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Dedication

The wish-granting and wish-fulfilling jewel

The source of fearlessness

The Bodhisattva that illuminates the Ten Directions

The origin of splendour and light, the essence of a Noble Being

The Chakravartin- the Fourth Druk Gyalpo

The unifier of compassion and the powerful protector

May we offer our sincere prayers

And rejoice in His virtues.

His Majesty the Fourth Druk Gyalpo is a pure representation of Chakravartin, the Tathagata. He is the manifestation of perfect wisdom and conduct, a natural result of merit. Like the Buddha, with blossomed signs of a great being, he is exemplary in His leadership, invincible in wisdom, indestructible in strength, and pure in voice, delightful in speech, lovely in physical form. He is perfect resemblance of the Lord of Dharma.

On the glorious and joyous 67th Royal Birth Anniversary of His Majesty Jigme Singye Wangchuck, the Bhutan National Legal Institute celebrates His Ten Strengths, the height of His compassion and His sublime diligence.

On this glorious and most auspicious day, we offer our sincere prayers for good health and long life of His Majesty the Fourth Druk Gyalpo. We celebrate the perfection of qualities and pledge to enhance access to Justice and strengthen the rule of law in the country through legal education and legal literacy.

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Preface

Human aspirations, knowledge, resilience and service has become the backbone for a redefined tangible service concept, service positioning and service experience process. Today the value of services are judged through experience concepts: how each people experience services, feel about and define it. The process of service conceptualization and articulation requires service design, service development and service innovation. The imperative of change with a dynamic and complex legal scenarios provide the need for diversified and responsive services to create a systematic and purposeful institution to respond and fulfil the aspirations of the people. Marking the great annals in the development of legal infrastructures in Bhutan, the Bhutan National Legal Institute established the Legal Aid Center on 19 October 2022. It marks the creation of a new institution that centers on enhanced legal services based on efficient legal service concepts to secure Justice to the neediest. It provides a sustainable path to a progressive justice institution based on 'inside-out perspective' of [most] promising combinations of service and value proposition. This is based on legal and judicial service concept that creates a clear, agreed and shared concept of legal aid services with a matured concept of service design. These transformative judicial and legal approaches connect the emerging era of 'service management' that is rested on the culture and philosophy of knowledge creation and service.

'Transformative thinking,' and *'cognitive institutionalism'* recognizes the *'affective solidarity'* and *'collective conscience'* in the spirit of Justice and strong institutions. As institutions transform, transformation can be understood as driver and maker of major institutional change. This calls for investment in institutional resources in the process of institutional change. Institutional resources consist of *human resource* and *informational assets*. *Human resources* refer to the people who operate within an institution as well as their skills, while *information asset* refer to any type of valuable data or intellectual resource controlled by an institution. The critical link between *human resource* and *information asset* is the knowledge transfer. 'Knowledge transfer practice' is a new way of sharing resources and experiences to maintain a competitive edge. It stipulates *'knowledge management'* and treatment of all working individuals as *'knowledge*

workers.' With knowledge generation on [all] fronts including academic and scientific, it calls for a new spectrum of knowledge management and knowledge sharing. Knowledge management is a new field in the legal academic environment. Importantly, as world undergoes tremendous progress, both at generating knowledge and incubation of knowledge, as 'knowledge houses,' knowledge as a stem of growth becomes a key indicator of intellectual progress.

While knowledge creation and knowledge repository are two main essences that store innovation and ideas, knowledge sharing or collaboration should be a new and effective institutional transformative norm. Knowledge is becoming a key resource and it can be interpreted as an acquisition, development, transfer and retention of skill[s]. With information age and rapid globalization and movement of people, knowledge sharing has become very easy as well as difficult. However, knowledge transfer requires the requisite pool of knowledge resources that involves knowledge creation, coordination, transfer, and integration to create a competitive advantage for institutions. Knowledge transfer is a fundamental process of civilization and it is central to learning which in turn is critical to development, as it supports the exploration of new ideas and methods.

Legal knowledge sharing and knowledge transfer are essential components of modern judicial and legal governance. The *Bhutan Law Review* as part of legal knowledge capital intends to create a pool of academic legal resource[s] to uphold the organizational culture of knowledge creation and sharing. Law is a knowledge-based profession and its core 'legal practice' is about providing specialized knowledge and services to the people. These require intellectual capital, an aggregated experience and 'collected wisdom' to provide knowledge-based services. The *Bhutan Law Review* is an academic legal resource that combine[s] knowledge and information; enhance the ability to create and share legal information and knowledge to streamline services to be professional and informed in a legal service environment.

Legal research, analysis and information categorization are important aspects of legal information. Presently, with expanding technology and use of online services, managing legal information and knowledge

requires sound legal information and knowledge management practices. The concept of design thinking enables the integration of best knowledge creation and management practice[s] with knowledge management culture[s] to invest in sharing of both explicit and tacit knowledge. Legal research not only plays an essential role in creation of new legal knowledge base, it also helps to acquire best legal competencies, legal research skills to gild the intellectual assets of the organization. Legal research should not be considered only as information seeking: rather it is a combination of a variety of information and knowledge related activities and an assimilation of legal information with effective and critical legal analysis.

Although the primary skill that characterizes the legal profession remains the intellectual capabilities, it has to be supported by legal research to effectively maneuver modern legal research tools and usher an information based legal reasons. Legal arguments, case analysis and factual case briefs has to be supported by knowledge management practices, that results in critical knowledge accumulation and transfer. We have to build on the intellectual capacities every year so that we are progressive and result-oriented. Presently, the ecosystem of legal academia is replete with sophisticated legal research tools and proliferation of ideas. To compensate the knowledge and 'resource sets' contemporarily, we require 'experience sets.' These bundle of experiences are incalculable national legal resource that capitalizes on expanding information resources and human capital. Furthermore, publishers of electronic information resources are frequently adding new search functionalities and other enhancing features to their products. We need to be adaptive as researchers and legal academicians.

In order to create knowledge cognition and intellectual resources, the *Bhutan Law Review* is designed to serve as a bastion for information and legal research tool. It operates within the paradigms of dynamic creation, management and transfer of legal knowledge so that, legal literacy and legal intellectual pursuits are enhanced and advanced to meet the needs of contemporary times. In Bhutan, with recent institutional reformation and systematization approaches; and with the new tool[s] of engagement and assessment, it entail[s] the valid logic for creation and advancement of legal knowledge and ideas to proliferate idea repositories and learnings. However, the proliferation of legal knowledge bases, both online and offline, have increased the grounds for legal ideas enabling knowledge

conversion. However, the contemporary management model[s] require the amalgamation of set of knowledge, skills and aptitudes to proliferate professional work culture and service. These require the continuous liaison of dialogue between legal research, analysis and academics.

While organization[s] are dynamic institutions, it rarely works without an efficient pool of knowledge resource. Organizational knowledge creation and sustainable creation of legal knowledge pool require the creation of new ideas and concepts. Rudimentarily, concepts and legal ideas [may] exist in its own ordinary forms, which may require legal polishing through legal research, analysis and debates. This is not to create a ground for legal contentions, but to gather an approach to contest ideas and expound new [sets] of legal tools to examine the relativity of law and legal sciences. The expanding role of research, analysis as well as legal-academics and design thinking calls for calibration of issues, formation of new knowledge through socialization, externalization, internalization and combination. As an attempt to create institutional knowledge and proliferate academic writing opportunities, the law journal intends to offer an opportunity to crystallize legal knowledge and advance academic experiences.

The concept of knowledge society basically stems from an effective professional knowledge which establishes the need for effective learning. The *Bhutan Law Review* intends to form a legal academic life that promotes legal scholarship and legal positions to describe contemporary legal and social issues. More importantly, legal fundamentalism identifies knowledge and scientific legal ideals that integrates and mutually supports each other to promote legal academia and scholarship. With today's changing work environment[s] and changing legal and institutional paradigm[s], it demands scholarship with emotional intelligence. It needs self-awareness, self-regulation[s] and relationship management.

Basically, for a person or an organization to grow, alongside non-humanistic interventions, it necessitates the conceptualization of the idea of empathy, relationship management, non-negotiable emotional togetherness, and wellbeing. While these precepts may not belong to legal research *per se*, it encapsulates the best modern legal governance, research and academia, an intelligence-based administration, human connection, emotional signposts, and emotionally intelligent individuals

who are important human requisite[s] for legal research. The basic way to transition is through employing an understanding based on mutual respect and cordiality. With increased areas of transformation and institutional changes, we are to respond with new set of skills, attitude[s] and practice with a transformative mindset. While 'external transformation' can be implemented with reformative exercises, 'internal transformation' or the theory of 'primordial mindset changing' requires time, motivation and emotional intelligence.

As part of transformation practices that is undergoing today, the *Bhutan Law Review* as a systematic and scholarship-based legal literature intends to thematically capture **'transformation'** as a theme for the 18th Volume of the *Bhutan Law Review*. This is to ensure that the *Bhutan Law Review* is relevant, contemporary and is context-based to the changing national, institutional and administrative priorities of the country. Relevancy and contextualization are contemporary assets of scholarship and knowledge transfer. With institutional changes and indexes in the country, generating new knowledge and turning it into new products and services is crucial to maintain and enhance the competitiveness of the institutions. Innovation and excellence will positively impact our lives in very different ways: through sustainable legal research and transforming the researches into services and maximize the social and economic benefits of new ideas. A strong scientific legal knowledge base is a key asset.

With transformative paradigm[s], the broad based research and academic culture and adapting to changing academic legal research landscape and improvement of knowledge transfer and accumulation is essential. Creating conditions for successful knowledge transfer, by harnessing skills and competencies and identifying knowledge resources so that it facilitates the promotion of good academic practices, ideas and leverage innovation is must. With the central role of the Bhutan National Legal Institute to promote legal research, academic innovation and enhance judicial education, the institution of legal research and analysis plays a crucial role. Legal research and academics is a growing *rule of law* enterprise. Legal formalism recognizes that laws and actions must be prospective and embrace contemporary models of legal thinking. It should promote research- based legal interventions and legal conscientiousness, logic and rationality.

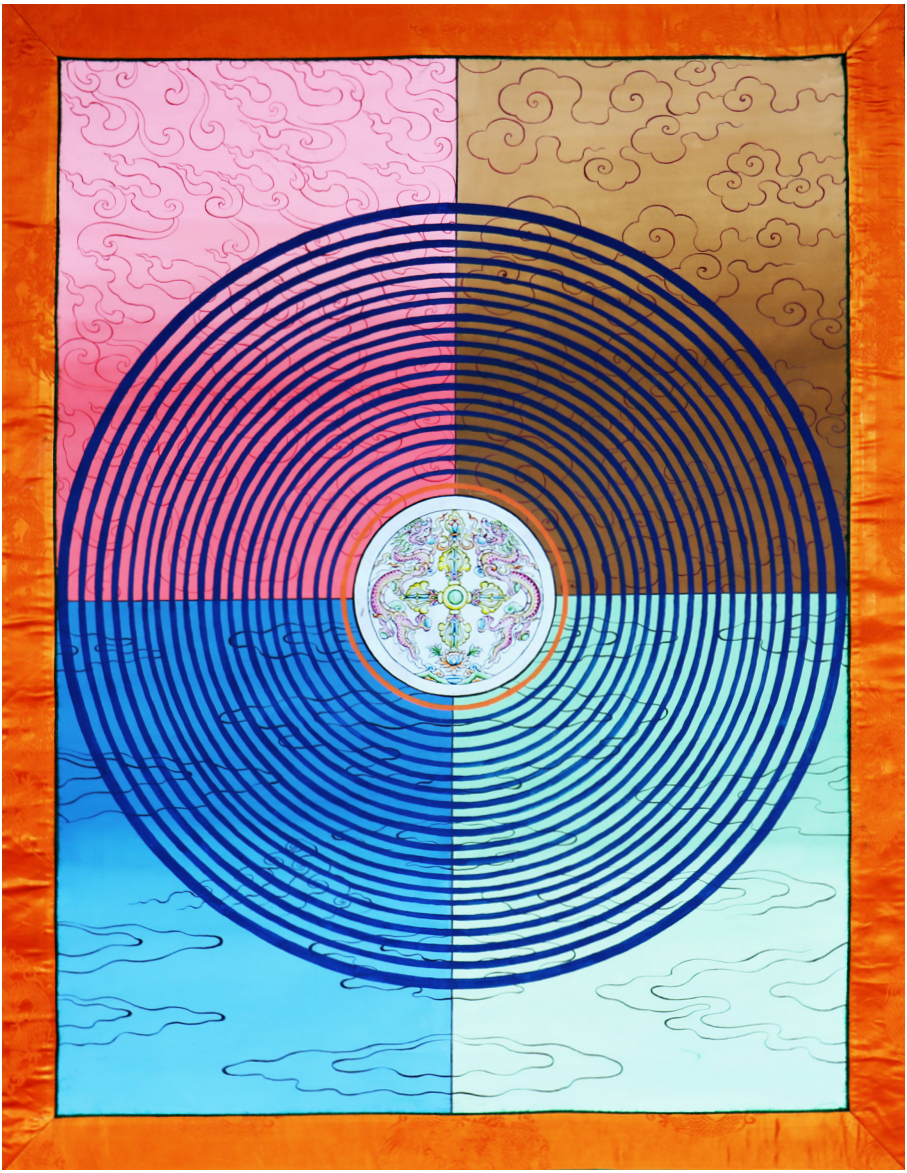
As a forum to promote academic legal research and writing proficiencies amongst the legal fraternity, the *Bhutan Law Review* serves as a median of information for the interest of Justice. It helps to inculcate a sense of academic prowess to promote legalistic research to enable a society based on *rule of law* and legal research and research-based interventions. Bhutan is progressively witnessing the proliferation of legal ideas as well as complicated legal and judicial issues. This necessitates the need for new legal ideas, analysis and interpretation based on popular judicial, social and legal conscience and temperament. In these times, legal research and legal academia provide a robust background for critical evaluation and appraisal of the laws and facts so that it is holistic and interpretations are robust and are in the interest of Justice. The role of Justice as a 'just intervening medium' can be challenged. When the idea of law is multifarious, the role of law and its interpretation[s] are taken over. Different people concoct[s] a different interpretation of the same facts; and they argue convincingly that Justice has not been calibrated in the judicial decisions. While laws have been professionalized, legal reasoning with research and critical academic analysis of the 'issues at hand' requires a progressive approach.

