Australasian Institute of Judicial Administration, *Litigants in Person Management Plans: Issues for Courts and Tribunals* (Australasian Institute of Judicial Administration Incorporated, 2001), The Australian Law Reform Commission, *Traditional Rights and Freedoms- Encroachments by Commonwealth Laws-Final Report No. 129, December 2015* (21 June 2017) <https://www.alrc.gov.au/publications/freedoms-alrc129>, Productivity Commission, Access

justice stakeholders, particularly the Australian judiciary, have been able to respond to this phenomenon through the conscious development of common law as well as other measures designed to manage it. In Australia, there are *Bench Books*, *Guidelines* and precedents that specifically deals with SRLs.

The scope of this article does not allow a detail description of these developments in Australia. However, this article argues that these recent developments have shifted the passive judicial approach in Australia to more active case management approach. Under these new developments, Australian judges are required to, within their inherent duty and power to ensure a fair trial, support or assist SRLs, including those defendants who have waived their right to legal representation. This role has proved both an opportunity and a challenge to ensuring delivery of fair justice. For example, some defendants may dismiss their lawyer and conduct an incompetent trial themselves. In such cases, a judge is required to accord some support or assistance to the SRL to ensure a fair trial. Without it, the defendant may suffer an unfair trial because he or she may be self-regarding, unreasonable, or foolish in the conduct of their defence – for instance, a defendant may think his or her forensic acumen is superior to legal representation.[131] Therefore, to ensure a fair trial, Australian judges are required to inform defendants of their basic rights to challenge the admissibility of evidence, cross-examine, and call witnesses.[132]

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to Justice Arrangements- Productivity Commission Inquiry Report, Vol. 1, No. 72, (Australian Government, 2014), 644-5, Tania Sourdin and Nerida Wallace, 'The Dilemmas posed by Self-represented litigants: The dark Side' (2014) 24 *Journal of Judicial Administration 61,* Elizabeth Richardson, Tania Sourdin, and Nerida Wallace, Self-Represented Litigants– Gathering Useful Information– Final Report (2012) *Australian Centre for Court and Justice System Innovation (ACCJSI), Monash University*; and Elizabeth Richardson, Tania Sourdin, and Nerida Wallace, Self-Represented Litigants – Literature Review (2012) *Australian Centre for Court and Justice System Innovation (ACCJSI), Monash University* and Elizabeth Richardson and Tania Sourdin, 'Mind the Gap: Making evidence-based decisions about self-represented litigants' (2013) 22 *Journal of Judicial Administration 191.*

131 *R v East* (2008) QCA 144. In this case, it was held that the trial judge failed to warn the jury to disregard certain aspects of the appellant's presentation of his case concerning the assessment of the evidence.

132 *Macpherson v R* (1981) HCA 46.

Judicial support or intervention by a trial judge to SRLs are required to address, to the extent feasible, the difficulty which he or she might normally experience vis-à-vis lawyer.[133] SRLs are to be given the information and advice necessary to put them in a position where they can make an effective choice in the exercise of their rights.[134] But judges are not required to provide advice, guidance, or representation to SRLs ordinarily provided by a legal representative.[135] How active the court should be is seen to depend on the facts and circumstances of each case.[136] There is a risk that affording privileged status to SRLs may also result in unfairness to the represented opponent. The paradox still is that the presence of SRLs places a particular burden on the court in ensuring a fair trial[137] and the courts are required to intervene and provide information to an SRL.[138]

B. Bhutan

In Bhutan, the *Bench Book*,[139] in addition to the procedural law, guides the conduct of trial proceedings. It directs how a court should conduct the hearings. However, it does not address issues that might arise from trials involving SRLs. The *Bench Book* does not clarify whether there should be any differentiation accorded to trials involving SRLs vis-à-vis for example, ascribed time for disposing of the cases and the duty to ensure a fair trial.

At the same time, the phenomenon of SRLs is not documented. Who constitutes this group of litigants and what problems and difficulties they face in partaking in the Bhutanese criminal justice process are not acknowledged. The scale of SRLs and their effects on the trial process are not known. There is no research about whether SRLs in Bhutan have

133 *Tomasevic v Travaglini* (2007) VSC 337.

134 *R v Gidley* (1984) 3 NSWLR 168, 181.

135 *Dietrich v The Queen* (1992) 177 CLR 292, Dean J, 334-5

136 For example, some cases may not require active approach of the court, for example, in *R v Esposito* (1998) 105 A Crim R 27, extensive-questioning by a trial judge that amounts to cross-examination was held impermissible, while in for example, in *R v Briks* (1990) 19 NSWLR 677, the court held that the judge must within his duty to ensure fair trial must ensure an accused is convicted on legal evidence even if the propriety of the evidence is not contested by the parties.

137 *Dietrich v The Queen* (1992) 177 CLR 292, Brennan *J*, 32

138 Ibid Dawson *J*, 345 and Toohey J, 354.

139 The Royal Court of Justice, *Bench Book for Judicial Process* (Kuensel, 2nd ed, 2007).

access to some legal services, whereby the gap between the needs of the SRLs and the services available cannot be assessed. Consequently, it is not clear whether there may be a need for specific guidelines and services for SRLs. There is also no specific case law or judicial pronouncement that clarifies the class of offence for which the right to legal representation should be a guarantee and how the courts must address the competency of SRLs to waive their right to legal counsel and appear in person without counsel before a court. There is no information on how courts in Bhutan manage SRLs; whether their approach, if any, is adequate in responding to SRLs; the challenges they face; whether judges are able to intervene as and when required so as to ensure fair trial; the significance of GNH to law and administration of justice in relation to SRLs; and whether current practices align with the GNH.

In all, the extent of judicial intervention in Bhutan, including the question as to how much or little a judge must inform the defendants of their rights to ensure them a fair trial, is not clear. Undoubtedly, devising a consistent approach would be necessary to manage trials involving SRLs, considering the vulnerabilities and disadvantages they continue to suffer without counsel and the mandate to ensure a fair trial. Against this backdrop, Australian approaches to managing SRLs that are designed to ensure a fair trial are argued to provide a useful comparative lens to examine the Bhutanese practices. However, to what extent the Australian approaches are applicable and of relevance to the Bhutanese justice system remains unclear. These are the few illustrative issues, detail of which are beyond the scope of this article but are explored in detail in forthcoming articles that form part of the Ph.D. thesis.

Conclusion

The concept of fairness and fair trial are evolving concepts in Bhutan. As in Australia,[140] because each case is different, it would be impossible to formulate a precise definition and defining attributes. It will be subject to continual refinement and very much depend on the context and situation of each case. This article claims that in Bhutan, the conception of fairness and fair trial under the over-arching legal-theoretical approach of GNH vis-à-vis SRLs may be broader from and vary with other jurisdictions.

140 *Dietrich v The Queen* (1992) 177 CLR 292, Toohey *J,* 353.

Whether in Bhutan or at Australia, the fair trial right in its minimalist application is seen to ensure that the procedure is followed and equality is accorded to the parties in a case. Accordingly, the right to legal representation as one vital component of a fair trial is one procedural requirement essential to ensuring a fair trial by the court. In Australia, if a fair trial cannot be ensured without representation in certain trials, such trials are stayed or adjourned. In Bhutan, the courts must ensure that the trials are open and fair. Nonetheless, it is not clear whether the right to legal representation should be a pre-condition of a fair trial in a certain class of cases or for all offences and litigants.

Unlike the adversarial trial procedure of Australia, the number of inquisitorial powers that the courts in Bhutan have under the procedural law makes it less difficult for the courts to intervene and act whenever required to ensure a fair trial and secure the interests of justice. However, the manner and the extent of the exercise of these powers are not known. It is not clear whether there is a consistent and uniform approach.