In light of these changing legal, social and government paradigm[s] that focus on accountability, *rule of law* and transparency, legal academia and legal research play a fundamental role to aid Justice. Justice is the analysis of reasons that is deciphered through proper legal and judicial research so that we have the capital of rational arguments. These practice[s] mostly genres around how academically sound a legal professional is with skills to argue, analyze and reason. While legal arguments can be both written and oral, written legal research, including professional legal analysis of the issues with cognizable and legitimate legal reasons are critical. For these reasons, the *Bhutan Law Review* was conceived as a legal academic literature in the pursuit of [best] legal academia, legal research and writings.

In light of these noble endeavours, the Bhutan National Legal Institute is humbled to publish the 18th volume of the *Bhutan Law Review* commemorating the 67th Royal Birth Anniversary of His Majesty The Fourth *Druk Gyalpo* Jigme Singye Wangchuck. The *Law Journal* celebrates the legendary achievements of His Majesty the Kings in securing peace and ushering prosperity and stability in the country.

In the present volume, catching with the contemporary changes and administrative reforms in the country, the articles are intended to capture the aspiration, vision and the literary academic genre of the developments. However, due to paucity of enriched legal literature[s], the articles capture various legal views on the principles of discovery, punishments, human behaviourism, alternative dispute resolution and myriad other contemporary legal issues to reflect the contemporary legal, social and human aspects of the administration of Justice. The articles are expected to throw a light on judicial and legal practices amid changes brought to usher in accountability and responsible administration and service. We hope and aspire to inspire our readers by creating a forum of enriched and professional legal academia to promote a just society, based on *rule of law*, information and service. Hope we could engage the readers and create a ripe forum for increased readership and academic audience.

Article 11: National Council



The Exposition of Constitutional Kuthangs

The Constitution is a source of laws, legal principles and legal morality. Constitutional principles and value-oriented practice has become a contemporary constitutional directive. Constitutional practice is a necessary virtue for better social, political and legal institutions. *"Constitutional praxis"* and *"constitutional realism"* are basic tenets for a just society that is based on values we respect and uphold. *The Constitution of Bhutan* is most sacred legal document. It is the repository of legal and national virtues cherished through time, social, cultural and normative Bhutanese values. It is a established thesis that a *Constitution 'marries power with Justice'*- it makes the operation of power procedurally predictable, upholds the *rule of law*, and places limits on legal structuralism. It is the *supreme law* of the land and provides the standards that ordinary statutes have to comply with.[1] A *Constitution* is a social, legal and political document. *Constitutions* are social declaration[s] that reflect and shape a society, creating common identity aspirations, and legal goals. It proclaims the shared values and ideals and provides the apparatuses for legal, social and political function and administration.

Constitutional order represents a fundamental commitment to the norms and procedures of the *Constitution*, manifest in 'behaviour, practice, and internalization of norms.'[2] The constitutional order is much broader than just the constitutional text. It resounds the 'true and innate' value of the *Constitution* expressed through legal channels that respects and upholds basic premise of law, cultural legal norms, Justice and human rationality. It is said that drafting a *Constitution* is a small part of the challenge and giving legal effect to the *Constitution* is essential to ensure that spirit and letter of the *Constitutions* are respected. This is the foundation for a viable, legitimate and stable constitutional order. *Constitutionalism* is one of the crowning achievements of human civilizations. *Constitutions* has to be the forefront of scientific developments, economic power and human well-being. *The Constitution* is the gateway to cultural development and

1 Bulmer, E. (2017). *What is a Constitution? Principles and Concepts*, International Institute for Democracy and Electoral Assistance, Stromsburg, Stockholm.

2 Ibid., p. 12.

progress, and positive social changes. It remains as the main pivot for 'development potential' for an orderly society that protect the rights of individuals and communities, and promotes the proper management of resources for the development of the economy.[3] '*Transformative constitutionalism*' is an enterprise of inducing large-scale social change grounded in law.[4]

Holistic interpretation of the *Constitution* as well as contextual analysis of a *Constitution* for rational explanation is a concurring legal opinion. Recognizable 'constitutional reference points' serve as an institutional interpretive guidance to advance the purpose and conscience of the sacred document.[5] *The Constitution* ends in interpretation by illuminating the legal penumbras and serve as a searchlight to fulfill the aspirations and legal rights of the people. It imposes responsibility and the duty to direct the intentions of the laws to allow the growth of fertile legal grounds for effective legalism based on sound legal theories and principles.

The *Constitution* is a 'lettered legal instrument' drafted to respect the best human conscience. It is supported by legality, philosophy, and ingrained constitutional values that best gives directions for effective human, political and national interactions. It provides guidance based on premises of law, governance and effective administration of Justice. These frameworks supports the 'democratic constitutionalism' – that is inclusive and universal. In Bhutan, the *Constitution* is the 'collective expression' of our singular values, co-existence and interests.[6] It best gives the values a nation has nurtured over the centuries- cementing the visions of progress and national growth. It is the reflection of common aspiration, legal values and shared constitutional norms for generations to come. It sets a legal precedent for growth and unimpeded progress supported by laws and a strong legal system.

The *Constitution of Bhutan* is a very unique document of its own. It reflects Bhutanese values, standardizes and governs our national identity

3 Ibid.

4 Mutunga, W. (2014). *The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court's Decisions,* Nelson R Mandala School of Law, Kenya.

5 Ibid, p. 13.

6 Bulmer, E. (2017). *What is a Constitution? Principles and Concepts.*

and reshapes the future based on sound constitutional principles. It forges a very 'simplistic path' to development- that enshrines values concomitant with our national aspirations. *Gross National Happiness* is the founding value by which Bhutanese society reflect these aspirations and values that they aim to achieve. It sets 'national legal standards' and creates social, political and Justice norms that recognizes the experiences of accountability, *rule of law*, and respectable legal norms and standards that supports fundamental foundations of a strong democracy.

The *Constitution* is the source of social Justice, equity and mutually reinforcing values of accountability, Justice, *rule of law* and transparency.[7] It affirms the notion of human dignity and promotes the ideals of good life with positive social mechanism for collective progress and fair praxis.[8] The 'best praxis' of laws depends on best practiced virtues of law and actualization of regulative principles in the context of political, social and economic reality.[9] It also talks about systemic fluidity and foundations for meaningful social interactions. It functions as the guardian of legality and the sociological inquiry into the law which [may] require 'testing both the positive and negative aspects' of jurisprudence and legal doctrines.[10] The authority of the law, more characteristically the *Constitution of Bhutan* is 'dualistic legal infrastructure.' It depends on *modus significandi* and *modus operandi*. These requires that laws are enforced to reflect contemporary social and legal pluralism, polity and universal cosmopolitan values. This is significant to ensure 'sociology of constitutional values'- that directly answers how society influences or external values impacts laws and the legal system. For that matter, positive laws are an outcomes of the impacts of social forces that externally validates changing social customs, mores and anthropological interpretation of values. The dynamics of self-validation and external validation has to cross paths so that it removes legal paradoxes. The *Constitution* is consensually grounded and

7 Moleketi, G.F. (n.d.). *Constitutional Values and Rule of Law,* pp. 105-106.

8 Nishihara, H. (2001). *The Significance of Constitutional Values*, Waseda University, Japan.

9 Bolsinger, J. et al. (2018). The Value of Constitutional Values: The Relation between Norms and Values with Special regard to Element of the Bavarian and the Indian Constitution, *FHWS Science Journal*, Germany, *4* (1).

10 Přibáň, J. (2019). Constitutional Values as the Normalization of Societal Power: From a Moral Transvaluation to a Systemic SelfValuation, *Hague Journal on the Rule of Law*, *11*, pp. 451-459.

a 'gradually evolving document' that is empowered and enforced by the collective will of the people.[11]

The cosmology of laws are gradually changing. With changing legal landscape in line with economic, social and political dynamics, the *Constitution* as the parent as well as the guardian of the laws, across the globe are tested. People call for more dynamic and inclusive interpretation of the basic premises of the *Constitution[s]* to uphold its most sacred principles. It requires jurisprudential reflection, and scrupulous analysis of its 'application and impacts' so that it builds a just society. Laws should change: but it cannot push the values inherent to the normative systems – which reflect the collective wisdom of the people. The best ideals of the *Constitution* were best tested by its framers: it underwent common national legal analysis; and its provisions are carefully structured to ensure that social progresses are just and equitable. Legal self-referentiality is important to examine the strength of the *Constitution* as well as the whole architecture of the laws. People call it 'testing times' and it is through these circumstances that both law and people examine each other.

The role of Courts as the fully-fledged arbiter has a significant role in the legal system. Laws are an outcome of human reason and reasons for that matter are an outcome of human thought and thinking. The basic characteristics of a human thought and reason is: it is unwritten and tenable to changes. Human reason and legal science are semantics- but the 'basic constitutional sets' should guide as the reason and language of the document. An open society regulated by accountability, *rule of law* and respect should be supported by principles that calls for service standards, information, openness, transparency and access.[12] Development-orientation, efficiency, equity and responsiveness should be the catalyst for a positive social change: that is based on established constitutional and legal norms. These are evolving constitutional norms.

Institutions that guards the 'constitutional values' and advance the tenets of *Constitutional Justice* are of paramount importance. It should provide measures designed to advance constitutional norms, *rule of law*

11 Ibid., pp. 457-458.

12 The Public Service Commission. (n.d.). *Constitutional Values and Principles*, Republic of South Africa, p.11.

and mirror the basic legal premise of *Constitutions*. Generally, across the globe, 'constitutional norms' are fundamental structures to support rights and basic freedoms. These basic 'architecture and institutions' are in existence to support constitutional law, theories and *spirit of legal relativity.*[13] It should unite people by 'common sympathies, purpose and vision.'[14] In such legal and law making contexts, practically or not, the *National Council* act as a *House of Review*. It is mandated to review matters affecting security and sovereignty of the country and the interests of the nation and the people.[15] In the past, before the *Constitution* was in place, the *Royal Advisory Council* seated in place of the *National Council*.[16] In the *Constitution*, the *National Council* replaced the old terminology of the *Royal Advisory Council*. In some countries, like the *Royal Advisory Council*, the *National Council* is known as the 'Second Chamber.'

The *National Council* is an apolitical body. It renders wise and dispassionate advice to protect the security and sovereignty of the country. Laws in most jurisdictions[17] can be made without proper legal and social analysis, reflection and legal contemplation. In such instances, the *National Council* will provide space to commit for attaining national objectives in a peaceful way- so that it advance as a 'perfected median of national discourse and law making.'[18] The *National Council* is a body of statesmen where wise reflection and deliberation take place, particularly very 'difficult issues.' It is a watchdog to monitor and review the functions of both the ruling and the opposition party of the *Government.* This is to ensure that the *Government* and the *Opposition* are working in the interest of the country and the people. In the profound words of His Majesty the Fourth *Druk Gyalpo,* the *National Council* is to maintain and ensure checks and balances of the *Ruling Party,* the *Opposition* and the ministers, to ensure that national tasks are aimed at nation building and in the interests of the nation and it should be an apolitical body.

13 The spirit of relativity.

14 Loughlin, M. (2019). The Contemporary Crisis of Constitutional Democracy, *Oxford Journal of Legal Studies*, University of Chicago Press, *39* (2).

15 *Constitution of Bhutan*, Art. 11 (2).

16 Tobgye, S. (n.d.). *The Constitution of Bhutan: Principles and Philosophies*, p. 226.

17 Ibid.

18 Ibid.

The *National Council* consist of twenty members from each *Dzongkhag*. This was done to correct the historical error, which existed in the *Royal Advisory Council* in the past. This brought equal representation and voice to all Dzongkhags – thus designed to fulfill equality of representation.[19] In addition to it, the *National Council* consist of five eminent members appointed by His Majesty the *Druk Gyalpo.* This is to fulfil the mandates of the *National Council* to have persons with expertise in fields of commerce, law, science and other developing fields of national interests so that they are able to guide the country. The members need to be non-partisan and professional to provide balanced views on various aspects of development. This Article provides the clear basis of governance based on principles of good governance and effective strategic institutional management.

1. The National Council shall consist of twenty-five members comprising:

   (a) One member elected by the voters in each of the twenty Dzongkhags; and

   (b) Five eminent persons nominated by the Druk Gyalpo.

2. Besides its legislative functions, the National Council shall act as the House of review on matters affecting the security and sovereignty of the country and the interests of the nation and the people that need to be brought to the notice of the Druk Gyalpo, the Prime Minister and the National Assembly.

3. A candidate to or a member of the National Council shall not belong to any political party.

4. At the first sitting after any National Council election, or when necessary to fill a vacancy, the National Council shall elect a Chairperson and Deputy Chairperson from among its members.

5. The Druk Gyalpo shall, by warrant under His hand and seal, confer Dakyen to the Chairperson.

6. The National Council shall assemble at least twice a year.

19 Dr. Benjamin Reily, as quoted in the Tobgye, S. (n.d.). *The Constitution of Bhutan: Principles and Philosophies*.

The Symbolism of 25 Members

When *Guru Rinpoche* endeavoured to propagate the teachings of the *Buddha* for sentient beings, he did it along with his principal entourage, consisting of twenty five disciples. The number of members of the *National Council* corresponds to the number of principal disciples of *Guru Rinpoche.*

The Emblem of National Council

The twenty big lines on the rim of the *National Council's* emblem signify the twenty *Dzongkhag*s which in turn signify the *Twenty Samaya of Accomplishments*. The *Samayas* [vows] includes the restraint from harm, transgressing religious commands, desisting from sexual misconducts, which consist the *virtuous acts* to uphold the virtues and significance of the vows and religious declarations made to follow the values, principles and doctrines of religious lives.

Symbol of Four Elements

Among the elements of outer, inner, and the secret, the outer elements of earth, water, fire and the wind signify the equal pervasion of the outer physical world and inner contents of the sentient beings- without the effects of differences engendered by caste, gender and status. The basis of the elements of earth and inner constituents of all sentient beings are formed from the elements.

Discovery Process: A Powerful Tool for Preparing Your Case[1]

Introduction

Generally, lawsuits are often lengthy, cumbersome and vexing. Not only that lawsuits are drawn-out affairs riddled with legal jargon, progressive phases, and continuous prodding that seems alien to many except to the legal and judicial fraternities with judicial nuances. Trials can be huge consumers of time, energy, and money. Even seemingly, simple cases can take a long time to settle, whether they conclude with a settlement agreement or a court judgment. There are sundry reasons that lawsuits can take so long, everything from a court's crowded docket to pre-trial challenges ranging from the validity of the cause of action to the sufficiency of a complaint. While the courts safeguard the right to expeditious proceedings,[2] the parties instead of leaving everything to the courts, must on their part, take equal responsibility by strictly adhering to the hearing schedules. In this manner, the trial can be shortened and justice can be dispensed promptly. Among others, one of the most important tools of justice is the use of the discovery process, which provides both sides with the opportunity to build evidence to support their arguments at trial. In addition to bolstering cases, efficient, and productive discovery can also save financial resources, time and hassle that may result out of litigation. In this article, the author attempts to make an overview of the discovery process, its importance, key elements, and devices of the discovery process.

1 Contributed by Pema Needup.

2 *The Civil and Criminal Procedure Code of Bhutan 2001,* s. 75(a). All enquiries and proceedings shall be conducted as expeditiously as possible; *Constitution of Bhutan 2008,* Art. 9(5). The State shall endeavour to provide justice in a fair, transparent and expeditious manner.

Nature and Scope of Discovery

Discovery has a broad scope. It includes pre-trial[3] and post-trial[4] discovery as well. Section 44 of the *Civil and Criminal Procedure Code, 2021 (CCPC)* provides that the party may obtain discovery regarding any matter, not privileged, or relevant to a specific claim or defence in an action.[5] The *CCPC* contains separate chapters[6] on the discovery, although it has remained dormant and non-functional. If dormant, it raises questions about the reasons why it occupied huge portions of the *CCPC*. Many litigants and legal professionals are unaware of its existence and its benefits. Essentially, most litigants are unaware that discovery is a pre-trial process, and their obliviousness intuitively results in requesting the courts to make use of the relevant documents and material evidence available to them during the evidentiary hearing. This is one of the reasons that can be attributed to prolonged evidence hearings. Nowadays, a few legal professionals seem to explore the laws on discovery.[7] We could perhaps revitalize it any time soon through training and awareness programs.

Currently, in the absence of clear rules of discovery, *CCPC* does not specify at what stage of proceedings in civil cases, a discovery process can be used. However, the *Civil Procedure Code of India, 1908* provides that after the plaint has been filed by the plaintiff and after the written statement is submitted by the defendant, if the parties feel that proper facts were not disclosed in the suit, either of them can ask for the documents to obtain proper facts of the case. However, the parties can request the facts which have relevance to the parties' case.

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3 Discovery conducted before trial to reveal facts and develop evidence.

4 Discovery conducted after judgment has been rendered usually to determine the nature of the judgment debtor's assets or to obtain testimony for use in future proceedings.

5 According to *Federal Rule 26*, which is the model in *American Procedural Codes*, the inquiry may be made into 'any matter, not privileged, that is relevant to the subject matter of the action. Thus, discovery may be had of facts incidentally relevant to the issues in the pleadings even if the facts do not directly prove or disprove the facts in question. Black's Law Dictionary. (1999). Seventh Eds.

6 *The Civil and Criminal Procedure Code, 2001,* Ch. 7, 8, and 9.

7 In *OAG v. Home Minister Dasho Sherab Gyeltshen's* false vehicle insurance claim, a defence lawyer invoked s. 44 of *CCPC* and requested the court to instruct the *Office of the Attorney General* for the discovery of relevant documents from the *Anti-Corruption Commission.*

The Concept of Discovery

One of the essential elements of the *rule of law* is its procedures. To administer a fair trial, equal opportunities shall be given to both sides to access the documents related to the case through the discovery process. Discovery means a pre-trial procedural aspect wherein each party is allowed to obtain evidence from the opposite party or parties. Discovery means *"a compulsory disclosure, at a party's request, of information that relates to the litigation."*[8] It is the part of the case that comes after lawsuit[9] is filed and before trial[10] in which the parties gather documents and other evidence for use at trial. It usually takes place before the trial formally begins.[11] Discovery can take place in both criminal and civil[12] proceedings, but the issues surrounding electronic discovery are primarily focused on civil litigation.

Purpose of Discovery

The principle of discovery is to save expenses and shorten litigation. The main objective of discovery is to allow the parties to obtain full knowledge of the issues and facts of the case before going to trial. It enables the parties to know before the trial begins what evidence may be presented. It is designed to prevent *"trial by ambush,"* where one side does not learn of the other side's evidence or witnesses until the trial when there is no time to obtain answering evidence.[13] It is the process that allows you to ask another opponent for information he may have,

8 Garner, B.A. (1999). *Black's Law Dictionary,* Seventh Eds., p. 478.

9 In a civil action, the process starts after the "complaint" (a document that begins a suit) has been filed but before the trial begins. Wide-ranging pretrial discovery is an integral part of contemporary American civil litigation, particularly in cases involving substantial stakes.

10 In a criminal action, it generally starts after the defendant has been "arraigned" (brought before the court to plead to the charge brought against him).

11 Discovery is a pre-trial procedure in which each party can obtain evidence from the other party or parties that will be presented at trial.

12 In the United States, the discovery rules differ depending on the type of case (civil or criminal) and the type of court in which you are appearing (state or federal). Civil discovery is very broad and has relatively few restrictions. Criminal discovery, on the other hand, is quite different and limited.

13 American Bar Association. (2021). *How Courts Work.* www.americanbar.org.

which needs to be presented to secure fairness and objective direction in the case. In this case, opponents can also use the discovery process to get information from their opponents. Discovery processes also facilitate obtaining information from other sources, including co-defendants or potential witnesses.

Discovery is a privilege and a responsibility; when filing a suit. While you may have the right to obtain information from your opponent but you also must respond to your opponent's requests for discovery. If you refuse to comply with proper discovery requests from the other side, the court may order such a party to permit discovery.[14]

Discovery is intended to:[15]

a. Narrow and clarify the issues that will be presented to the court;

b. Find out the claims of each party;

c. Find out the important facts and details of your case and your opponent's case;

d. Get testimony from witnesses who may not be available at the time of the trial;[16]

e. Avoid trial by ambush;[17]

f. Freeze testimony to prevent perjury;

g. Serve to prepare a case for summary judgment;

h. Promote settlement of a case outside courts; and

i. Get rid of the surprise and delay that would occur if each party knew nothing about the other side's case until the trial itself.

14 *The Civil and Criminal Procedure Code of Bhutan, 2001,* s. 47(a).

15 Ibid., s. 43.

16 Ibid., s. 53. A deposition of an unavailable witness may be introduced into evidence at proceedings.

17 Withholding important documents have been a general tendency among the Bhutanese litigants.

Different Forms of Discovery Devices

The most common forms of discovery include, but are not limited to:

- Requests for Disclosure;
- Requests for Production and Inspection of Documents;
- Interrogatories to a Party;
- Requests for Admission;
- Oral or Written Depositions;
- Motions for Mental or Physical Examinations;[18]
- *Subpoenas*[19] served on third parties; and
- Affidavits.

Each form of discovery is used for a different purpose and follows its own set of rules as outlined in the procedural laws. A request for disclosure is a request for basic information regarding the parties and the lawsuit that they are involved in. A request for production and inspection is a request for documents and other tangible items related to the case for review by the party making the request. A request for admission is a request for the other side to admit or deny certain facts related to the case. However, the *CCPC* has stipulated only three types of discovery devices viz., affidavits, oral depositions, and written interrogatories.

Affidavits

We use affidavits to present evidence to the court. Sometimes, courts hear evidence from witnesses who give their evidence in person, or orally. However, for evidence without a witness – like receipts, photographs, or personal accounts of facts in the case – you must present your evidence by affidavits.[20]

18 A mental or physical examination of a party whose condition is an issue in litigation may be authorized by a court in the exercise of its discretion.

19 *Subpoena* is a written order issued by a court compelling or requiring a person to testify or produce certain physical evidence such as records, books or other documents for inspection.

20 Justice Education Society of BC. (2010). *A guide to Preparing Your Affidavit: Guidebooks for Representing Yourself in Supreme Court Civil Matters.*

Affidavits are dealt with under section 49 of the *CCPC*.[21] Affidavit is a sworn statement made by the person who is aware of the facts and circumstances which has taken place. The person who makes and signs is known as an *'affiant* or *deponent'*. The *deponent* makes sure that the contents are correct and true as per his knowledge and he thereby concealed no material therefrom. Even though the *"affidavit"* has not been defined in the *CCPC*, it means *"a sworn statement in writing made specifically under oath or affirmation before a Government or a Court official."* [22]

An affidavit is evidence in court. The judge treats it the same way as if he was giving oral evidence. Sometimes, an affidavit is called a *"statement."* To swear an affidavit means you promise what it says is true. To affirm an affidavit means you promise what it says is true and binding on your conscience.[23]

Essentials of Affidavit

Under section 49.1 of the *CCPC*, there are some essentials which are required to be fulfilled while submitting the affidavit in court:

1. It must be a declaration by a person;
2. It must be a statement of fact made voluntarily;
3. It must be in writing;
4. It must be confirmed by signed affirmation by the party making it; and
5. It must be taken before a Government or a Court official.

Contents of Affidavit

The purpose of an affidavit is to formally legitimize a claim. For an affidavit to be valid, the affiant who signs it must be personally aware of the facts within the affidavit and the deponent must take an oath that

21 *The Civil and Criminal Procedure Code, 2001,* s. 49. A party may request for an affidavit from a person regarding information relevant to the case at hand.

22 Kumar, N. (2018). *Affidavit under CPC Order 19 and format, meaning, essentials etc.* www.lawnotes4u.in.

23 Centre for Public Legal Education. (2021). *Evidence in Court: Affidavits,* Alberta.

he is truly honest within the affidavit. However, an affidavit is only valid when made voluntarily and without coercion.

An affidavit shall contain only those relevant facts[24] to which the *deponent* is aware as true to his knowledge. And if it contains inferences and opinions[25] the court can refuse to consider it. The information in the affidavit must be relevant and material to the issues at hand. Material means that the evidence is logically connected to a fact that the parties need to prove in their case.

Affidavit as Admissible Evidence

Affidavits are used in courts all the time. When a witness swears to tell the truth about what he saw before he testifies, he is swearing out an affidavit. An affidavit can also be used as evidence in court if the person swearing out the affidavit cannot be present to testify. In criminal cases, affidavits may be used as part of plea bargaining negotiations while in civil cases, they may be used during discovery or as part of a motion before trial, or even as evidence at trial. Section 52 of the *CCPC* provides that the statement made during discovery is admissible as substantive evidence or impeachment evidence at proceedings to impeach a witness who makes an inconsistent statement in the court.

False Affidavit

Before any person signs an affidavit, the person should keep in mind that there are legal consequences to signing an affidavit with false statements. Since he is signing a document under oath, it is the same as testifying in a court of law. If he provides false information, he could be penalized for deceptive practice and perjury under Bhutanese laws.

Filing or giving a false affidavit or information is an offence under the *Penal Code of Bhutan, 2004 (PCB).* Giving a lenient view will undermine

24 For example, a person saw **A** hit **B** on the nose on February 7, 2022, at 3:00 pm. This is a fact. It means he saw something happen and he has personal knowledge of it.

25 For instance, a man thinks **A** is a bad person. This is his opinion. It means what he thinks or believes.

the value of the document and it will harm the proceedings and will provide no justice to the parties. Criminal contempt of court proceedings can be initiated by the court against the person who files false affidavits in a court of law.

As per section 309(d), 310(a), 369, 370 of the *PCB:*

- A defendant shall be guilty of the offence of deceptive practice if the defendant knowingly files or gives a false affidavit or information. The offence of deceptive practice shall be a petty misdemeanour; and
- A defendant shall be guilty of the offence of perjury, if in a judicial or quasi-judicial proceeding conducted by a lawful judicial authority if the defendant knowingly makes a false declaration or gives false evidence about the issue or point in question. The offence of perjury shall be a misdemeanour.

Depositions

A deposition is part of the discovery process, through which parties to litigation can learn about each other's case and what testimony and evidence they should anticipate at trial.[26] Depositions are either oral or written interviews conducted between the parties or by one party to witnesses who know certain aspects of the case. A deposition is an out-of-court statement[27] or a statement before the court in a judicial proceeding given under oath by any person involved in the case. It is to be used at trial or in preparation for trial. Depositions are commonly used in litigation in the United States and Canada. They are almost always conducted outside court by the lawyers themselves, with no judge present to supervise the examination. Depositions enable a party to know in advance what a witness will say at the trial. Depositions can also be taken to obtain the testimony of important witnesses who can't appear during the trial.[28] In that case, they are read into evidence at the trial.

26 Larson, A. (2018). *What is a Deposition?.* www.expertlaw.com.

27 A deposition in the United States or Canada, involves the taking of sworn, out-of-court oral testimony of a witness that may be reduced to a written, transcript for later use in court or for the discovery process.

28 *The Civil and Criminal Procedure Code of Bhutan, 2001.*

Depositions are dealt with under sections 50 to 50.4 of the *CCPC*. It says the court may depose a person with relevant information. A deposition shall be taken before an officer legally authorized to take depositions in accordance with the prescribed interrogatories. Further, it says when the testimony is fully transcribed, the deposition shall be read out to the person deposed for verification as to its accuracy and signed by the person deposed. In the case of an illiterate person, he or she is entitled to have an official of the court read the statement to him/her before a literate witness to confirm its accuracy. The official of the court and the witness shall sign the deposition confirming the accuracy of what is written and what was read to the person deposed by the court official. A perusal of the above provisions shows that its scope is limited to the statements deposed before the court in a judicial proceeding.

Interrogatories

In law, interrogatory procedures have traditionally been a part of legal discovery, and have developed as one among other methods of discovery. *"Interrogatories"* are written questions that must be answered in writing under oath. In addition to taking depositions, either party may submit written questions to the other party and require that they be answered in writing under oath. If one party chooses to use an interrogatory, written questions are sent to the other side, and that party has a period in which to answer. Unlike depositions, interrogatories are not performed in person. Only parties to the lawsuit must respond to interrogatories. Outside witnesses do not need to respond to interrogatories. Written interrogatories are a great way to obtain information and can be very informative.

Witten interrogatories are dealt with under sections 51 to 51.1 of the *CCPC*.[29] It provides that a party may send a set of relevant questions to the other party to the case and that a party must inspect before answering interrogatories to ensure the accuracy of the response. Generally, interrogatories may only be used with leave of the court. However,

29 In India, interrogatories are covered under s. 30 and *Order XI Rule 1* to *11, 21* and *22* of the *Code of Civil Procedure, 1908.*

interrogatories have to be confined to the facts which are relevant to the matters in question but not to conclusions of law, inference from facts, or construction of words or documents.

Not all interrogatories may be conducted as means through which discovery may be sought, but rather only those interrogatories for which rules of procedure and interpretation have been established. At this time reference is made to the fact that it is the courts which establish those rules which determine what kind of interrogatory may be administered, and how it is to be administered. The problem of interrogatory includes the selection of appropriate affidavits and testimony which are preliminary to the administering of interrogatories. Not all interrogatories imply oral questioning of litigants in court. If interrogatories are allowed, they must be confined only to those questions which enable the interrogating party to obtain information directly related to the material facts at issue. To begin with, then, in discovery all of the procedure permitted or disallowed is entirely at the discretion of the judge.[30]

Purpose of Interrogatories

Interrogatories are allowed for the following purposes:

1. To ascertain the nature of the opponent's case or the material facts constituting his case;
2. To support one's case, either
    a. Directly, by obtaining admissions, or
    b. Indirectly, by destroying the opponent's case.