In any given case, ensuring a fair trial is an effort towards securing the interests of justice. Rendering legal justice which only concerns the observance of legal rules, principles and remedies may not be sufficient. In the interests of justice, the common practice of maintaining legality and concern over observing the due process to render justice might be insufficient and may also have to ensure increased party participation and empowerment.[141] Such a change is possible in upholding the three foundational values of justice with the practice of law – that - everybody has equal access to justice, and justice is rendered through the rule of law and fair process.

While there can be no consensus on what substantive justice may mean to parties and the community in a given case, developing some consensus on the issues of rendering procedural justice – a just and fair procedure, specifically in trials involving SRLs, is crucial. An adversarial process with an incompetent suspect without counsel is unlikely to result in a fair trial or secure the interests of justice. Therefore, developing a uniform and

141 Carrie Menkel-Meadow, 'Practicing 'In the Interests of Justice' in the Twenty-First Century: Pursuing Peace As Justice' (2001) *70 Fordham Law Review* 1761-1774, 163.

consistent approach to managing trials involving SRLs would help the courts in Bhutan to ensure every trial is a fair one under the prevailing standards. However, strategies cannot be developed without first understanding who are SRLs; what are their needs and difficulties; what is the scale of the problem and its effect on the administration of criminal justice. It has to assess if there are any specific services available to them; and how are they perceived and dealt with it by the court. There is a need for further research in these unexplored yet concerning areas of the criminal justice system of Bhutan.

Mindful Judging: Examining the Role of Compassion in Dispute Resolution[1]

Introduction

Compassion is the feeling we experience when we see some body suffering that motivates a desire to help. According to Aristotle, the essence of compassion is our feeling that the sufferer does not deserve the suffering.[2] It is argued that the compassion of the judge to an innocent litigant is morally right, although legally, it may be unacceptable. The newspaper story *"Why I gave stranger a kidney"*[3] features an interview with Trent Fenwick, a resident of Kelowna, British Columbia, who decided to donate one of his kidneys after learning that a man in Chicago - a father of two, needed a donor. When asked why he would make such an enormous sacrifice, Mr. Fenwick explained that "if you ever had a sick family member, you would do anything." Indeed, cases of people donating organs to save loved ones are plentiful. But why go to such great lengths for a stranger? Trent Fenwick's response: Your heart's desire is to give, so you give in whatever way you are at peace about."

This explains why some actions are altruistic, that involves sacrificing one's life to save another. In the similar way, empathy allows us to put in the shoes of the other; and comparatively allows a judge to see the perspective of all the litigants. Compassion may be an appropriate tool to decision-making; for judicial decision-making should be based on the facts, circumstances and the applicable laws. This Article attempts to study connection between law and compassion, and the roles compassion plays in dispute resolution.

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1 Contributed by Pema Wangdi.

2 Bandes, S A *'Compassion and Rule of Law', International Journal of Law in Context*, Cambridge University Press, 2017, p. 185.

3 Gulli, 2005.

Compassion and Rule of Law

In order to examine compassion and *Rule of Law,* let us consider its relationships. Compassion, can in one way or the other, affect the decision making - possibly introducing a 'conflict of interest' paradigm. In most cases, compassion of the judges is expressed through the latitude of laws, by exercising the allowable discretion. In this case, it is argued that it does not bring in a special challenge to the law - as the scope for use of discretion implicitly gives an 'advance notice' that it will be employed as a factor. Therefore, compassion is normally expressed through the *'mitigating circumstances'* if it is *a penal offence.* This underscores what Kupperman has said *"emotion sweeps over people."* [4]

Every day, judges face regular diet of difficult and emotional cases involving human misery and heart-wrenching circumstances. Despite the nature of the cases, a judge is expected to be stoically neutral and unemotional to allow fair and unbiased decisions. It is a sad fate that judges has to be the springboard to absorb the shocks and pains of its litigants. Research has shown that judges too suffer the same debilitating effects from persistent exposure to heart wrenching and traumatic cases.

Besides the trying nature of their jobs, they are in the enviable position of being able to affect positively the life conditions of those they come before them. Judicial compassion is a tool to accomplish that desired positive result and a way to understand another's suffering with the desire to relieve it, while experiencing positive emotions.[5] The presence of empathy is an essential attribute of a good judge. In countries like the United States of America, they are strikingly pitted between two contrasting opinions, the concept of judge as a *'detached umpire'* on one hand, and on the other, the concept of empathetic judge, whose decisions are affected by empathy of understanding and identifying with people's hopes and struggles.[6] The *'judge*

4 Kupperman, J J (1999) *Value….and What Follows* OUP, New York, p.26.

5 Hueston J and Hutchins M, *"The Power of Compassion in the Court: Healing on Both Sides of the Bench",* Court Review, Vol. 54, p. 96.

6 Colly, T B *"In Defence of Judicial Empathy",* George Washington University Law School, 2012.

as umpire' means that judges do not make law, but rather act as umpires and interprets the law. On the other hand there are judges who interpret the laws liberally, based on the time and context of the soceity as Colly states: [7]

> *For most liberal judges, they see that their primary purpose is to promote social justice and transform the society. They see that their role is using the law and their power to rule on the law to promote social justice*

Literal or the objective interpretation of laws is evident, when: [8]

> *A judge must weigh the best legal arguments on one side and the best legal argument on the other, and pick the side that has the better of it, no matter how slight the advantage.*

As emotions express value judgment, *'fairness'* as envisioned by Richard Posner, is who sees the position realistically and pragmatically. In this context, 'compassion and empathy' which are synonymously used today within the context of individual psychologies is both personal and relative. Personal happiness and psychological equilibrium is our own concern and not any one's else.[9]

Judging with Compassion

Judge Richard Posner suggests that, when it comes to Judging, *"An internal perspective - the putting oneself in another person's shoes is achieved by the exercise of empathy and compassion."* Whereas Nussbaum, in *Poetic Justice* explains that compassion, unlike in normal religious beliefs, is triggered by literature. *"Metaphorical thinking"*, guided by empathy, compassion and a reason has a big role in judging. However, in Buddhist thought, a combination of compassion and wisdom can generate pure compassion, an act that is

7 Ibid.

8 Kerr O, *'Legal Ambiguity, Empathy and the Role of Judicial Power',* 2009.

9 Kupperman J J (1999) '*Value….and What Follows'*. OUP, New York, p.26.

unconditional and selfless. It is said that the absence of either compassion or wisdom can only produce a good-hearted fool or a hard-hearted intellect.[10]

The term 'compassion' is compounded with love and hence describes compassionate love that involves giving of oneself for the good of another.[11] From the compilations of definitions offered by experts from variety of disciplines in Fehr's book, 'compassionate love' comprises five elements: the free choice for the other; valuing the other at a fundamental level; openness and receptivity; an accurate understanding of oneself, the other, and the situation; and a response of the "heart"- an accurate emotional understanding of the situation.[12] There is no mention of any reference to Buddhism in Fehr's research and this is interesting that it corresponds to the highest wisdom in Buddhist philosophy. The definitions are very identical.

Holistic Consideration

Judges are human beings who come to the bench with feelings, knowledge and beliefs that cannot be magically extirpated. Most legal realists believe that decision involves some discretion and no decisions happen in a vacuum.[13] It is said that adherence to precedent, and rules of construction and interpretation will only take to the 25th mile of the marathon, the last mile can only be determined on the basis of deepest values, one's core concerns, one's broader perspective on how the world works, and the depth and breadth of one's empathy and compassion.[14] Although judges are expected to deal the issue at hand ideally, the empathetic or compassionate perspective suggests that judges do not completely abandon their experiences when deciding cases.

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10 Walpola R (1959). *What the Buddha Taught*. Grove Press NY. p.46

11 Beverly F (2010). *Prosocial motives, emotions and behavior: The Better Angels of our Nature*. APA p.247.

12 Ibid. p. 247.

13 Weinberg J and Nielsen L, '*Examining Empathy: Discrimination, Experience and Judicial Decision Making*', Southern California Law Review, vol. 85:313.