The Rajasthan High Court in a recent judgment of *Govind Narayan and Ors. vs. Nagendra Nagda and Ors. (*MANU/RH/0832/2017) held that the whole purpose of interrogatories is to seek admission of a party on a matter in dispute so that the issues can be accordingly framed, minimizing the contentious issues or disputes left for the adjudication of the Court, with the ultimate object of facilitating early and expeditious disposal of

30 Kevelson, R. (n.d). *Semiotics and Methods of Legal Inquiry: Interpretation and Discovery in Law from the Perspective of Peirce's Speculative Rhetoric.*

the suit. Further, the court held that interrogatories cannot be permitted, once the evidence of the concerned opposite party is over.[31]

Objections to Interrogatories

Objections can be raised by the parties on the following grounds:

(a) Questions are scandalous;

(b) Questions are irrelevant;

(c) Questions are not exhibited bona fide;

(d) Matters which are inquired into are not sufficiently material at this stage;

(e) On the ground of privilege; or

(f) Any other ground.

Limits of Discovery

Discovery can feel like an incredibly invasive process. When involved, people are often curious if anything is off-limits or if their private and personal lives will be exposed. While the discovery process is designed to be broad and allow as much information as possible to come to light, there are some limitations.

As per section 45 of the *CCPC*, discovery shall not be allowed if:

(a) a suit has not been legally initiated;

(b) it is unreasonably duplicative;

(c) information sought is obtainable through another source that is more convenient, less burdensome or less expensive;

(d) it is unduly burdensome or expensive in the facts and circumstances of the case;

(e) it is for irrelevant information including facts bearing no relation to the case;

31 Lakhawat, M. (2018). *India: Discovery By Interrogatories.* www.mondaq.com.

(f) it is to harass or embarrass a party or a witness;[32]

(g) it is privileged information as defined in this Code;

(h) it is to protect the witness in the criminal trial; and

(i) it is against the interest of national security.

The following are considered not discoverable or information privileged from discovery:[33]

- **Private Matters** - What exactly falls under this category is still being defined, but courts have generally recognized that certain aspects of our personal lives should remain private – as long as they are not relevant to the case. This can include work products,[34] financial information,[35] insurance policies,[36] protective and modifying orders,[37] official records,[38] health or body issues, sexuality, sexual practices, sexual partners, religious beliefs, and immediate family relationships.

- **Confidential Conversations** - The following conversations are considered privileged: spouse and spouse,[39] lawyers and clients,[40]

32 *The Evidence Act of Bhutan, 2005,* s. 68 (b).

33 *The Civil and Criminal Procedure Code, 2001,* Ch. 9, s. 55-58.

34 Ibid., s. 55.1. Work-product shall include (a) materials, mental impressions, conclusions, opinions or legal theories of the opposing party and his/her legal representative; and (b) expert evidence given by the expert to the opposing party and his/her legal representative informally.

35 Ibid., s. 56. Discovery of the defendant's financial situation is generally not permitted except when punitive damages are sought.

36 Ibid., s. 57. The court shall not allow discovery of insurance policy limits for trial but may allow it in order to allow the party an opportunity to assess adequately the settlement value of the case.

37 Ibid., s. 58. On a sufficient cause being shown, the Court may at any time order that discovery or inspection be denied, restricted, deferred or make such other order as is appropriate.

38 *The Evidence Act of Bhutan, 2005*, s. 107 & 108.

39 Ibid., s. 111.

40 Ibid., s. 109.

doctors and patients,[41] religious advisors and advisees and information as to the commission of offences.[42]

Failure to Comply with Discovery

As per section 47of the *CCPC,* if a party has failed to comply with a legitimate request for discovery, the court may:

(a) order a such party to permit discovery;

(b) order a such party to permit inspection;

(c) grant a continuance until discovery has occurred;

(d) order whatever relief is deemed appropriate; and

(e) order the non-compliance party or legal representative to pay reasonable court costs, attorney fees or both.

Conclusion

A good beginning makes the rest of the journey easier. The same holds for the legal discovery process although discovery has more advantages than its disadvantages. In both civil and criminal cases, discovery involves examining the evidence that the other side plans to present. It can prevent any surprises at trial, narrow the issues that are litigated, and often help the two sides resolve out-of-court rather than going through a full trial. Discovery shall not be made if the court does not think that this order will lead to fair disposal of the suit or be useful for saving costs. Discovery is a privilege and a responsibility, but at the same time the parties should not abuse its process merely as *"fishing expeditions".*[43]

Although, discovery is adequately dealt with in Chapters 7, 8 and 9 of the *CCPC*; it lacks the rules of procedure and many litigants and lawyers are unaware of its existence and its benefits either. Ignorance of the

41 Ibid., s. 112.

42 Ibid., s. 113 & 114.

43 *Fishing expedition* refers to someone overly investigating or demanding information from an individual or organization. In law, the term is mostly used to describe using the discovery phase of a lawsuit to demand too much information based on hunches and accusations.

law can be one of the reasons for the delay in the disposal of cases. It can only be revitalized through training and awareness programs. Both prosecution and defence have to engage in discovery. The denial of pre-trial discovery in criminal cases is a denial of due process. The effective use of the discovery process can save a client money, time and energy in the long run. Discovery is a useful tool in the litigator's arsenal.

Negotiation Management and Aspects of Rhetoric[1]

Introduction

> *In all negotiations of difficulty, a man may not look to sow and reap at once; but must prepare business, and so ripen it by degrees*
>
> **-Francis Bacon**

Everyone negotiates. In fact, negotiation is probably as old as mankind and it was born out of human's early struggle for survival and dominance.[2] During the last century or so, negotiation has become an art where regardless of skills of negotiators and methods of negotiation, results often differ due to *externalities of variables* that come into play. One of the very important variable is the rhetorical aspect of negotiation which includes communication skills, culture, power, objections and art of shrewd craftsmanship. To begin with, rhetoric is the art and study of the use of language with persuasive effects.[3] Aristotle divided the means of persuasion into three categories: *logos* (logical), *pathos* (emotional), and *ethos* (credibility) and said that these three logical arguments must be used together in order to persuade the audience. Therefore, as the idea of negotiation gains widened favour as a means of managing differences and resolving disputes, the use of rhetorical aspects become an important factor to influence the outcome of negotiations.

Structuring Steps, Dialogue, and Conversation

Negotiation is a process of potentially opportunistic interaction by which two or more parties, with some apparent conflict, seek to better through

1 Contributed by Thongjay.

2 Lewis, R. (1955). *When cultures collide*, Nicholas Brealey Publishing.

3 Max, A., Antonio, P., & Edward, P. (2015). *Rhetoric, Chapter 3 Rhetoric and Communication asking for Directions.* http://knightswrite.wikidot.com/chapter-3-rhetoric-and-communication-asking-for-directions. *See* Ingwersen, P. (1993). Review of Communication and Negotiation*, The Library Quarterly*, *63*(3), pp. 380-385.

jointly decided action than they could otherwise.[4] According to Rubin and Brown, negotiation refers to a process in which individuals work together to formulate agreements about the issues in dispute.[5] Although definitions of negotiation vary in their form and content, one common thing is the focus on negotiation as a process which includes both verbal and non-verbal behaviour.[6] There are two type of phase models, *stage models* and *episodic models* which differ in how phases are defined. A major distinction between the two is that *stage models* treat phases as fixed, whereas, *episodic models* treat phases as flexible, allowing variations in both the length and order in which they occur.[7]

Holmes identified three stages in negotiation: *initiation, problem solving,* and *resolution*.[8] Others propose four stages such as *relational positioning*, *identifying the problem*, *generating solutions*, and *reaching agreement*.[9] In contrast to the fixed phase approach taken by other scholars, Holmes take a more episodic approach in using flexible phase mapping. Although the debate exists as to whether negotiation phases should be fixed or flexible, it is evident from the studies that the strategy used varies across negotiation stages and precise nature of stage is also context sensitive.[10] Negotiation is about communication. It is a dialogue in which each person explains his or her position and listens to what the other person says. In this regard, a special emphasis must be given to the cognitive process of the negotiator and the instrumental use of the resources that are available. Habermas argued in favour of communicative reasons and

4 Lax, D. A., & James, K. (2006). *3-D Negotiation: Powerful tools to change the game in your most important deals,* Harvard Business Press.

5 Jeffrey, R., & Brown, B. (1975). *The Social Psychology of Bargaining and Negotiation,* Academy Press, Inc., NewYork.

6 Thompson. (1990). Negotiation Behavior and Outcomes: Empirical Evidence and Theoretical Issues*, Psychological Bulletin*, *108* (3), pp. 515-532.

7 Putnam, L. (1990). *Reframing integrative and distributive bargaining: A process perspective*, Research on Negotiation in Organization, pp. 3–30.

8 Holmes, M. E. (1992). *Phase Structures in Negotiation,* pp. 83-105.

9 Brett, J. M., & Michele, J. G. (2006). *A cultural analysis of the underlying assumptions of negotiation theory,* Negotiation Theory and Research, pp.173-201.

10 Lim, S. G., & Keith, M. (1994). *Phases, deadlines, and the bargaining process*, Organizational Behaviour and Human Decision Processes, pp. 153-171.

refers to compromise oriented approach as communicative action.[11]This illustrates the importance of communication as a guiding mechanism for coordination of negotiation. Therefore, rhetoric, as Aristotle envisaged, attempts to capture a holistic approach to negotiation, which governs parties' attempt to persuade each other.[12]

Aristotle defined rhetoric as the ability to see what is possibly persuasive in every given case.[13] While it is not to say that the rhetoricians will be able to convince under all circumstance, he or she has a complete grasp of its method, if they discovers the available means of persuasion. Aristotelian's definition clearly places great value on communication itself, and recognize that the persuasiveness of the negotiator, which is intertwined with the person that is persuaded. Therefore, when applied with communicative skills, persuasion creates paradigm shifts, break boundaries, strengthen change, stimulate novel, and constructive solutions in negotiations.

An effective communication is directly proportional to an effective negotiation with reasoned discussion. Reasoned discussion is not merely exchange of idea, thoughts and opinions, but it is based on sensible reasons and the art of creative and influential persuasion. Consequently, in this element of reasoned discussion, there resides a communicative reason which is able to secure or enhance the persuasiveness of the negotiation and art of creative influence within a communication procedure. Negotiator needs to have excellent communication skills so as to change the mind of other. A change in agreement is brought about by changing the minds of the parties.

With communicative skills, negotiators must use dialogue and the art of respectful conversation. Dialogue and conversation constitutes the

11 Jürgen. H. (1990). *Moral consciousness and communicative action*, MIT Press. *See Also* Bohman, J., & Rehg, W. (2014). *Jürgen Habermas,* The Stanford Encyclopedia of Philosophy (Fall Eds.), Edward, N Z. (2015). (Eds.). http://plato.stanford.edu/archives/fall2014/entries/habermas/>.

12 Arvanitis, A., & Antonis, K. (2011). Negotiation and Aristotle's Rhetoric: Truth over interests?, *Philosophical Psychology (24)* 6, p. 847.

13 Ibid., p. 848.

normative process of language use, in which spoken words are unrehearsed and logically spontaneous. It moves from determined points of departure towards an undetermined goal for the utterance of each individual is decided not merely by the individual himself but the preceding remark of the interlocutor to whom his remark is a reply. However, it is important to remember that the main interest of dialogue is not about winning an argument, but rather the provision of the chance for opening up a conversational clearing.

Communication is also a cultural based dialogue: different social groups have distinct ways of communication.[14] For instance, the Occidentals tend to have independent traits of dialogue called *individualistic self-construal culture*. They tend to share information directly making rational appeals. On the other hand, the Orientals tend to have interdependent trait called *collectivist self-construal culture*.[15] They share information indirectly making emotional appeals. Hence, it showsthat different types of communications may be handled differently across cultures.

Proofing, Topos, and Refutation

In rhetoric, the available means of persuasion is based on three kinds of proof. They are logical proof *(logos)* which comes from the line of argument in the speech, ethical proof *(ethos)* i.e., the way the speaker's character is revealed through message, and emotional proof *(pathos)* which is the feeling that the speech draws from the hearers. Aristotle focused on two forms of logical proof: *enthymeme* and example. He regarded *enthymeme* as the strongest of the proofs. It is merely an incomplete version of a *formal deductive syllogism* and uses *deductive logic-moving* from global principle to specific truth. The example uses inductive reasoning, drawing a final conclusion from specific examples.[16]

14 Adair, W. L., & Jeanne, M. B. (2005). The negotiations dance: Time, culture, and behavioural sequences in negotiation, *Organization Science*, *16* (1), pp. 33-51.

15 Markus, H.R., & Kitayama, S. (1991). Culture and the self: Implications for cognition, emotion, and motivation, *Psychological Review*, *(98),* pp. 224–253.

16 The Rhetoric of Aristotle. http://webcache.googleusercontent.com/search.

Negotiation is the communicative execution of strategies to reach to an ultimate goal. The skilled negotiator knows how to use *topos* in a timely fashion and [may] create consensus over his or her argumentations. He or she must have an argumentative scheme that enables to construe an argument for a given conclusion as Aristotle rightly said: *'we must find the location (topos) from which to attack.'*[17]

One important *topos* in negotiation is that of *'expanding the pie'* which Aristotle states that *'of two goods the greater is that which added to one and the same, makes the whole greater.'*[18] This view is consistent with negotiation theory's focus on increasing the benefits for all parties involved, thus finding a way that leads to a mutually acceptable outcome. Aristotle also pointed out the importance of the precedent as a sound *topos.* For him, it can be persuasive argument for negotiators to refer to past judgments once it appears reliable and indicative of the truth.

Although *topoi* remain a valuable tool for negotiator to scheme an effective argument, overuse of one *topos* over another could easily lead to use of biased arguments, and possibly the failure to reach consensus. This certainly, means that one form of argumentation is not better than the other, but timely use of each can lead the negotiation to its solution i.e., an outcome mutually acceptable for all parties. Negotiators must prepare the proper *topoi* of the most important aspects of the subject matter before entering into the negotiation room. Another important aspect of negotiation as communication is: it involves refutation. As each party has their own set of opinions and expression of their particular insights, that may inevitably threaten or conflict with others. In such case, refuting party must be explained with one or more reasons that his or her opposing claim is irrelevant or may not be considered. It may demonstrate that one's issue is more important than other's and it must consider qualitative significance: the matter of degree, and quantitative significance: the number of cases to which an idea applies. The best arguments have the both.[19]

17 Iovan, D. (2010). *The Aristotelian Dialectical Topos,* University of Cluj-Napoca, Romania, p. 131. *See Also* Christopher, W. (2007). *Revisiting Aristotle's Topoi,* Tindale.