14 Colly T B, *'In Defence of Judicial Empathy'*.

This perspective comes from a *Critical Race Theory* tradition, which says that judges who come from different social background may provide a more nuanced understanding of the facts, evidence and credibility determinations than a judge who lacks such experience. This helps to truly identify the human dimension of the case, and it is not that judges should ignore the laws, but rather exude an ability to grapple with complex legal theories and dense technicalities, with an ability to understand and identify with people.[15]

The Emotional Intelligence

If judging was a mechanical exercise and task, it will require no emotional intelligence and social skill. A computer would be a perfect judge, and artificially intelligent instruments can replace the judges. But the law is not mechanical and judging needs the use of human intelligence and judgment. Empathy and compassion collaterally assist a Judge to understand the case in the perspectives of the litigants. It also equally informs a judge about the legal question in issue, which requires an answer with an adequate understanding of the way in which litigant will be impacted by the decision. In case of *Miranda v. Arizona*, it was held that a judge must attempt to put themselves in the shoes of the young suspects, as the case may be. This happens in reasonableness issues. The balancing tests, and use of judicial tools to determine which rule will be best for the society that balances individual interests, understanding and perspectives of the others. This is also called as *"Judicial Spectator"* approach. This can directly connect to the description of Richard White's description of compassion as, sorrow for the suffering or misfortune of another and the consequent desire to alleviate that suffering which may (or may not) result in action.[16] The United States Supreme Court has actually weighed the question of the role of compassion in legal reasoning. In the case of *DeShaney v. Winnebago County Department of Social Services,*[17] the court stated that the "judges and lawyers, like any other human, are moved by natural sympathy."

15 Ibid. p.1964.

16 White R (2008). Radical Virtues: Moral Wisdom and the Ethics of Contemporary life. Rowman & Littlefield Publishers, INC. p107.

17 Bandes S A, *'Compassion and Rule of Law'.*

However, it is argued that compassion and sympathy can interfere with rational deliberations. It is considered as a human impulse that is deeply rooted in emotions: that is impulsive, and has no cognitive content that interferes with logical analysis. It is argued that although the feeling of compassion and empathy are universal, it directly proposes that the courts and the judges are not responsible to alleviate or prevent it. Legal experts argues that compassion is not a reliable indicator in a legal dispute; compassion cannot resolve competing claims and privilege certain types of litigants for the wrong reasons.

Ultimately, lawyering and judging is a delicate balance between constantly evolving world and fundamental principles that define our legal system. It calls upon compassion, as well as intellect, our heart as well as our head.[18] Therefore, judging involves recognizing the moral standing of the other - and is generally extended to 'human beings' who comes to the court as clients and parties. Empathetic treatment requires great intelligence that is able to penetrate and appreciate other's value.

But it has to be known that while making a decision, feelings are distilled into different sects: while empathy implies feeling another person's feeling as if they were our own, one could empathize with another of his particular suffering or pain. However, in empathizing, one is only focused in one state of mind and not on the individual who is suffering. Sympathy, on the other hand, tend to reduce the perceived differences between self and other, by mirroring the other's experiences within oneself; but this means that we focus more on our own emotions than the situation of the other person. On the other hand compassion for another person involves recognizing her as another and giving attention to her as the one who suffers.

The Two Perspectives

Compassion is argued from two sides, as is with other issues in general. These arguments are pitted against those who condemn compassion as a mere emotion or view it as a vice that is associated with softness.

18 Gerdy K B, *'The Heart of Lawyering: Clients, Empathy and Compassion'*, p. 189.

While the western stoics look upon passions as forms of false judgment and the wise however look otherwise. While the stoics view happiness as living in accordance with the inner principle of the universe, they adopt individualistic approach to self-development. As Emmanuel Kant states, *"morality is not a matter of self-abandonment but the highest form of self-fulfillment."* In this way, if compassion sways from the *"moral path and purpose"* and lead us to follow emotions, it is important to affirm the *"cold-hearted goodness"* based on principles of justice.

The righteousness conduct is defined by conscientious duty and service, by respecting the rights of others. In this context, the only suffering will be sickness and misfortune.[19] The stoics find compassion meaningless if it does not have a practical purpose. Compassion has to result in positive actions. Compassion is the precondition for any concern about others, the rights they have, and our duties toward them.

Some argues that compassion may invite emotions - without complete identification of the problems. Compassion allows us to experience our own humanity through the other person - and this is by no means a contemptible thing. However, compassionate response to suffering is a basic moral motivation, and once a compassionate attitude becomes more prevalent, it can transform every aspect of society including the way we care for the sick, the poor, and to the litigants in case of judicial process.

Conclusion

White emphasizes the connectedness of all life, and the reality of suffering, which cannot be ignored or rejected as irrelevant. Perhaps this view can overcome the stoic's perspective. Rousseau finds compassion and pity as the foundational virtue necessary to embrace society and Schopenhauer emphasized the significance of pity or compassion as response to suffering. White says that Buddhism offers us an alternative paradigm that challenges the independence of the self, and it suggests a renewed sense of compassion, not as a vice or a questionable virtue, but as the most fundamental virtue that should encompass our existence in the world.

19 White R (2008). *Radical Virtues*, Rowman & Littlefield Publishers, Inc. p.111.

The supreme virtues in Buddhism are compassion, loving kindness, sympathetic joy, and equanimity. Much of Buddhist practice is devoted to cultivating these virtues, which eventually leads one to the state of awakened mind also known as *Bodhisattva*. The *Bodhisattvas* are those, who have attained enlightenment, and devote themselves to removing the sufferings of the world through the propagation of wisdom concerning our true nature as proposed in the fundamental teachings of the *Four Noble Truth*.

This Article attempted to study connection between law and compassion, and the roles compassion plays in dispute resolution. Judging is not a mechanical job. It calls for the use of human intelligence and social skills. Judges are human beings with different feelings, knowledge and beliefs. Judicial decision-making involves some discretion influenced by compassion, empathy and sympathy. The catch is when to be a pure umpire of the game and when to intervene for the cause of justice and strike a fine balance by judging mindfully.

'Precious than the Gold; but Heavier than the Mountain': Analyzing the Law of Contempt of Court Order in Bhutan[1]

Introduction

Civil suits and criminal sanctions are two divergent and intricate legal concepts. In Bhutan, these divergent concepts have merged together especially under the *law of contempt of court*. The convoluted legal archetypes have resulted in imposing criminal sanctions to cases of civil nature. During my visit to a number of *detention centers* in the country as a part of my research, I came across a number of people who were criminally incarcerated under the *law of contempt of court*. During an informal conversation with one of the detainee, it was learnt that he had been detained for over eight months, and another for almost a year. Although, these persons were legitimately remanded under the *law of contempt*, a careful scrutiny exposes an inexact periods of detentions and deprivation of liberty, which merits a judicious legal discourse.

Contempt of court may be defined as *"any conduct that tends to bring the authority and administration of the law into disrespect or disregard or to interfere with the due administration of justice."*[2] In many countries, *law of contempt* is used as an effective tool to aid the enforcement of judgments, and Bhutan is no exception. The *law of contempt* is designed to ensure that the courts are able to *"discharge their functions without fear or favour."*[3]

Generally, the concept of *contempt of court* is categorized into two different aspects, namely into *civil contempt* and *criminal contempt*. *Criminal contempt* is considered when:

1 Contributed by Sonam Tshering.
2 John L et al. Wark, Editors. *Encyclopaedia of the Laws of Scotland (1926-1941),* P.468
3 In Re : Vinay Chandra Misra, AIR 1995 SC 2348

> *A person either within or outside the court by way of spoken or publication or an act, brings down the authority of the court or affects the administration of justice.*

Law of criminal contempt is thus, designed to *"protect the authority of the courts and preserve pure streams of administration of justice."*[4] On the other hand, *civil contempt* is generally considered when a defendant or person fails to abide and obey the *Orders* of the courts. It is used as *"a means to enforce the rights of individuals or to secure remedies for parties in a civil action"*[5] or *"willful disobedience to any judgment, decree, directives, order, writ or other processes of a court or willful breach of an undertaking given to a court."*[6]

In short, the *law of contempt* was designed to:

> *Ensure that all citizens have unhindered access to effective, unbiased courts whose authority is respected, and that public confidence in the legal system is maintained. Litigants – and the public – must have confidence that the court's decision will be based only on the evidence which was seen and tested by all parties. The Law of Contempt of Court also aims to ensure that no one can undermine the functions of the court, either by depriving the court of the ability to fairly decide the case or by hindering the enforcement of the court's judgment. Public confidence in the due administration of justice should be maintained as a result.*[7]

Thus, the main purpose of the *Law of Contempt* is to ensure justice and promote the confidence of the people in the court and the justice system. Although, the courts employ the *contempt of court* proceedings as a matter of necessity and as a last resort, it is normally seen as a *"tool of injustice"* or the application of *"unfettered judicial authority."*

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4 In re: Bineet Kumar Singh, AIR 2001 SC 2018

5 The Free Legal Dictionary at https://legal-dictionary.thefreedictionary.com/contempt+of+court as of 28 Sept. 2019

6 Law Commission of India, Review of the *Contempt of Courts Act, 1971*, Report. 274, 15, 2018

7 Law Commission, London, *Contempt of Court: Juror Misconduct and Internet Publications*, (LAW COM No.340) Law Commission, *House of Commons, Crown,* 2013

The Law of Contempt in Bhutan

Unlike most legal systems, Bhutan does not have a separate legislation on the *law of contempt*. The courts in Bhutan exercise the authority of *contempt* through *The Civil and Criminal Procedure Code*[8] *of Bhutan, 2001*.[9] The major offences of *contempt* under *The Civil and Criminal Procedure Code* (CCPC) are categorically scheduled to capture the following offences, which are:

a) General *contempt;*[10]

b) Failure to adhere to hearing schedule;[11],

c) Non-compliance with judicial Orders;[12]

d) Failure to appear;[13]

e) Absent without leave[14]and

f) *Civil Contempt.*[15]

Further section 104 is a repetition of section 102.1(b). Although CCPC mention the words as *Civil* and *Criminal Contempt*, the *Code* does not differentiate nor define what constitutes a *Civil* and *Criminal Contempt* except in section 107. For example, sections 102.1(b), 104, 105 and 106 seems to be *Civil Contempt*, and the *Code* does not provide a detailed distinction between the two. According to section 102, it states that:

> *A person showing disrespect to the Court during Court proceedings may be subjected to civil or criminal sanction in accordance with the laws of contempt.*

8 Hereafter referred as *CCPC*. This *Code* was amended in 2011.
9 Ss. 102 to 108 provides the law of contempt.
10 S.102.1 of *CCPC*
11 Ibid S.103
12 Ibid S.104
13 Ibid S. 105
14 Ibid S.106
15 Ibid S. 107

This necessitates a specific and separate legislation by the Parliament on the *Law of Contempt of Court* to implement these contempt provisions of the CCPC. For example, in section 105 it states that:

> *Where a person summon fails to appear or present evidence at the order of the Court, he/she may be found in contempt of court and may be subjected to civil or criminal sanction.*

This demands a separate legislation on the *law of contempt* to lay down the conditions under which, the court can impose civil and criminal sanctions. In other sense, such an open-ended clause provides a wide discretionary power to the courts to ascertain if the case warrants civil or criminal sanctions. The CCPC was enacted in 2001 and was recently amended – but the amendments never generated the questions on the *Law of Contempt of Court.*

The Risk of Disproportionate Penalties

The current provisions on the *contempt of court* under the CCPC provides an unfettered discretion to the courts to determine the amount of sentence and the fines liable to be paid by the person in the event of *contempt of court*. For example, section 107.1 of the CCPC was amended in 2011 providing the courts with an unlimited discretionary power. The above section states that:

> *Finding civil contempt shall result in fine/imprisonment until the civil order has been complied with. However, for the monetary case, the person shall be imprisonment for a number of years calculated based on the value-based sentencing.*

This has turned to be a criminal sanction, though some might argue it as civil imprisonment in monetary cases. For example, Mr. **A** owes a sum of Nu. 30 million to a Bank **B** and the judgment states that, Mr. **A** is required to pay a sum of Nu. 25 million to the judgment creditor. Mr. **A** is unable to fulfill the *Order* of the court although he agreed to the pay the amount before the judgment was pronounced. His inability to repay was attributed

to his business going bankrupt, or he losing his job or is unable to generate sufficient income to repay the borrowed amount. Let us presume that Mr. **A** is also the sole bread earner for his family.

In pursuant to the judgment, if the judgment debtor files a petition for the enforcement of the above claim, and the court restrains his liberty under section 107.1 of the CCPC, Mr. **A** may be liable to get an imprisonment of over five hundred years[16] under this provision calculated at Nu. 125 a day based on the current *Minimum National Wage Rate*. In cases other than monetary, section 107.1 provides that, the defendant is liable for either *"fine or imprisonment until the civil order has been complied with."*[17]

In this, first, the amount of fine is not defined allowing the courts an unencumbered discretion to determine the actual amount of fine. Second, in case of imprisonment of the judgment debtor, it also provides the Judge a leverage for discretion. For example, in another illustrative case scenario, Mr. **X** and Mrs. **Y** are parents to two children. Owing to friction in the family, the couple got divorced; and Mr. **X** was ordered to pay the monthly child allowances, failing which Mrs. **Y** reserves the recourse to request the court to enforce it before the court of law. Unfortunately, Mr. **X**, by reasons beyond his control, failed to pay it. The court summons Mr. **X**; and in lieu of the payment of the allowances, imprisons him. This directly severs all other means of help to his children or to the estranged family. Further, Mr. **X** is ordered to remain imprisoned until he complies with the *civil order*.

Now, this directly alienates his ability to work and pay the allowances. It ultimately results in creating a room for further incarceration and imprisonment, since he has no negligible opportunity to repay it. This can be seen as a direct incarceration of Mr. **X** as the *Order* directly exterminates his ability to pay resulting in children not getting the maintenance, and him ending up fettered for life as § 107.1 empowers the courts to imprison the defendant till he complies with the *Order*, that is pay the maintenance in

16 S.18 of *Penal Code of Bhutan* may not be invoked in this case since, it is not a criminal contempt but a *Civil Contempt*. If we apply S. 18 of *PCB*, then the maximum of penalty would be up to third degree (Imprisonment of minimum of 5 years to maximum of less than nine years).

17 S. 107.1

this case. Setting the example of another case, it is susceptible that it may transpire differently if judge **A** has personal issues with defendant Mr. **B**. One day, the defendant happens to be in his court for non-compliance with the *Civil Order* where the court has discretion either to impose him with fine or restrain his liberty with imprisonment. Here, the Judge **A** imprisons Mr. **B** for a night and releases him the next day. And let's say, the defendant **B** aspires to contest in the upcoming elections. A night of restraint famously called as imprisonment or conviction may bar him from contesting the elections, as the *Bhutan Election Act* requires the candidate to have no criminal records to bring sound electoral practices. In this anecdotal instance, a fairer decision, or the worse of it can result affecting future aspirations of the people, who are implicated out of a case of civil nature. Therefore, it carries a *domino effect* like consequences for Mr. **B.**

The concept of *"due process"* and *"audi alteram partem"* which means to hear on both sides, are natural rights enshrined in the *Constitution* as a *Fundamental Right*[18] and a statutory right reflected under the CCPC. Apparently, *contempt* results the issue of an *order* from a court of law; and provides no opportunity on the other party to exhaust the *"due process"* or the opportunity to be heard. Generally, the person is arrested in compliant to the *Order of Contempt* and is imprisoned or fined thereto till he or she complies with the *Enforcement Order*. In view of this, Lord Denning suitably said:

> *A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt. It if not prove by showing that, when the man was asked about it, he told lies. There must be some further evidence to incriminate him. Once some evidence is given, then his lies can be thrown into the scale against him. But there must be some other evidence.*[19]