18 Rapp, C. (2010). *Aristotle's Rhetoric*, The Stanford Encyclopedia of Philosophy.

19 John, M. (2008). *Should We Ever Negotiate with Terrorist,* Heinemann Library.

Negotiator's argument may be refuted either by a counter-syllogism or by bringing an objection.[20]Although there are two styles of refutation: for some depend on the language used, while some are independent of language, they must consider the rationale being used. Through inductive and deductive arguments one must show that there is no enough data being used for arguments. An effective refutation in negotiation includes argument anticipation, a range of refutation options, and a clear and direct expression of disagreement.

Logical proofs evidently aim at producing an inter-subjective consensus by persuading others. They are not techniques meant to deceive the hearer, but instead it tends to form a rational discourse process, whose results might have general credibility, being accepted by all parties. And the acceptance of a negotiation outcome on the basis of commonly acknowledged arguments or criteria is often the exact purpose of negotiation.

Dealing with Objections

In rhetoric, answering questions and anticipating possible future objections would set up a scope for the argument to have a strong defence. The classical rhetoric shows that there was the practice of addressing anticipated counterarguments, which were used in one's speeches to get one's position accepted, and at the same time to rebut an opponent's position.[21]The arguer's ability to address anticipated objection was a sign of argumentative competence and this way of arguing, if carried out correctly, can have a powerful effect on the opposing party.

On the other hand, the modern argumentation theorists have focused on questions like whether an arguer should deal with all possible objections, or which objections should be dealt with. They too have shown a strong interest in the technique of addressing anticipated counterarguments

20 *Aristotle's Rhetoric*, Book II, Ch. 25 (1402b, 1403a). http://rhetoric.eserver.org/aristotle/rhet2-25.html.

21 Amjarso, B. (2010). *Mentioning and Then Refuting an Anticipated Counterargument: a Conceptual and Empirical Study of the Persuasiveness of a Mode of Strategic Maneuvering* [Doctoral Dissertation] p. 14.

as a means by which one can enhance its persuasiveness. There is also a distinction between real and imaginary objections when anticipated however, what is important is that negotiators must be able to anticipate objections from the other party.[22] Negotiators come across all types of objections in the negotiation process. There is a process for uncovering and dealing with objections. For instance, it is better to start with the proper attitude. Clarification and acknowledgement of objections are followed by anticipation and how to handle it. The negotiator must not be defensive about other party's objections. Understanding the objection before answering is pertinent. Most of the time, the objection is not the real reason, but instead a way to hide something else. Objections are often indirect ways to express prospects to say that the other party wants to know more. It is always better to not fake an answer. Negotiators should admit if they do not know the answer, but should promise that he or she will get back the answer promptly.

Conclusion

The rhetoric as a human communication is about finding ways to persuade other parties, arranging structure of coherent argument, emotions, speaking without having to memorize, and making effective use of voice and gestures. It is not merely just about what is actually said but how it is said. Therefore, an effective communication plays a fundamental role in any interaction and successful negotiations. Despite debates, it is evident that the step of negotiation is flexible and strategy used varies with each stage and more importantly, precise nature of stage is also context sensitive. Although negotiations could have all sorts of different intentions and motivations, the process itself has a life of its own. Use of common *topos* of analogy can prove effective, but overuse of one *topos* over another could easily lead to the failure to reach consensus.

Rhetoric is the art of discourse. There are no definitive rules to the path to persuasion. Pursuing rhetorical aspects would lead to more effective use

22 Perelman, C., & Lucie, O. T. (1969). *The New Rhetoric: A Treatise on Argumentation*, Trans. John Wilkinson and Purcell Weaver, Notre Dame.

of communication and arguments during the negotiation and this in turn would bring negotiators closer to the outcome of negotiation. It would help negotiators devise proper negotiation tactics and avoid pitfalls. In the end, rhetoric is not only important for negotiation management but also nurturing for leadership quality as the kind of people who have good rhetorical skills are usually thought leaders and public figures.

The Role of the Justice Sector in Unsettled and Uncertain Times[1]

Introduction

'We are in a world of worry.' This was the opening line of the 2022 *Human Development Report (HDR).*[2] The world we live in is characterized by uncertain times and unsettled lives. The impact of the COVID-19 pandemic is still felt across our societies: a case in point is that the *global human development index* value has regressed in almost every country for two years consecutively. The war in Ukraine and the *climate crisis* are fueling a cost-of-living crisis. *UNDP's Special Report on Human Security,* published in 2022, found that even before the COVID-19 pandemic, more than 6 in 7 people in the world felt insecure. [3] Bhutan has not been spared from the impact of the cascading crisis. Although Bhutan is carbon-neutral, it is impacted severely by *Climate Change.* Rapid urbanization and the overall modernization processes are also bringing about changes to the way we live and how we interact with each other. These changes are also manifested in the data from the *Justice Sector.*

Increasingly, data indicates that more young people are coming into conflict with the law, particularly in relation to drug abuse. In 2020, police arrested a total of 3589 people; of those, 28 percent were youth aged 18 – 24.[4] During the successive COVID lockdowns, the number of reported domestic violence cases grew by almost 52 per cent.[5] Rapid changes in our society also bring about stress to families. We have witnessed steady increases in matrimonial matters, including divorce,

1 Contributed by Azusa Kubota.

2 Human Development Report 2021-22. (2022). *Uncertain Times, Unsettled Lives: Shaping our Future in a Transforming World,* UNDP, p. iv.

3 UNDP. (2022). *New threats to human security in the Anthropocene – Demanding greater solidarity*, p. 4. srhs2022pdf.pdf (undp.org).

4 Crime Record and Analysis Unit. (2020): *Statistical Yearbook,* Royal Bhutan Police, p. 4. Statistical Yearbook 2020.pdf (rbp.gov.bt).

5 National Commission for Women and Children. (2021). *Covid-19 Impact on Women and Children Study,* p. 97. https://ncwc.gov.bt/publications/COVID19-Impact%20of-Women-and-Children-Study1646648937.pdf.

child support and custody disputes, and asset division suits, to name a few. In 2020, 3,630 civil cases were registered, among which almost 33% were matrimonial cases.[6]

These trends might signal that people are more aware of their rights; thus, there is a greater inclination among the public to report grievances. Nevertheless, my numerous conversations with different communities in Bhutan, interlocutors allude to the fact that rapid changes are putting strain on our families and society. UNDP's *HDR* states that mental well-being and psychological resilience are essential for human development in the face of unsettled lives amidst multifaceted uncertainties.[7] Every one of us, particularly the state institutions, have a role to play in ensuring that people are empowered and resilient to withstand the shocks.

Article 21(1) of *Constitution of Bhutan, 2008* states that *"the Judiciary shall safeguard, uphold, and administer Justice fairly and independently without fear, favour, or undue delay in accordance with the Rule of Law to inspire trust and confidence and to enhance access to Justice."* [8] During the COVID-19 pandemic, we saw how the breakdown of trust across and within nations hampered our ability to respond to and recover from the pandemic. Globally, fewer than 30 percent of people think that most people can be trusted, the lowest value on record. Never has there been as much distrust in the world as there is today.[9] The *Justice Sector*, particularly the *Judiciary,* has a critical role in inspiring trust and confidence among the public. So, what can be done to ensure intergenerational Justice in unsettled and uncertain times?

Investment, Insurance, and Innovation towards Achieving a Just and Fair Society

The *Human Development Report* advocates for policies that focus on the ***Three I's - investment, insurance,*** and ***innovation***[10]- these will go a

6 Royal Court of Justice. (2020). *Annual Report,* p.50. https://www.judiciary.gov.bt/archives/1645374088-.pdf.

7 Human Development Report 2021-22. (2022). p. 196.

8 *Constitution of the Kingdom of Bhutan, 2008*, Art. 21(1).

9 Human Development Report 2021-22. (2022). p. 10.

10 Human Development Report 2021-22. (2022). p. 18.

long way in helping people navigate this new uncertainty and thrive in the face of it. Through its multi-year *Justice Sector Strategy*, the *Justice Sector* has outlined vital priorities and advocated for and facilitated the application of the ***Three I's***. Reflecting on my three-and-a-half years of working closely with the *Judiciary* and the *Justice Sector* in Bhutan, some transformational results have been achieved in all three areas.

E-litigation is an example of practical and smart investments and insurances to ensure access to justice is equally available to all. The global surge in social protection in the wake of the COVID-19 pandemic provided a sense of security to the most vulnerable. The recent launch of the *Legal Aid Center* will go a long way in offering social insurance coverage for those most in need. UNDP partnered with RENEW and a Bhutanese law firm to provide time-bound legal aid to women who were subjected to domestic violence during the pandemic. One of the beneficiaries described the programme as a *"bright light in the darkness and a helping hand during the worst period of my life."*[11] The anticipated benefits of the newly established *Legal Aid Center* are far-reaching, and I would like to sincerely commend the *Judiciary of Bhutan* and the Bhutan National Legal Institute for taking this historic leap forward.

The *Judiciary of Bhutan* has always believed in the potential of digital solutions. The e-litigation platform, introduced in April 2021 amidst the pandemic, witnessed a steady increase in its use. We at UNDP are humbled to be a partner in this catalytic initiative which made Justice considerably more accessible, particularly in remote areas. About 70 percent of the courts are now equipped with remote hearing equipment.[12] To date, 668 hearings have been conducted using the e- litigation processes in various courts.[13] Innovation is not only about technology or new ideas. Adopting practices from elsewhere and reviving old ideas in different forms can also bring transformation in times of crisis. *Court*

11 Transcript from Interview with a beneficiary of the *Pilot Legal Aid Program for Vulnerable Women*. (2022).

12 Royal Court of Justice. (2022). *Standard Progress Report,* e-Litigation Project.

13 Ibid.

Annexed Mediation (CAM), instituted in 2019, allows litigants to opt for negotiated settlements with the assistance of neutral in-house judicial mediators at any time during the litigation process.[14] The table below presents data that proves its effectiveness in offloading weight from the courts, improving the efficiency in dispensing Justice.[15]

Year	Total no. of civil cases registered	Cases offloaded from the mainstream courts through CAM	Percentage of offloading cases
2021	4718	994	21.06%
2020	3657	445	12.16%

While touring throughout the country, I witnessed the substantial impact of the *Nangha Nangdrik* in resolving disputes efficiently and amicably. This initiative, emerging from the visionary leadership of Her Royal Highness Sonam Dechan Wangchuck, builds on ancient traditions whereby local leaders perform the roles of community-based mediators, travelling from door to door to help facilitate harmony and restore peace. This programme has worked well in closely-knit Bhutanese communities founded on Buddhist principles and values. Since its inception, over 17,000 cases have been mediated through this scheme. These are all meaningful ways to bring Justice closer to people and contribute to equalising administration of Justice, bringing us closer to the just and harmonious society that is envisaged by the *Five-Year Development Plan.*

Moving Forward with the Changing Times

As societies change, those of us responsible for providing services, including Justice services, must adapt ways of delivering services. Change is not new, but the challenge we face now is that the speed of change is faster, and the changes are multiple, and oftentimes unknown. The *Judiciary of Bhutan* has always embraced the application of digital solutions, and it is my sincere hope that this openness will be carried

14 Bhutan National Legal Institute. (2019). *National Mediation Report*, p. vii. http://bnli.bt/wp-content/uploads/2022/03/NMR-2019-compressed.pdf.

15 Royal Court of Justice. (2020-2021). *Annual Report.*

forward. In the name of enhanced efficiency, some countries have gone a step further by introducing, for instance, AI-operated "robotic judges" to dispense judgements for routine cases such as traffic offences and divorce settlements.

In a society such the one in Bhutan where human connections and touches are indispensable in rubricating human relations, this might be taking a bit far. However, a healthy-balance of traditional approaches and digital solutions, such as *Nangkha Nangdrik* and e-Litigation, is something that Bhutan can continue to pursue as an exemplary model for the world.

Use of Data to be Anticipatory

Being anticipatory is critical, or rather inevitable, in all sectors, as it requires agility to respond to fast-moving situations with great uncertainty. Intelligent use of real-time data would allow for timely decision-making and adjustments.

The 12th *Five-Year Plan* of the Royal Government of Bhutan (2018-23) is underpinned by the principles of leaving no one behind, narrowing the gap between the rich and poor, and ensuring equity and Justice.[16] A just society is defined as *'a society where every citizen has equitable access to resources and opportunities to pursue and realise individual and national aspirations.'* Improving Justice services and institutions remains one of the critical priorities in creating that 'just society.' In this regard, providing effective Justice services has been identified as the 16th *National Key Result Area*: to strengthen Justice services and institutions through:[17]

- Harmonisation of conflicting laws;
- Enhanced coordination among justice sector agencies;
- Improving the efficiency of judicial services; and
- Ensuring citizens' awareness of laws and procedures.

16 Gross National Happiness Commission. (2018). *Twelfth Five Year Plan 2018 – 2023,* Volume I: Main Document, p. 26. https://www.gnhc.gov.bt/en/wp-content/uploads/2019/05/TWELVE-FIVE-YEAR-WEB-VERSION.pdf.

17 Ibid., p. 96.

The *NKRA* also highlights the need to enhance corrective and rehabilitative measures to reintegrate offenders into society.[18] The *Royal Courts of Justice* is the lead agency for this *NKRA*.[19] The two *Key Performance Indicators* or *KPI*s for which data is made available include:public satisfaction in Justice services (67.7%) and reduction of recidivists in the prisons (4.7%).[20] To monitor the situation, there is a need for a robust system for data collection and dissemination. Similarly, while Bhutan has made notable progress in attaining selected goals, the availability of data against the globally recommended indicators for the *Sustainable Development Goal (SDG) 16* is limited for some (see table below). It is not practical or necessary for all indicators to be measured regularly. However, as the *Justice Sector of Bhutan*, based on its aspirations and priorities, a selected number of indicators can be monitored periodically to ensure that progress is being made as envisioned.[21]

SGD 16: Peace, Justice and Strong Institutions

Sl. No	SDG Indicator	Year	Value	SDG Achievement Level	Long term objective value
1.	Homicides per 100,000 population	2020	2.46	Challenges remain	0.3
2.	Unsentenced detainees as a percentage of overall prison population	2019	14.18	SDG achieved	7
3.	Population who feel safe walking alone at night in the city or area where they live	Information unavailable			
4.	Property rights	Information unavailable			

18 Ibid., p. 96.
19 Ibid., p. 96.
20 Ibid., p. 98.
21 *Sustainable Development Report.* (2022). https://dashboards.sdgindex.org/map/indicators/birth-registrations-with-civil-authority.