Therefore, the *Law of Contempt* in Bhutan is not only ambiguous in its essence, but also provides unlimited discretion to the Courts in many instances. Moreover imprisonment for civil suits is too wide a judicial discretion without the *Law of Contempt* to define the provisions of the

18 *Constitution of Kingdom of Bhutan*, Article 7, S.1

19 Miller, *Miller on Contempt of Court*, (4th Ed.), Oxford University Press, 2017 pp. 37

CCPC properly and adequately. Such, the *"power to punish for contempt was arbitrary, unlimited and uncontrolled, and therefore should be exercised with the greatest caution: that this power merits this description will be realized when it is understood that there is no limit to the imprisonment that may be inflicted or the fine that may be imposed save the Court's unfettered discretion, and that the subject is protected by no right of general appeal."*[20]

Amendment

The *National Assembly* in the last Session tabled CCPC for amendment. The *National Assembly* amended Section 107.1 and submitted it to the *National Council* for further deliberations in the upcoming Winter Session. The current amendment by the *National Assembly* stands as:

> *Finding of civil contempt shall result in fine or imprisonment until the civil order has been complied with. However, (a) for monetary cases the person shall be imprisoned for a number of years calculated based on the value-based sentencing; and (b) for restitution in criminal cases, the person shall be imprisoned for a number of years calculated based on the minimum wage rate.*

The current amendment has made the *law of contempt* even more complex with criminal sanctions serving as an alternative to the remedies provided under other laws such as monetary, recovery or restitution. The court is authorized to imprison a person who is unable to pay the civil debt, which can be equated to a treatment in a criminal offence. Actually it poses a serious question if the provision is doing any justice to a Bank who could not recover its loans or to the *private money lender* who needed the money or to the family that required the child maintenance. Restraining a person reduces his ability to repay and makes him to incriminate himself.

This amendment provision, if passed by the *National Council* and becomes the law, will definitely do more harm than good. This will allow the courts to take away the liberty of a private citizen or a person who has not committed any crime against the State. This not only violate the constitutional rights of the person but also defeats the very purpose and aims of a criminal justice system and shake its foundational premise of

20 *In Legal Remembrancer v. Matilal Ghose & Ors., (1914) I.L.R. 41 Cal. 173*

"proof beyond a reasonable doubt."

As a matter of principle the standard of proof in civil suits and criminal cases are completely different. While the civil suit depends on the premise of *"preponderance of evidence"*, criminal offences require the burden of *"proof beyond a reasonable doubt"*, which present equally contrasting principles of law. In this note, the process of imprisoning a person for failure to repay a loan would equate that a civil suit and criminal offences are same, which is fundamentally unrealistic, and legally incorrect. It is unsure if the Members of the *National Assembly* has overlooked the demerits of the amendment of this provision in the current *Bill* or they have failed to understand the principles and objectives behind the *law of contempt*.

Recommendations

In view of the serious considerations to narrow the gaps in the *law of contempt* provided under the CCPC, the following proposals are recommended to uphold the right principle of law, and ensure that criminal justice and civil remedies are separate in the interest of justice and fairness:

1. The Parliament must come up with the *law of contempt* as mandated by section 102 of the CCPC;

2. This *Law of Contempt* must:

    a. Clearly define and distinguish between the *civil contempt* and *criminal contempt* in order to enable the courts to take the decisions more uniformly and ensure that criminal sanction is not imposed to civil suits;

    b. Differentiate and distinguish between criminal sanctions and civil sanctions separately;

    c. Contain adequate and relevant provisions to protect the citizens from exercising their *freedom of speech and expression* such as defence of innocent publication or distribution, discussion of public affairs in good faith;

    d. Contain detailed provisions on grounds for appeal from

the *Contempt Orders* and decisions to appeal to the higher courts;

e. Determine appropriate amount of fine to ensure that, the fines are proportionate to the severity of the *contempt* or in case of enforcement, fines should be proportionate to the amount recoverable or how much the defendant owes to the aggrieved party;

3. The current amendment of *National Assembly* must be reviewed and revised by removing the penalties provided in the amendment.

Conclusion

It is no doubt that *contempt* is a necessary tool for the administration of justice and uphold the sanctity of the court. It is also equally important that, in a democracy, no person should be held under *contempt* for an indefinite period and risks them in prisons merely on the fact that they are unable to pay the amount they loaned or owed or has disobeyed the *Orders* of the court. In the interest of fair play and justice, the courts must consider the ability of the person to repay or obey the *Orders* of the court before sending the arrest warrants under *contempt*. If due diligence and considerations are not exercised, the current provisions on *contempt* under the CCPC can even authorize the courts to sentence a person to life directly under section 107.1 of the CCPC, particularly, if the defendant has no other means to comply with the *Enforcement Order* or repay the amount in full. It is high time that, the parliamentarians review these provisions and carefully weigh the merits and demerits of existing provisions related to *contempt*. They may also come up with a separate *Law of Contempt* to address the current loopholes. The *contempt of court* must not be used as an alternative to sentencing or to recover money or restitute a borrowed amount, but employ it to uphold the sanctity of the courts and the justice system. The *contempt of court* must be enforced to uphold the rule of law and ensure the flow of clear streams of justice and not otherwise.

International Law: The Application of the Principle of 'Double Jeopardy' in Multiple Jurisdiction Cases[1]

Introduction

The principle of double jeopardy or *'non bis in idem'*[2] comes from civil law jurisdictions. The principle has been incorporated into different international *Conventions* and are distilled and translated into domestic case laws, *Constitutions* and statutes.[3] This directly frustrates the very principle that advocated it when different States (or Nations) take cognizance of a same matter for investigation and judicial proceeding simultaneously or successively within their own jurisdiction - which is actually at different jurisdictions. Globalization has increased and expanded modern trade and commerce. This has resulted in proportional increase in the rise of corruption matters punctuated by bribery, tax evasion, unjust enrichment, abuse of official functions, embezzlement of public funds, breach of trust, money laundering, to name a few. Where such matter involves action of entities and persons beyond the border, or nationals and entities of another country, (like transnational bribery), it requires special measure and technique to handle the matter effectively and expeditiously. Various *Conventions* strive to incorporate these offences under domestic laws of its member States in the interest of fairness and effective administration of justice.

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1 Contributed by Dechen Lhamo.

2 The principle *'no bis in idem'* means *'not twice for the same'* analogous to the principle *'nemo debet bis vexari pro una et eadam causa'* which means *'No man should be proceeded against twice for the same cause'.*

3 This protection is reinforced in over 50 national *Constitutions* including Germany, Japan, Nigeria, and South Africa, and others have recognized through customs and practices. Also see, Lorraine Finlay, 'Does the International Criminal Court Protect Against Double Jeopardy: An Analysis of Article 20 of the Rome Statute' (2009) 15:2, *Univ. of California, Davis* 22.

Among others, the *United Nations Convention on Anti-Corruption* (UNCAC) requires its member states to adopt, mandatorily, legislative and other measures to apply these offences not only to their nationals living abroad but also to foreigners associated with its subjects. Similarly, the *OECD Anti-Bribery Convention* and its monitoring mechanism has effectively deemed foreign bribery a crime in all 41 countries, while 38 of them strengthened corporate criminal liability laws in compliance with the objectives of the *Convention*.[4] It is thus evident that when member states devise their criminal legislations, the spectrum of criminal jurisdiction is purposely expanded to foreign nationals within its jurisdiction as well as its nationals residing in a foreign place. As a result, practical challenges and jurisprudential questions have popped up in cases where common subjects are investigated and prosecuted in multiple countries or jurisdictions. Doctrine of *'International Double Jeopardy'* is one widely discussed subject and its application have raised following questions:

1. Is it right for a person to be subjected to criminal sanction more than once for the same cause of action?

2. How to balance rights of individuals with sovereignty of nation(s)?

3. Should regulatory sanctions qualify for the purpose of double jeopardy protection?

4. When does the protection of double jeopardy apply to attache? and

5. The need of international recognition of penal sanctions for the purpose of extending double jeopardy protection or at least recognize its determining factors.

International Double Jeopardy

The principle of *'double jeopardy'* is enshrined in a variety of international and regional rights' *Conventions* including Article 14 (7) of the *International*

4 OECD, *'Better Politics for Better Lives, Putting an end to Corruption'*. Available at www.oecd.org/publishing/corrigenda>.

Covenant on Civil and Political Rights (ICCPR), Article 4 of the 7th *Additional Protocol of the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Article 8(4) of the *American Convention on Human Rights*, Article 19 of the revised *Arab Charter on Human Rights*, the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* as proclaimed by *the African Commission on Human and Peoples' Rights*, Article 50 of the *Charter of Fundamental Rights of the European Union*, and Article 54 of the *Schengen Convention*.

Traditionally, multiple prosecutions were allowed under different jurisdictions under the principle of *'dual sovereignty'*[5], but this has erratically changed over the time. Although the application of *'International Double Jeopardy'* protection is recognized, it differs from jurisdiction to jurisdiction both in substance and procedure and thus it is difficult to determine a single or a common consistent norm across jurisdictions for application of this principle.

Europe

The *European Union* has higher level of compliance of the *'[International] Double Jeopardy'* protection as the member states have agreed under regional *Conventions* and *Treaties* to do so, which indeed boosted their trust and confidence of the legal system amongst themselves and around the world. The *Schengen Convention* provides that an individual or entity cannot be prosecuted by different EU member states for the same offence:

> *[a] person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another...for the same acts....*[6]

Similarly, Article 50 of the *Charter of Fundamental Rights of the European Union* categorically provide:

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5 Davis F T, *'International Double Jeopardy: U.S. Prosecutions and Developing Law in Europe'* (2016), *AM. U. INT'L L. REV.* 70.

6 *Schengen Agreement, 1985,* s. 54.

> *No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.*

The corresponding provision in France is emulated in Section 113 of the *Penal Code* and Section 692 of the *Code of Criminal Procedure* that states:

> *No prosecution can take place with respect to a person who has been definitively convicted in another country for the same facts, and, in case of conviction, where the penalty has been performed or suspended.*

This invariably applies to extra-territorial matters. A remarkable ruling of the *European Court of Human Rights* in the matter of *Grande Stevens*[7] in 2014 provides that even *'administrative penalties obtained by the Italian Companies and Stock Exchange Commission precluded a criminal prosecution for the same acts by the same company'*; this ruling was well recognized in France wherein the *Constitutional Court* in 2015 barred an imminent trial of individuals and companies accused of *insider trading* on the ground that the same defendants had already been absolved of responsibility after an administrative investigation by the French Authorities.[8] Thus the *European Union* members stringently observe the *'non bis in idem'* principle in cross border matters as per *Conventions* and laws.

The United States of America

Contrary to the above, in the United States, the double jeopardy law provides no protection against multiple prosecutions across borders. Although the 5th Amendment to the *US Constitution* provides fundamental criminal justice principle of *'…no person shall be…subject for the same offence to be twice put in jeopardy of life and limb…'*[9] the Courts have restrictively applied the protection only to *'single sovereign'* and so even within the US the *'non bis in idem'* principle does not provide any protection against federal government

7 *Grande Stevens v. Italy*, App. No.18640/10 (Eur. Ct. H.R. Mar. 4, 2014), available at http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-4687386-5686720&filename=003-4687386-5686720.pdf

8 Frederick, above n 4, 73.

9 *United States Constitution* amend V.

from prosecuting matters already decided by state governments and vice versa.[10] It is therefore more likely that a company in the US will face simultaneous or successive investigations as well as prosecution by the Department of Justice ('DoJ') and the Securities Exchange Commission ('SEC') for the same conduct.

Asia

In the Asia-Pacific region, matters concerning Mutual Legal Assistance (MLA) and extradition have reference to double jeopardy. Although dual criminality requirement is generally stipulated under *Treaties*, *Conventions*, practices, and laws concerning MLA and extradition, such cooperation are denied by requested States if the person sought is prosecuted and convicted or acquitted for the conduct underlying extradition.[11]Although, this in a way stipulate a bar to a subsequent prosecution, it is unlikely to happen as any State may elect to prosecute a foreign national under its law even if the person is being prosecuted in other States for the same facts. Factors such as reciprocity, subject interest to the nation, treaties and bi-lateral arrangement and diplomatic relations played important role in recognizing *'International Double Jeopardy'* in Asian countries.

In India, reading Section 403 (5)[12]of the *Criminal Procedure Code [of India]* together with Section 188[13] determines that any person who is convicted and acquitted in a foreign country by a court of competent jurisdiction has no protection against double jeopardy that is provided under Section 403(1),[14] thus he or she is deemed triable as offence committed within

10 *Heath v. Alabama*, 474 U.S. 82, 90 (1985).

11 ADB-OEDC, (Thematic Review Final Report), *Mutual Legal Assistance, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific* (2007), 4.

12 *Criminal Procedure Code* [of India] s. 403 (5): *'Nothing in this Section shall affect the provisions of section 26 of General Clause Act, 1987, or Section 188 of this Code'.*

13 *Civil and Procedure Code* [of India] s.188(1): *'when an offence is committed by any citizens…in any place or beyond India…or any person wherever it may be, he may be dealt…as if it had been committed at any place within India…'.*

14 *Civil and Procedure Code* [of India] s. 403(1): *'A person who has been tried by a court of court of jurisdiction for an offence and convicted or acquitted of such offence…shall not be tried again for the same offence…for which he might have been convicted…'.*

India. However actual legal cases involving the jurisdictional point were rare.[15]

In Thailand and Pakistan, they pursue transnational bribery cases on case-by-case basis. Pakistan decide whether to prosecute or extradite having regard to factors such as the importance of the case to Pakistan and the requesting State, the gravity of the crime and whether the requesting State would extradite to Pakistan under the same circumstances. Thailand had an international criminal case over which it had jurisdiction, but because it lacked evidence to prosecute, the government of Thailand extradited the suspects to face trial elsewhere.[16] Furthermore, the issue of whether *'International Double Jeopardy'* will prevent a company from facing criminal prosecution after it resolves charges on the same core facts remain unsettled in Singapore. It is more likely that Singapore– which is positioned as Asia's legal capital– still resort to overcome these challenges by entering into reciprocal treaties, which they have successfully carried out in similar concerns like mutual assistance in criminal matters, terrorism, extradition among others.[17]

Procedures, Collaboration and Guidance

On the jurisprudential point, there are sound reasons for providing the double jeopardy protection on the basic notion of fairness that *'you should not be punished twice for the same crime.'* The concern of multinational companies in recent development, is that of the non-recognition of double jeopardy principle which has subjected them to unfair treatment as multiple investigations and inquiries are conducted on a same matter while the international double jeopardy protection is by and large intended especially for transnational companies' to encourage voluntary disclosure of potential corruption and in furtherance of their cooperation with the authorities. There are however equal convincing and compelling reasons that recognizing double jeopardy protection is not healthy in the fight against transboundary bribery.

15 Sarup, R K P '*Double Jeopardy, in Indian Law Concerning offences committed abroad: Need for a fresh approach', The Indian Law Institute* 10 (available at www.ili.ac.in).

16 Above n 10, 56.

17 *The Practitioners Guide to Global Investigation*, <https://globalinvestigationsreview.com/chapter/1079623/singapore>.

Firstly, not recognizing it would prevent race to prosecution or settlement by countries, whereas recognizing it would mean a rush for countries with interest to conduct investigation and settle the matter first and arguably the quality of prosecution is compromised resulting in lesser or lighter penalty. Offender would, under the circumstances, find it incentivizing to submit the matter to a country that provides lesser punishment. Secondly it was observed that authorities cite questionable interpretation of nation's double jeopardy law to justify failing to launch certain investigations.[18] Thirdly, it affects sovereignty of two nations. It is unfair to impose a country that it cannot prosecute its own nationals or domestic entity, or a foreigner or foreign company for harm done to it merely because another nation got there first. Thus, it is imperative to find how these conflicting views could be harmonized through a common legal framework.