5.	Birth registrations with civil authority	2020	99.90	SDG achieved	100
6.	Corruption Perceptions Index	2021	68	SDG achieved	88.6
7.	Children involved in child labor	2019	3.5	Challenges remain	0
8.	Exports of major conventional weapons	2020	0	SDG achieved	0
9.	Press Freedom Index	2021	28.86	SDG achieved	10
10.	Access to and affordability of justice	Information unavailable			

The *Justice Sector Strategic Plan* envisages an efficient governance mechanism for such analytics and timely actions for corrective measures. The proposed *Justice Sector Steering Committee* might be the most suitable platform for regular reflections on the selected and prioritized indicators in an *"Executive Justice Sector Dashboard."* The ongoing efforts to consolidate and stream various data management systems of the *Justice Sector Institutions* may ultimately lead to such efforts.

Conclusion

As I depart the beautiful Kingdom of Bhutan, I would like to sincerely commend the *Justice Sector Institutions*, and particularly the *Judiciary,* for making bold policy choices and bringing about breakthrough initiatives through digital solutions and innovation. I hope these experiences will be documented, codified, and widely shared for the benefit of the many who aspire to achieve a just and fair society for all. I also take this opportunity to thank partners in the *Justice Sector* who have made these transformational changes possible. The *UNDP, Bhutan* is humbled to have been a partner in some of these journeys.

Alternative Dispute Resolution Developments in Cambodia[1]

Introduction

Alternative Dispute Resolution (ADR) has developed due to perceived failures and weaknesses in the formal dispute resolution system, regulated by law, and enforced through the *Judiciary.* It is implicit that the law and the formal system of justice belong to the state. The other mechanisms to resolve the dispute, different from the *Judiciary*, are called Alternative Dispute Resolution. The ADR mechanism is composed of negotiation, mediation, conciliation, and arbitration. ADR is generally used as an "informal" term in the field of dispute resolution. There are no current ADR regulations in Cambodia. It has been proven that the use of ADR provides a better and less costly outcome to disputants than formal court outcomes. In general, the process is less formal, less confrontational, and potentially allows opportunities to address psychological issues.[2]

In Cambodia, as in many Asian countries, there is a long tradition of ADR under which disputes are resolved by collaboration or compromise rather than by adversarial conflict.[3] The ADR mechanism has traditionally been used to resolve disputes by local authorities at the village and commune levels. The ADR mechanism continues to be actively applied at local and district levels for conflict management in Cambodia. ADR plays an important role as a non-adjudicated mechanism to solve conflict and can accommodate the judiciary as a complementary process. Cambodian people have been solving their disputes outside the judicial system for a long time. The ADR approach is increasingly contributing to social

1 Contributed by Savath Meas.

2 Burton, J., & Dukes, F. (1990). *Conflict: Practices in Management, Settlement &Resolution*, St. Martin's Press, New York, U.S.

3 Raquel, Z.Y., Kong, R., &Phan, S. (2005). *Pathways to Justice,* Phnom Penh: UNDP, Cambodia.

justice and peace, while at the same time complementing the judicial system. Whilst mediation, conciliation, and arbitration rely on third-party intervention, the difference among these mechanisms is the level of intervention of the third party.

Several researchers have examined alternative dispute resolution and mediation practices in Cambodia. Chandler stated that Cambodian villages preferred to settle their disputes by mediation or conciliation than the judicial system. He wrote in the history of Cambodia that:[4]

> *Quarrels within a village or among neighbors were settled by conciliation rather than by law, and they often smouldered on for years. Villages were usually "ruled," for ceremonial purposes and the purposes of relations with higher authorities, by elderly men chosen for their agricultural skill, literacy, and fair-mindedness.*

Traditional Mediation and Conciliation

The traditional conflict management system used by Cambodian villagers to resolve daily disputes is a process known in Khmer as *somrohsomruel* and has ancient roots in Khmer society.[5] Under this system, a preference for avoiding disclosure of problems led to an attempt to settle matters individually, or with the help of close relatives or neighbors, before calling on an independent third party to resolve a dispute through mediation. Respected elders, Buddhist monks, and local authorities at the village and commune levels, have historically worked to resolve disputes outside the judicial system.[6]

This traditional mediation process usually began at the village level. Only when the dispute was not resolved would it move up a hierarchical ladder, first to the commune, and then to the police, district, or court. Although procedures varied, depending on the locality, the basic framework and its

4 Chandler, D. (2000). *A History of Cambodia*, Boulder, West views Press.

5 Ramage, et. al. (2008).

6 Luco, F. (2002). *Between a tiger and a crocodile – Management of local conflicts in Cambodia*, UNESCO, Phnom Penh.

key steps, the sequence of events and the individuals involved followed a general pattern: when one or both parties demanded mediation, a village chief would arrange a meeting. The parties were then summoned to the chief's house or the site of the dispute. Some village chiefs would agree to the presence of elders and family members.

The chief would then ask the parties to provide their side of the story. He might even ask other people to clarify the situation. The chief would then try to calm things down and would either ask both parties to find a mutually satisfying solution or impose his decision upon them. There were no regulated dispute management procedures to speak of. Each chief had a personal method for resolution, based on individual experience and knowledge.

ADR in Cambodia Today

In 2003, the Council of Ministers adopted a legal and judicial reform strategy (LJRS) with the aim of providing "justice for all Cambodians." One objective of the LJRS was to introduce ADR mechanisms that consider the obstacles Cambodians face in accessing formal justice.[7] A project called "Access to Justice" with the support of the United Nations Development Programme in Cambodia where about 500 civil servants were trained as mediators within the framework of the legal and local conflict mediation district offices to resolve disputes for the community people. Over the years, the ministry has established 68 justice service centres (JSCs) at the district, Khan, and Municipality levels throughout Cambodia. Recently, the *Ministry of Justice* developed the policy on "National Legal Aid," which allows for legal aid services such as ADR, and mediation and defines the institutions that can provide these services. The policy will be aligned with future developments/projects in this area, including Law on ADR.

The ADR model in Cambodia today includes aspects of the traditional model and incorporates the ADR experience of Commune Dispute Resolution Committees (CDRCs), JSCs, NGO peacebuilding

7 Raquel, Z.Y., Kong, R. &Phan, S. (2005).

practitioners, arbitrators of the Arbitration Council, and Commercial Arbitration with a specific focus on appropriate settlement mechanisms for local practices. For example, small civil disputes involving issues, such as debts, contracts, land borders, farms, and slander may be mediated at the local commune council level through the government's JSCs.

The *Ministry of Justice,* in collaboration with national and international non-governmental organizations, trains JSC officials in the use of modern mediation methods and techniques. This training provides JSC officials with mediation skills and educates participants on the role of mediation in the legal system. Ultimately, the goal is to establish a culture of mediation across the country and improve access to justice for Cambodian citizens, through the coordination of formal and non-formal mediation processes.

The mediation practice and procedure are principally seen as a voluntary approach but in actual practice, most of the traditional and local mediators act and operate as conciliators to give advice and options to disputants. Mediation is not mandatory or regulated by law on dispute resolution. Mediation service is not highly valued by the courts, but the government encourages the public to use mediation mechanisms before going to court. However, the government does not offer incentives to try mediation before going to court. The mediation is not regulated by law and has no accreditation/certification institutions or mediators that are officially recognized. In general, there is no official relationship between the court system and mediators. There are some cases where government mediators attached to the JSC mediate on court-referred cases. However, the courts and JSCs incorporate mediation in Court of First Instance cases and are considered part of the legal system.

The enforcement of mediated settlement is not binding, and this agreement is not legally recognized by courts or the judicial system in Cambodia. Mediation is offered by NGOs and the *MOJ* is not seen as a common component of the legal curriculum at university or by the Bar Association of Cambodia. Mediation advocacy education is a new concept, and we, at Cambodia Centre for Mediation (CCM), hope to advocate and promote the use of mediation by the public and government agencies.

The Cambodian government ministries of Commerce and Labour established the Arbitration Council (AC) in 2003, and the National Commercial Arbitration Centre (NCAC) in 2006. AC is an independent, national institution with quasi-judicial authority derived from the Labour Law of Cambodia, with the support of the Ministry of Labor, employers, and workers, and technical assistance from the International Labour Organization (ILO), the AC is empowered to assist parties in resolving collective labour disputes in Cambodia. NCAC was enacted by Law on Commercial Arbitration with the support of the Ministry of Commerce, business communities, and the International Finance Cooperation (IFC) sponsored and supported the initial training.

As of 2020, the AC has handled a total of 2,948 cases affecting more than 1.14 million workers; its process is efficient and cost-free to the participants. AC has heard cases from a range of industries across Cambodia, including garment and footwear, handbag, hospitality, construction, transportation, food and services, and agriculture sectors. The success rate of labour dispute resolution was 75%, which is the same achievement as in 2019.[8] As of 2020, NCAC has administered 25 cases involving parties originating from six different jurisdictions with a total sum in dispute of more than USD 72 million. All the awards issued by NCAC so far received a good track record in terms of enforcement.[9]

Conclusion

A number of laws and legal frameworks have been enacted utilising the traditional mediation model and the experience of the ADR practitioners. The ADR, in particular mediation practice, is inherently rooted and used for centuries in the Cambodian culture. However, modern mediation practice is seen as a new form of dispute resolution. Mediation concept and practice are and could be effectively utilized in resolving local disputes, civil, commercial, and other similar disputes. This, in turn, would enhance the current practice and improve access to justice by Cambodians.

8 Annual Report. (2020). Arbitration Council Foundation, Cambodia.
9 Annual Report. (2020).

As the real need for conflict prevention and dispute resolution tools that are fit for purpose in our society and around the globe, disputants in civil and commercial conflicts, have the choice and access to appropriate dispute resolution processes that will continue to respond to users' needs. Moreover, an ever-increasing load of court cases, and the long delays in dealing with the workload, make the establishment of court-annexed mediation and mediation services a very wise option.

Judiciary and Media: Beyond Mere Co-Existence[1]

Introduction

Law is the general rule for human behaviour. It is unrestricted as to time and space. When human behaviour is contested, this general rule decides what is proper and appropriate. When it does, the law is applied to a context with specific and definite circumstances. More than often, the law is rendered an uncertain tool to dissolve disputes.[2] Judges resolve disputes and administer justice by interpreting and applying laws within the facts and circumstances of each case. While each case surrounds differing sets of facts and issues and stands for itself, the role of judges in the courtroom is governed by procedural laws.[3] Procedural law entails judges certain discretionary powers but those which are not unbridled.[4] A test of fairness, consistency, and the interests of justice guides the exercise of these powers.[5] Judges must comply with the constitutionally mandated principle of the same law for everyone[6] but administer justice based on a holistic consideration of facts, evidence, and law.[7] No two cases are entirely the same or even similar. As much as the judges aspire, the media can, to a greater extent, facilitate the development and establishment of a fair and consistent court procedure that is capable of rendering justice wherever it is due.

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1 Contributed by Dr. Karma Tshering.

2 Assy, R., & Higgins, A. (2020). *Principles, Procedure, and Justice: Essays in honour of Adrian Zuckerman,* Oxford Scholarship Online, p. 94. DOI: 10.1093/oso/9780198850410.001.0001.

3 *The Civil and Criminal Procedure Code of Bhutan, 2001* including its amended versions (*CCPCB*).

4 Despite adversarial in structure, our courts have the possibility to, before pronouncing judgment and in the interests of justice, search for evidence and question witnesses (s. 90.3), conduct judicial investigation after hearing evidence (s. 88), and engage judicial enquiry committee to make necessary inquiries and investigations relevant to the case (s. 89 of *CCPCB*).

5 *The Civil and Criminal Procedure Code of Bhutan, 2001,* s. 4 & 6.

6 *The Constitution of Kingdom of Bhutan 2008*, Art. 7(15).

7 Ibid., Art. 21.

Freedom of the press, radio, and television, and other forms of dissemination of information, including electronic is guaranteed as one of the fundamental rights under the *Constitution of the Kingdom of Bhutan 2008*.[8] It places the expression of ideas within the domain of the individual and not the government.[9] Allowing the exercise of freedom of circulating ideas and opinions has the potential to awaken the public conscience and remind the authorities of their responsibilities. Collectively, the public may be provided with a diversity of views, with which, they can make informed choices and decisions.[10] It may positively or negatively influence the public. This freedom, especially of media, must, therefore, be read with other rights and duties. In the exercise of its freedom of the press, the media must respect other rights. These fundamental principles underline certain minimal requirements. No right is absolute nor freedom free. No right has higher levels of protection. A fair balance is maintained when the media exercises this freedom with more objectivity and approaches reporting with impartial and unbiased thinking. As will be discussed, it remains true that the possible harm to society by allowing unprotected speech to go unpunished would be outweighed by the possibility that protected speech might be muted.[11] This article seeks to highlight some of the issues the *Judiciary* and media will continue to face and lay out some ways to manage them.

Traits of Media as the Fourth Arm of the Government vis-à-vis Judiciary

The evolution of the traditional doctrine of the constitutional separation of powers has allowed the emergence of the perception that the media is the fourth branch of the government. Allowing ourselves to equate media with other arms of government though not on a constitutional or statutory pedestal injects traits it should be recognized with. Media

8 Ibid., Art. 7(5).

9 Tobgye, S. (2015). *The Constitution of Bhutan: Principles and Philosophies,* Supreme Court of Bhutan, p.153.

10 Ibid.

11 *State v Johnson* 108 [1982] cited in Tobgye, S. (2015). *The Constitution of Bhutan: Principles and Philosophies,* Supreme Court of Bhutan.

as a governing branch should be characterized as: 'being autonomous from government and others, having a duty to speak the truth whatever the consequences, and having primary obligations to the public and readers.'[12]

Media has a long-standing association with the workings of democracy, specifically over one decade in Bhutan. While it often reflects the political philosophy in which it functions,[13] Media like other arms of government must uphold and further public interest through efficient and effective media service. It should refrain from encroaching into the functioning of other arms of government unless allowed to a specific extent by law. As much as media is important, an independent and impartial *Judiciary* is necessary for society to transform itself into a free, fair, and just society. The unique position of the *Judiciary* in governance as the justice institution requires it to remain insulated from public and government pressure. Insulation of the *Judiciary* from the media, public and political branches are found to ultimately result in the promotion of impartiality, fairness and regularity in the interpretation and application of the law.[14] While certain checks are necessary and required among the arms of government, excessive and invasive interference and encroachment are wholly undesirable and at times unnecessary. The interdependency of the arms of the government requires the evolution of a system that provides some practical security for each against the invasion of the other.[15]

12 McQuail, D. (2008). Media Accountability and Freedom of Publication - Discussing the rise of the 'Fourth Estate' in describing reporters in the British House of Commons in 1841 cited in Rachel Lubreda. The Fourth Branch of Government: Evaluating the Media's Role in Overseeing the Independent Judiciary, *Notre Dame J.L. Ethics & Pub. Pol'ys, 22.*

13 Merrill, J.C.(2008). *The Imperative of Freedom: A Philosophy of Journalistic Autonomy*, Hastings House.

14 Ferejohn, J. A., & Kramer, L. D. (2002). Independent judges, Dependent judiciary: Institutionalizing Judicial Restraint, *New York University of Law Review, 77.* https://www.nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-77-4-Ferejohn-Kramer.pdf.