As to the internal process and consultations concerning double jeopardy protection, although the American and Asian's stand on international double jeopardy principle differs from that of the EU[19] (the former does not recognize it), the US Department of Justice (DoJ) has adopted internal policy called *'Petite Policy'* which although does not provide right of a criminal defendant against double jeopardy, it creates exception to decline prosecution. It proposes that the DoJ will not to bring an enforcement action if a foreign authority is better situated to investigate and prosecute the crime. The determining factors include the strength of the other jurisdictions interest in prosecution, the ability and willingness of the other jurisdiction to prosecute effectively, and the adequacy of legal sanction of the conviction in other jurisdiction.[20] For this reason the DoJ enters into *Deferred Prosecution Agreement* and *Non-Prosecution Agreements* with Corporations, and today it remain as a favoured tool to resolve complex cases in the United States. This process helps enhance companies' compliance of self-reporting and disclosure norms on foreign transaction or foreign companies in the US.

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18 *Why International Jeopardy is a Bad Idea* (2015), <https://globalanticorruptionblog.com/2015/03/09/why-international-double-jeopardy-is-a-bad-idea/>.

19 *Heath v. Alabama*, (474 U.S. 82 (1985): The U.S. Supreme Court interprets, *'this (double jeopardy) clause to proscribe only on multiple prosecutions by a single sovereign'.*

20 Bourtin, N et al, *'Double Jeopardy: Coordinating Cross-Border Corruption Investigations'* (2012) 248-29, *New York Law Journal* 11

Furthermore, based on past experience, it is difficult to design a uniform legal framework underlying the application of *'non bis in idem'* as various nationals' interests are involved; hence an appropriate way forward is to propose use of consultations, collaborations and diplomatic channels. Article 42 (5) of *UNCAC* provides that if a State learns that another State is conducting an investigation, prosecution, or judicial proceeding regarding the same conduct then there shall be appropriate consultation with one another to coordinate their actions. Similarly, the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (2011)* firmly provides that where more parties have jurisdiction over an alleged offence, they are obliged to consult each other in order to determine the most appropriate jurisdiction for prosecution. It is thus deducted that these provisions on mutual collaboration and consultation duly aids to harmonize provisions of the *Convention* wherein the provisions of the *Convention* requiring uniform corruption offences for its member and the principle of double jeopardy protection (which is argued as contradictory to one another in the beginning of the article) are indeed deemed interconnected and complementary to each other.

Conclusion

In the fight against corruption, *Conventions* and *Treaties* are signed by nations to ensure corruption offences are incorporated in their respective laws. As a result, multinational companies and people working abroad are faced with predicaments of punishing twice for the same wrongful act. While individuals and legal persons find it easier to claim double jeopardy protection as a right in a single nation, it is not easier to claim the same defence when it involves cross-border offence, thus the likelihood of re-prosecution is very probable. Nonetheless there are nations that legitimized this defence (International Double Jeopardy) through national laws and judicial and administrative determinations.

But the practice differs largely in the EU from the American and Asian practice. In brief, the EU provides full protection of transnational double jeopardy, and companies and persons who are convicted or prosecuted or even penalized by regulatory authorities abroad will apparently not face any penal actions in the EU. The US on the other hand, offers no protection of such nature in the US. A person convicted under the federal jurisdiction

may still be subject to prosecution under the state law. The US 'DoJ' came up with this intelligent tradition of signing agreement with companies and persons to defer prosecution or withdraw prosecution altogether. This, while not providing as the defendant's right of non-prosecution, invariably ensures companies' disclosure, self-reporting and cooperation of the companies with authorities on criminal matters. In Asia, the chances of re-prosecution will largely depend on case-by-case basis and factors such as reciprocity and national interest will play a greater role.

Corollary to the above, it is fair, just and appropriate to determine that:

1. Countries must strive to sign pacts with counterparts or countries of interest entailing joint investigation and prosecution arrangements for matters of transnational financial crimes (especially countries which do not have legal norms unlike the EU);

2. In order to balance sovereign interests with individual rights, it is found reasonable and fair to prosecute an entity or a person for the second time or more if the penal sanction or imprisonment is so grave in the second country and that subsequent prosecution must objectively deduct or consider sanctions already imposed on by the first country. Regarding civil restitution and restitutions pertaining to damages, both or all countries of interest may carry out separate suits since these claims are exercised as a matter of victims' right and not so much as penal sanction. This recommendation must also involve consultation and appropriate arrangement with counties that are likely to be involved in the scheme depending on the geo-political factors and economic relations among others; and

3. In order to encourage companies and individuals involved in financial crime to come forward for disclosure and self-reporting purpose, it is pertinent for each countries, that have not yet recognized '*International Double Jeopardy*', to either take legitimate stand on recognizing it, or enter into bi-lateral or multi-lateral arrangements, or at the very least recognize factors (such as the one adopted by the US 'DoJ') through guidelines and procedures, which their government or law enforcement authorities will consider in determining re-prosecution of cross border corruption offences if it happens.

'To Kill or not to Kill': Why the Death Penalty is not a Solution for Crime Control[1]

Introduction

Bhutan is a nation founded on the values of welfare, compassion and human dignity. Life of all sentient beings, and that of human being in particular is sacred and precious. Our citizens are the assets of the nation and powerhouses for economic growth and prosperity. David Gordon rightly echoed this, when he said that people are the hope of human race.[2] Bhutan is witnessing vigorous economic growth, which is fueling an unchartered rural-urban migration. The urban sprawl is likely to be accompanied by deviant behavior, delinquency and crimes.

Lately, we have witnessed a spate of violent crimes, especially rape of children which were thus far only heard elsewhere. As evident from both the mainstream and social media responses, this has evoked national rage. The recent rape and murder of a girl child in Paro has evoked strong reaction from the people demanding the severest punishment for the perpetrators of the crime. On 21 September 2019, *The Bhutanese*[3] carried an article on the views expressed by Hon. Tshewang Lhamo, *Member of Parliament* (MP). It called for the amendment of the *Constitution* and the *Penal Code,* and mooted reinstatement of the death penalty sentence for the rape of children below twelve years. In this Article, I take a look at the advantages and disadvantages of the death penalty, which was abolished by His Majesty the Fourth *Druk Gyalpo* in 2004, before it was abrogated by the *Constitution* in 2008.

1 Contributed by Tenzing Lamsang.

2 See Tobgye, S *"The Constitution of Bhutan- Principles and Philosophies,"* p.7.

3 *The Bhutanese* is a private newspaper that can be accessed at https://thebhutanese.bt

The Protection of Children

Going by the opinions expressed in the social media, it can be understood that some Bhutanese people preferred death penalty and other severe forms of punishments for the perpetrators of the crimes. The nation was shocked by the Paro and other similar incidents, especially involving children victims. But do we want revenge as a balm for our collective anger and hurt; or the long-term reforms in the justice system that can actually help us to secure the purpose of justice and personal security.

Moreover, we cannot relegate the safety and welfare of our children to the police and legal systems alone. Our own duties as parents and guardians of the children in our care and custody need to be reconsidered and revamped. Who are committing the crimes against children; why do children come in conflict with laws; how many of our children are languishing in penitentiary facilities are some questions we should ask ourselves. If we analyze the laws protecting children in our country, we have a strong legal framework. Therefore, in addition to the education and awareness of our people, what may be a high time is strengthening our law enforcement system including prevention, investigation and prosecution of offences against the children. Forensic facilities to analyze the DNA and finger prints; and other modern evidence-gathering tools and techniques will help bring offenders to justice.

Blood for Blood?

Aristotle said, "At his best, man is the noblest of all animals; separated from law and justice, he is the worst." The current social media emotional outpourings vying for the mob justice may revert us to the *'laws of animalism'* that calls for the *'survival of the fittest.'* In such a culture, the suspect is handed to the kangaroo courts of the mobs, which take revenge no matter what the rationale - lowering the society to the animalistic and irrational behaviour of the crowd. Even if the process of the law is enforced through a legitimate legal paradigm, the question which remains unanswered is what if the alleged suspect is later found innocent. Are we ready to take the risk of collectively murdering an innocent man or woman to fulfill our momentary blood thirst? Moreover, the 'blood for blood' attitude is

contrary to the Bhutanese character and nationhood. We are a civilized society which upholds the respect for all forms of life. Paro and other incidents should be used to contemplate the merging issues and collectively deal with the crimes and other antisocial developments unfolding in our peaceful country.

What about the other Capital Crimes?

When we moot death penalty for sex crimes on children, we must be aware that there are other crimes of serious nature such as vandalism of *Chortens*, (Buddhist stupas) and other sacred relics; smuggling of drugs, and crimes against persons and state, which unequivocally incite same public outrage. Do such crimes not deserve death penalties? Once, and if at all the *Constitution* and other laws are amended prescribing death sentence for the rape of children, it may create a leeway for many crimes including the above to become punishable by death. It is not long that we proscribed the public sale and use of tobacco[4] and enacted stringent laws, resulting in numerous convictions. However, we have now fathomed the associated challenges in its implementation; nor has the law effectively deterred tobacco use.

Moreover, what if the person who was punished with the death penalty was later found to be innocent? Can the state reinstate the life of the accused persons? There are plenty of cases where follow up evidence and investigations showed the persons who suffered the death penalties were either falsely implicated or there was a genuine mistake in the investigations. The Italian thinker Beccaria in his influential 1764 book, *'Crimes and Punishment'* described the death penalty as:

> *It appears absurd to me that the laws, which are the expression of the public will and which detest and punish homicide, commit murder themselves, and in order to dissuade citizens from assassination, commit public assassination.*

This book showed the futility of death penalty and torture in response to the crimes. It was successful in influencing many countries in the

4 Tobacco was outlawed in Bhutan in 2010 through the *Tobacco Control Act 2010*.

West to abhor and abrogate death penalty. Even if the death penalty is reintroduced in the Bhutanese criminal justice system, it will instinctively recondition the thoughts and perceptions of our judges - making burden of proof more stringent than ever, and ensure that all due processes of the laws are exhausted. This will make the justice system more rigorous and demanding; making imposition of death penalty very rare – rarest of the rare cases, as in India.

The Collateral Damage

Death sentence not only affects the accused, but torments his family members. One only needs to see the video films of the farewells given to the death row inmates with their family members. It has devastating impact on the children and families. Moreover, prison population in some countries at times reveal that such harsh laws operates more on the poor and disadvantaged due to the lack of means to vindicate and clear themselves of the accusation of crimes. Further, literature reveals that quite a few number of sex offenders have been victims of sexual violence themselves, when they were children. Therefore, in addition to the reactive and retributive legal measures to remove the sex offenders from the society, we must also design preventive interventions targeting at the very causes and roots of the social ills and crimes. Instead of vying for the life of the accused persons who were involved in violent sexual offences, we should use the situation to bring about reforms in evidence-gathering, efficient prosecution and expeditious judicial processes in meting out swift justice to the offenders. As heinous as rape and murder crimes are, we should not give the power to the criminal perpetrators to entrap us to stoop low to devise means and procedures unbecoming of a democratic and a *rule of law* society. It is better to deprive their freedom for a long duration and make them realize, regret and repent their conducts. Death is not only unnecessarily cruel but it will diminish the real essence of justice.

Death Penalty and Right to Life

The *Constitution* guarantees the right to life,[5] prohibits capital punishment[6] and forbids torture, cruel, inhuman or degrading treatment and punishment.[7] Further, to ensure that, not a single innocent person is wrongly punished, the *Constitution* enshrines the 'right against self-incrimination' as a safeguard. This means that "A person charged with a penal offence has the right to be presumed innocent until proven guilty in accordance with the law."[8] Which further means that, contrary to the popular misconceived notion, a person need not prove himself or herself innocent – he or she has the right to remain silent; and it is the state prosecution who has the burden to prove beyond a reasonable doubt, before the competent court that the accused person has indeed committed the crimes charged; and if the prosecution fails to convince the court, the benefit of doubt goes to the accused person. He or she is acquitted of the charges.

Besides, studies indicate that the death penalty has not deterred heinous crimes, especially occasional bouts of crimes of passion. People were known to be committing pick-pocketing even while witnessing public executions. This, and other considerations have led the majority of the countries to abrogate death penalty.

In our country, 20 March 2004 is an important date in the legal and judicial reforms. On this day, His Majesty the Fourth *Druk Gyalpo* abolished the capital punishment through a Royal *Kasho* (Edict).[9] And when the *Constitution* was framed in 2008, it was ensured that the Royal legal reform was endorsed and proclaimed by the country's highest law.

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5 See Article 7 Section 1 of the Constitution.

6 See Article 7 Section 18 of the Constitution.

7 See Article 7 Section 17 of the Constitution.

8 See Article 7 Section 16 of the Constitution.

9 See *"Abolition in Samoa and Bhutan; Eighty Countries now totally Abolitionist,"* Amnesty International, London, 2004.

The Royal Amnesty

Even if the *Constitution* and other laws were to be amended and the death penalty reinstated, in addition to the strict judicial scrutiny, His Majesty the *Druk Gyalpo* has the prerogative to grant amnesty to the death penalty convicts. His Majesty may either pardon, set them free, commute or reduce the judicial sentences.[10] The Royal initiative of 'open air prisons'[11]; and periodic grant of amnesty to the prisoners is an evidence of extreme compassion and magnanimity to His Royal subjects - thereby giving the condemned lease of another chance at life. However, this consideration is not granted to recidivists or the repeated or violent criminals who are threat to the society. His Majesty, for instance, on 12 September 2014 granted pardon to 45 prisoners who were convicted under *Tobacco Control Act, 2010 (Amendment 2012)*.[12]

Conclusion

Let alone taking life of human beings, even unintentional harm to the insects is repugnant to most Bhutanese people. Therefore, while the perpetrators of violent sexual crimes, especially on young precious children must be subject to the severest punishment our law provides, it may bode well for us not to contemplate reinstating death penalty. *First*, its mere presence in the statute book does not ensure automatic application in vindication of our rage and revenge. *Second*, the more grave the offences committed and charges labeled on a person, the higher the degree of burden of proof is required for the prosecution and conviction of the accused persons. *Third*, it is a lethal weapon which may operate unjustly against certain group of people in the society; *fourth*, we can never bring back the dead person if it is proved to be a case of miscarriage of justice, wrong convictions, malicious prosecutions or genuine mistakes. *Fifth*, we are a progressive, peaceful, compassionate society in the comity of democratic nations promoting human rights, rule of law and peaceful co-existence.

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10 See Article 2 Section 16(c) of the *Constitution*.

11 Dema, C. (2013) 'Second Batch of Inmates Sent for the Open Air Prison,' *The Bhutanese*. 19 June.

12 Available at www.bbs.bt (accessed 20 October 2019).

It was perhaps with all these considerations and many more that His Majesty the Fourth *Duk Gyalpo* in his unparalleled and immaculate wisdom abolished the death penalty, despite national security concerns. While the emotions of the people who are genuinely concerned and hurt are palpable; and while we respect their right to express opinions, it is hoped that we have bid final goodbye to the death penalty, for any and all crimes, for all times to come. Besides, it is better that hundred guilty men go unpunished; than punish a single innocent man. Perhaps, the death penalty and other stringent penalties may also be the reasons why the perpetrators often silence the victims by killing them to eliminate evidence of the crimes and escape punishment. Therefore, is better that we open one school than built hundred prisons. Death penalty is not a solution for crime control.

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