15 Lubreda, R. (2008). The Fourth Branch of Government: Evaluating the Media's Role in Overseeing the Independent Judiciary, *Notre Dame J.L. Ethics & Pub. Pol'ys, 22*(507).

Cautionary Critics of Judicial Act

It follows that under the extended doctrine of separation of power, an arm of government, including the fourth estate, must be allowed to perform its mandates with the least inconvenience. This remains true for the *Judiciary* and media as well. The media can conduct competent legal reporting. It can report on law and the administration of justice. However, where it seeks criticism of certain judicial acts, the media must do it cautiously. Reports on case proceedings must be fair, truthful and reasonable. The information must be accurate. They should not mislead people. As the relationship between the media and its readers and viewers is based on trust, misinformation or manipulation of information will amount to a violation of the truth and a travesty of truth. If unrestrained freedom of media is allowed to attack institutions, glamorize violence, demonize individuals, create differences and magnify errors, it will consequently have the effect of undermining democracy and endangering sovereignty.[16]

As telling the truth is its virtue,[17] the media should refrain from reporting or publishing anything that might directly and immediately prejudice the proper administration of justice.[18] Pending court decisions, the media should not comment or debate, and draw its conclusion, conjectures, reflections or remarks. In voicing the voice of the people, it might become a public court and interfere to the extent it pronounces its verdict before the court pronounces it. This will abrogate the role of the court and reduce court procedure into distortion and chaos – a case of media trial – where convictions are easy and conclusions are reached within the shortest time and where 'it does not matter if one is innocent

16 Tobgye, S. (2015). *The Constitution of Bhutan: Principles and Philosophies,* p. 154.

17 Ibid.

18 *The Civil and Criminal Procedure Code of Bhutan, 2001*, s. 4: under which the principle of open trial may be limited in the interests of justice. Exclusion of media from trial proceeding for reasons mentioned under the provision applies to a standard that must be adhered to prevent a media trial. See also section 189.1 under which a court must not proceed with a trial of any defendant while same is pending before any other competent court. This rule by analogy can also be stretched to the responsibility of the media to refrain from indulging with the cases that are *sub-judice*.

or guilty.'[19] The idea of justice is based on social ideology. In that, people are overnight experts and verdicts are based on how beautifully or rather sentimentally a case is put forth.[20] Justice does not, like in the media trial, depend on the popular voice or even vote. As such, it is the natural duty[21] of the media to abstain from acts that will amount to media trials as it would constitute contempt of court.[22] For example, if reporting about a pending criminal case, the media should not expose, remark upon or analyze a confession allegedly made by the defendant. They should refrain from revealing or commenting on or assessing evidence, even if they acquired it through investigative journalism. The fundamental principle of criminal law requires that the guilt of a person is proven beyond a reasonable doubt – all the while observing all the legal safeguards for an accused.[23] Any interference or obstruction by the media can result in the denial of his or her right to a fair trial. Over time, whether media content interferes with the due course of justice has come to be tested on a very thin line of examining whether it tends to interfere than whether it does interfere.[24] In that, the liberty of the press is inevitably rendered subordinate to the mandate of administering justice.[25] The media must be mindful of and manage to tread through this thin line.

A journalist may make a valid criticism of judicial conduct or a court's judgment for the public good. Invocation of public interest argument might be the common justification, but it should not be taken to entail media a moral authority to invade privacy and exceed the limits of ethical practice even if in search of truth. Cause for the common good, general welfare and security and well-being of everyone in the community, as

19 Thongjay. (2022). Social Media Platforms: Becoming a Challenge to the Judiciary, *Bhutan Law Review, 17,* p. 19.

20 Ibid.

21 Royal Court of Justice. (2022). *Royal Address of His Majesty the King in 2015*, Judiciary Strategic Plan 2022-2032.

22 *Penal Code of Bhutan, 2004*, s. 367.

23 *Constitution of Bhutan,* Art.7 (16) & *The Civil and Criminal Procedure Code of Bhutan, 2001*, s. 96 (2).

24 *Ankul Chandra Pradhan v Union of India* [1996] 2 SCC 199.

25 *Constitution of Bhutan,* Art. 7 (21).

the simple connotation of public interest suggests,[26] cannot and should not accommodate the possibility to cast slanderous aspersions or undue attacks on the reputation and integrity of a judge, judicial officer or the court or infer inappropriate intentions, or personal bias of a judge. The media should not cast a cloud of doubt or accusations of incompetence or lack of credibility against a judge, a court, or the judiciary as a whole. For each stands for oneself in person and a part of the institution and the system as a team, every judge or judicial officer must be cautiously treated individually and refrain from generalizing a sampled perception to be generalizable, demonstrative, reflective, and true to and against everyone in the whole system. No one should generalize or share the common myth of what is made to seem like commonly colourable attributes of judges and judicial officers of being biased, prejudicial, and corrupt. Any attribution, comments, or remarks by insinuation have the effect of carrying the public into such unfair and inappropriate myths – that consequently tarnish the public trust and confidence in the *Judiciary.*

Against this backdrop, the media must consider if a subject is in the public's interest. At times, what the public wants to know might have nothing to do with whether it is in the public interest. The media must consider whether they would through their work contribute to creating a safe, healthy, and fully-functioning society. They can seek to hold government and institutions, including the *Judiciary,* to account but they must do it ethically. This is done by testing their chosen subject through the privacy test. Privacy remains the critical test of ethical journalism and public interest.[27] Ethical journalism requires the media to respect and refrain from intruding into the private lives of ordinary persons, including public figures whose private affairs would not impact their public duties. It is a test of whether intrusion into the privacy of someone would rather further public interest. Another way to assess the furtherance of public interest in any journalistic work is to examine what impact it

26 Collinson, W. (2012). *The Public Interest*, Ethical Journalism Network, The Public Interest - Ethical Journalism Network.

27 Ibid.

would have on whom and to what extent.[28] A decision on this issue is best taken at or by the highest authority for it requires a difficult and delicate consideration and judgment. Attempts to place anyone or any institution at the risk of public hostility first require the media to preserve its integrity and maintain the ethical balance. In short, it calls for caution, tolerance, objectivity, and ethics in reporting on any subjects, including judicial acts as will be elaborated on in the following sections. Without these basic groundings of media practice vis-à-vis freedom of speech and press, the conceptual framework of the notion of public interest risks it being used as a means to advance partisan or private interests.[29] Without it, there can be no responsible journalism in Bhutan like anywhere else in the world and – it will fail in its mandate as the fourth estate. Truly, public journalism would continue to view reporters within an ethical framework that the media supposedly junctions.

Effect of Media on Judiciary

As it must follow, the effect of media on the *Judiciary* cannot be undermined or overlooked. Transmission of the information on court proceedings and decisions to the public allows no room for trial and error. It could influence a judge's decision and the sentiments of the public. Both must be prevented to allow a fair administration of justice. While it is expected of judges to be independent and uphold the integrity of the *Judiciary,* the outreach ability of the media exerts greater power. Media can subtly influence a case. Judges as humans are also open to the influence of media like anyone else. Though they are expected to treat them not only as legally irrelevant[30] but also as invariably based on incomplete and inadequate knowledge of the facts,[31] judges might as well

28 Ibid.

29 See generally on how tech giants' could shape public discourse by abusing the notion of public interest: Samples, J., & Matzko, P. (2020). *Social Media Regulation in the Public Interest: Some Lessons from History*, *Essays and Scholarship,* Knight First Amendment Institute, Columbia University.

30 *Evidence Act of Bhutan 2005* provides laws on the admissibility, relevancy and types of evidence – based on which – a court verdict must be reached every decision.

31 Unlike the judicial discovery of facts and issues through the stages of judicial process under the provisions of the *CCPCB.*

be concerned about how their decisions might be publicly expressed.[32] While this might not necessarily be true for all judges, it is plausible that judges will not act or think in certain ways after streaming online sources on the legal systems, reading, hearing, or watching about clients in the case of media that provide extra information or even referring to a precedent.[33]

Undoubtedly, the media is the best means through which people could learn about a case and the judicial processes involved in its adjudication. However, an effort to pursue this positive aspect of journalism could result in certain negative effects [however unintended]. The media should not, as mentioned above, undermine its audience. Conventional mainstream media channels coupled with the proliferation of social media platforms cover a wide range of people with varying backgrounds and interests. Media could easily be held responsible for creating hypes among certain sections of society that could potentially interfere with a judicial proceeding and amount to contempt of court. Judges might be pulled into the politicized and emotionally charged public arena even if they properly shouldered their responsibilities. While judges must dispassionately apply rules and interpret laws within a constrained discipline, at times, the types of questions the public has about the existence of two laws, differing outcomes in two comparatively similar cases, the need to discipline and punish trial court judges on reversal of their decisions by the appellate courts, the need for all judges to share the same ideology, unbridled powers of judges, and inconsistent approach to administering justice, are some questions which are difficult and cannot be answered sufficiently and even precisely at any point of time.[34]

It would be no exaggeration to highlight that the interest of media is much into so-called high profile and some cases than other cases howsoever

32 Potter, M. (2011). *Do the Media Influence the Judiciary*, Courts and the Making of Public Policy.

33 Torossian, R. (2011). *How media coverage affects judges and juries*, Agility PR Solutions.

34 Greenstein, M.N. (2019). *Judicial Ethics, Impartiality, and the Media*, Judicial Ethics.

serious it might be. Picking and choosing cases for reporting without some definite and objective criteria should necessarily be seen to be a case of coloured reporting and in some cases abuse of the liberty and freedom to report. Such reporting has huge potential of leading to disorder and anarchy. The coloured opinion of the public would necessarily result in colouring their trust and confidence in the *Judiciary.* It is an open secret that certain speculations and allegations about the judges for reasons no other than because they yield [what the public thinks unfettered] power have over time resulted in the public sharing those speculations and allegations as some facts. For example, any member of the public merely shares the assumption that judges are corrupt, implausible, and incompetent. This is the gravity of the effect of media that the *Judiciary* continues to endure in its continuing effort of demystifying the public that the judges are as well bound by the law and could be held responsible for breaching their roles and responsibilities under the law.

It is true judges have a great deal of discretion when they interpret legal documents. It is, therefore, important to understand the decision-making process. It is possible judges may use the law to justify any result. This does not, however, suggest that they are not restrained by law and principles. Some judges might select outcomes that are easiest to justify legally. Some might aim to deliver the most desired outcome. Others might seek to balance the two possible outcomes mentioned and make trade-offs to the optimal.[35] Judges are often tasked to decide cases for which the laws provide no clear answer. At times, laws provide a clear answer but that answer to the judicial conscience could lead to unjust results. Legal certainty makes the task of judging difficult. Laws provide standards but do not decide specific cases. Determining which law applies how and where and in what situations requires an attentive exercise of judgment.[36] Judges as humans are not liberated from faults and influence as will be further elaborated in the following section. We continue to

35 Stephenson, M. (2010). *How Judges Decide*, Harvard Law Bulletin.

36 Assy, R., & Higgins, A. (2020). *Principles, Procedure, and Justice: Essays in honour of Adrian Zuckerman*, p. 93.

suspect, as it is found, [37] that judges in high-publicity trials are influenced by the media coverage of the case.

Judiciary as the Institution of People

The *Judiciary of Bhutan* like the *Judiciary* of any other jurisdiction is a legal person. It can have no natural feelings of its own like a natural person. When it is breathed, thought and worked by numerous natural persons acting in the capacity of judges and judicial officials, it is those natural persons to be praised for its success or blamed for its failure. As the temple of justice, it is a sacrosanct place where laws are upheld and justice is administered. This is one reason the media and public can at no time disparage and tarnish the image of the *Judiciary* as an institution whose independence is sacrosanct. In that, assaulting the *Judiciary* is as crude and uncivilized as assaulting a referee who impartially and fearlessly applies the rules of the game of football.[38]

The *Judiciary* should, as it must, be beholden to the *Constitution* and no one. However, treating its independence sacrosanct by no means automate the same treatment for the judges and judicial officials. They must function in accordance with the law. As the holders of judicial office, they must not let their minds be affected by what they see, hear or read outside of the court. As already mentioned, judges and judicial officials as humans, however, might be subconsciously influenced. To this end, the *Judiciary* is not free from human follies. The objective and the rationale road to administering justice independently is at times delicate. As the *Judiciary* continues to ensure its human agents refrain from getting influenced by media, the media should not make its already delicate task unduly difficult with irresponsible news reporting and social media postings.

Where media involvement amounts to interference, it might be, as mentioned, punished for contempt of court. As in the case of the concept

37 Rishabh. (2021). *The role of media trials in judicial proceedings*, IPleaders- Intelligent Legal Solutions.

38 Roger, T. (2017). *Judicial Independence is Sacrosanct*, Malaysian Bar.

of judicial independence, the media and public should appreciate that contempt of court is a statutory means to ensure a sacrosanct judicial process and justice and not to protect and safeguard judges and judicial officials as it is sometimes understood. Contempt of court, as it must, only safeguards the functions they exercise. The media should not let or expect the undertone of some extraneous considerations to derail judges from their impartial and independent role as adjudicators. As much as the *Judiciary* is bound, media should be impartial as well – for it boils down to the commonly relevant aspiration of justice delivery, that – *'Justice should not only be done, it should manifestly and undoubtedly be seen to be done.*[39] Irrespective of how appealing some narratives are, it is best left for the court to decide what is a fair procedure and outcome in any given case. Certainly, a fair balance to this end would be maintained if media adhere to the principle of *sub judice*.

Responsibility of Judiciary and Media

Given its larger audience, the responsibility of the media is, therefore, far greater than individuals exercising their right to freedom of speech and expression. The freedom of media should not, as mentioned already, be allowed to degenerate into the ability or a license to attack judges and judicial officials, close the door of justice and tarnish the reputation of respectable persons and the *Judiciary.* It can at times attack litigants as well.

As highlighted in the previous sections, if the freedom and liberty of the media are unrestricted and unregulated, the exercise of the same will result in an inevitable byproduct of infringing the privacy and tainting the reputation of any given person, including judges. In some criminal cases, both those, directly and indirectly, affected parties, including the victims might suffer from excessive publicity and invasion of their privacy. The media might at times publish statements that hold suspects guilty before such orders are passed by the courts. Irrespective of the court verdict, the publicity of a suspect is negative and will remain negative forever for some.

39 *R v Sussex Justices*: Exparte McCarthy [1923] All ER Rep 233.

While media might assume, 'law and social justice do not always go hand in hand – at least, not in short term.'[40] Due process of law safeguards everyone. The media should refrain from unduly criticizing court decisions when those decisions run afoul of popular sentiments. Due process knows no one. It knows no colour, gender or hashtags. No one should be venerated at the expense of another. Differential reporting, as it must, demonstrates a lack of long-term societal focus on potential risks and accentuates the need for the media to act responsibly – as responsibly regulated and governed media, whether by self or law, could help emancipate societies.[41] Therefore, citing and relying on self-proclaimed experts giving unsubstantiated advice, assuming and identifying guilty parties and fabricating conspiracy theories through the amalgamation of facts and false and speculative interpretations about the Judiciary and its functioning will result in the manipulation of public perception of the *Judiciary.*

While information flows freely and fluidly on digital platforms, countering disinformation and societal polarization would not just be challenging but impossible in some cases. It is of utmost importance that the media and *Judiciary* work together and manage information at the source. The media must fact check, filter information, edit, and frame news that can manage risks it might pose to manipulation of public perception of the *Judiciary.* As we might realize, people tend to understand, believe and remember narratives and manipulated news way better than any factual or analytical presentation of news.[42] As it must, the *Judiciary* is willing and open to sharing any information, including court decisions. The media must check the proprietary of any information about the *Judiciary* with the *Media and Communication Unit* of the *Judiciary* before they publish. The *Unit* is the gateway to accessing information about the *Judiciary* and its functioning. The *Unit,* functioning under its *Standard Operation Procedure*, has the mandate to disseminate factual information

40 Kay, J.(2018). *Social Justice is Popular. But the Rule of Law is Sacrosanct*, Quillette.

41 Reisach, U. (2021). The social responsibility of social media in times of societal and political manipulation, *European Journal of Operational Research, 3*(291), pp. 906-917.

42 Ibid.

to the nation whenever necessary. It continues to ensure and enhance timely access to judicial information. All of these are aimed at fostering transparency and accountability in the *Judiciary*, improving judicial service, and enhancing public trust and confidence in the *Judiciary.* The media can continue to take the help of the *Unit* in translating court decisions for the ordinary citizen. What the public will know about a case or proceeding will depend on how the reporters report and determine the stories or issues to report it. The media must work together with the *Judiciary* to prevent misinterpreting the legal reasoning of the courts, preoccupying outcomes over substance, assessing cases on their dispositions, and subjectivity in legal reporting. Alternatively, the media might employ legal reporters to assist them in ensuring accuracy in the usage of legal terminologies and reasons. Because taking decisions out of context and reporting about the outcome without explaining the legal reasoning has the tendency to, as we continue to witness, perpetuate a public view that the *Judiciary* is simply deciding cases based on the personal ideologies of its agents.

As much as we attempt to impose professional ethics and responsibility on any person or institution, the media must adhere to ethics and ensure ethical reporting. Ethics is properly referred to as the standards of right and wrong that prescribe what humans ought to do, usually in terms of rights, obligations, benefits to society, fairness, or specific virtue.[43] In Weber's conception of ethics of responsibility in the context of media, the corporate social responsibility of the media houses should necessarily mean considering the impact of their corporate decisions on all societies in which they operate.[44] It is only by way of strict adherence to ethics as well as professional and public accountability by the media, can true and fair information flows to the public. Understandably, this is the only type of information that the media should disseminate and the public should have access to. Only then, their perception of anything, including the *Judiciary,* would be fair and reasonable and objective, all the while, the *Judiciary* continues to allow unimpeded access to information unless

43 Velasquez, M. et al. (2010). *What is Ethics?*, Markkula Center for Applied Ethics.
44 Ibid.

classified:

> *Given the structural changes in the media context such as commercialization, increasing competition, decreasing public spirit and more self-conscious and demanding citizens, a shift in media ethics and accountability systems from the level of the individual professional to media organizations and institutions seems imperative.*[45]

Conclusion

Freedom and liberty of the press should not be seen as the deregulation of media. It should rather be taken as a helpful tool to examine the corresponding duties of media. It must regulate itself or let it be regulated by the law. Versed in media and its norms, media personnel are expected to create content that does not abrogate the role of courts and hamper the fair administration of justice.

Any undue interference would amount to a travesty of justice. The public must be informed to the extent they must be. Media freedom and liberty are not absolute and unlimited. Media content tends to influence the *Judiciary.* It also tends to unduly influence the trust and confidence of the public in the *Judiciary* as well. As legally mandated, judges must be allowed to independently consider the objective view of law and justice. Any prejudicial media content may be addressed by the court with contempt proceedings and sanctions. This would not be, as is the last resort of the *Judiciary,* a promising sign of Bhutan as a democratic, free and happy society. The media might try not to allow courts or government to regulate them. This would be possible only if the media function within the ethical walls of their mandates.

In light of the need to partner with the media on the issues facing the judiciary and media, the *Judiciary* established the *Media and*

45 Bardoel, L., & Haenes, D. (2004). Media responsibility and accountability: New conceptions and practices, *Communications,* pp. 5.25.

Communication Unit to assist the media in covering the judiciary in its news and reports. Even in the era of social media posts and commentaries and instantaneous news reporting, the goal we have to let stay set is to respect the integrity of the judges and courts making up the *Judiciary* while maintaining effective communication with the public about the functioning of the courts. There are no doubt media in its varying forms will continue to facilitate the development of important knowledge and communication strategies. This will require the U*nit* and other media platforms to work together. One of the best ways to maintain a fair balance between the conflicting interests of the *Judiciary* and media is to liaise with each other and get any information about the *Judiciary* through the *Unit*. Effective interaction will allow the dissemination of true and transparent information about the *Judiciary* which will in turn help to maintain if not strengthen the public trust and confidence in the *Judiciary,* all the while, promoting journalism in light of the professional ethics and public accountability that the media must as well be charged with. Adherence to ethics would require no watchdog or gatekeeper over anyone or any institution.

Enhancing Punishment to Reduce Crime: Can Deterrence Work for Bhutan?[1]

Introduction

Many countries rely heavily or even exclusively on punishment for reducing crime and recidivism [reoffending]. Around the world there seems to be a common perception among ordinary people, policy makers and legislators that *severe* and *harsh punishments* are the key to preventing a crime. This idea that behaviour can be changed by increasing the severity of punishment, known as "deterrence," has thus been one of the main pillars of sentencing law in most societies. Over time, its prominence tends to increase in moments when crime is increasing, or as is often the case, even when it is perceived to be increasing, even though statistics tell a different story. However, there is now wide body of evidence to show that in many countries over the last 30-40 years imprisonment rates have increased while crime rates themselves have declined. In a study of the United States as well as European and Scandinavian countries, for example, Van Dijk and colleagues could find 'No relationship between the severity of sentencing of countries and trends in national levels of crime.'[2] This raises crucial questions about the appropriateness of deterrence as a key pillar of sentencing strategy, something we set out to address in this article.

But first to the Bhutanese context. Bhutanese society is changing, and it is in such periods of change that crime frequently moves to the top of social concerns and political agendas. Here in Bhutan, the political system, physical environment, and social structures have undergone significant changes in recent years owing to modernization, socioeconomic development, and the transition to democracy. As much as there are good reasons to be proud of the positive changes, Bhutan is also grappling with

1 Contributed by Dema Lham and Mark Brown.

2 Farrell, G., Tilley, N., & Tseloni, A. (2014). Why the crime drops? Crime and Justice: *A Review of Research, (43)* 421-90, p. 444.

new challenges. As a country that espouses *Gross National Happiness*, some of these challenges are disquieting. The rise of visible social variances, unstable economic conditions, and unemployment coupled with [other] factors drive people, especially the younger generation to unwholesome development trails. Or at least these are the widespread perceptions. Reported crime rates have consistently increased in the last decade with, for example, reported crimes per capita roughly doubling between 2015 and 2019.[3] Therefore, to address some of these challenges and cater to the needs of an ever-increasing range of social changes, many legislative reforms have been brought in over recent years.

What has been their focus? What we discover is that in Bhutan, as frequently elsewhere also, sentencing policy initiatives have often been adopted to augment the deterrent effect on crime.[4] Under the rubric of "strict laws to reduce crime," Bhutan has over a few years favoured policies such as "stringent laws," increased penalties, greater sentencing severity, the establishment of more jails and detention centres. Legislative reforms dealt with general as well as specific offences. The tenor of these changes and the sense that, despite constant ratcheting up of severity, offenders remain undeterred is well captured in an appeal letter to the public and youth issued by the *Royal Bhutan Police* in 2014. The problem, it was noted, was that:

> *Despite the intensive drive leading to the arrest of a large number of people and subsequent convictions, it is noticed that people continue to smuggle narcotic drugs and controlled substances and resort to drug abuse. This reflects that people do not have much fear of law and punishment. People seem to be least afraid to refrain from such illegal act given the existence of strong drugs law and that the Parliament of Bhutan has already undertaken steps to frame a stringent law against the violators*.[5]

3 Royal Bhutan Police. (2019). *Statistical Yearbook*. Thimphu: RBP, Planning and Research Division, p. 150. https://www.rbp.gov.bt/Forms/SYB2019.pdf.

4 Resolution of the 87th Session of the National Assembly of Bhutan. (2007).

5 Royal Bhutan Police. (2014). *Appeal to the public and the Youth.* https://www.rbp.gov.bt.

The purpose of this article is therefore to address squarely this matter of deterrence as a response to crime in Bhutan. Our aim is to provide policy makers, legislators, the *Judiciary,* Civil Society Organisation[s] and interested citizens with the most up to date evidence on the effectiveness of deterrence – both as a sentencing practice and as a policing tool – and to suggest what works, what does not and what options for crime control could most usefully be explored in Bhutan. The remainder of the article is divided into three sections. In the first, we briefly address some of the key constitutional and legislative provisions guiding responses to crime in Bhutan. Standout features of this are, on the one hand, longstanding ascriptions to the importance of prevention and reform, while on the other, a rising tide of increasingly punitive responses to what are ultimately social problems. Second, we look to the international literature where deterrence has been studied. What this shows, for a start, is that estimating deterrence effects (e.g., the effects of longer prison sentences) is extremely difficult, and as a result most high-quality studies come from just a small number of countries (primarily, the United States and Europe). Their results, however, are clear, robust and consistent: increasing the severity of criminal punishments has almost no effect whatsoever on crime rates or ex-prisoners' reoffending. This practical fact is reflected in the frustration echoed above by the *Royal Bhutan Police* that stringent laws are having no effect on people's behaviour. What the research shows is that further ratcheting up of punishments will not solve the problem. So, can we find any virtue at all in this concept of deterrence? The answer is yes. In fact, deterrence does 'work,' but the evidence is that it works at the level of *policing and prosecution practices* (mainly, increasing the chances of an offender being apprehended, and the swiftness with which they are brought to court and punished), but that *handing down more severe sentences as punishment provides little detectable benefit*. With that in mind, section three of the paper makes some preliminary suggestions for alternative approaches and reforms. For now, though, we begin with a brief overview of some guiding principles contained in our constitution and law.

I. Punishment and Reform in Bhutan

Bhutan's legal system has a long traditional background that is mainly based on natural law. The formal justice system, as we recognize it today, was introduced only in the 1960s and since then has rapidly developed to cater to the needs of ever-increasing social changes and challenges. At the beginning of this reform process in 1959, the *Thrimzing Chhenmo*, also known as the *"Supreme Law,"* was enacted and was, in essence, a codification of civil and criminal law provisions.[6] Duffy pointed out that the unique nature of this legal instrument, referring to its embodiment of traditional Buddhist values in the form of a collection of criminal law provisions accompanied by fundamental rules of procedure, as well as rules regarding religious rites and the protection of religious rites."[7] *Constitution of Bhutan*, as the supreme law of Bhutan, prohibits, *inter alia*, *"a person from being tortured or to cruel, inhuman or degrading treatment or punishment,*[8] *and the use of capital punishment."*[9]

In 2004, the *Parliament* adopted the *Penal Code of Bhutan* with the objective *"to reinstate the dignity of victims of crime and increase the possibilities of reform and rehabilitation of the offenders."* Its purpose was described by the Chief Justice in *Lord Buddha*'s words: *"For perpetuating good and chaste action."* The Chief Justice emphasised that the purposes of the *Code* were *"not retributive but reformative and deterrence."* And importantly in respect of the latter, he described the deterrent logic of the *Code* and its role in securing the greater happiness thus:

> *Awareness of the penalties and enumeration of comprehensive offences should deter crimes making the people to live in the civil society. With security, people would be happy and prosperous under the protection of law.*[10]

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6 Simoni, A. & Whitecross, R. (2007). Gross National Happiness and the Heavenly Stream of Justice: Modernization and Dispute Resolution in the Kingdom of Bhutan, *American Journal of Comparative Law, (55)*172.

7 Duffy, J. (2012). *Nangkha Nagdrik* in the Land of the Thunder Dragon: Psychology, religion and the potential of Mediation in the Kingdom of Bhutan, *Asian Journal of Comparative Law*, p. 320.

8 *The Constitution of the Kingdom of Bhutan, 2008*, Art. 7 (17).

9 Ibid., Art. 7 (18).

10 Translation of the *Proceedings and Resolutions* of the 82nd Session of the

With the modernisation brought in by the *Constitution* and the *Penal Code,* the types of available punishments continued to narrow in scope. Corporal punishment and other form of degrading punishments had already been abolished in1965.[11] The main punishments available today for a person convicted of a criminal offence are imprisonment, fines, or community service, but the latter is rarely used by the judges, while there is also an option of payment of compensation as restitution to the victim or victims' families. Imprisonment can be combined with fine or community service or both.[12] In practice, however, when speaking of deterrence, it is to the role of the prison and imprisonment as the main tool of penal policy that attention is directed.

The draw of increasing penal severity – which is to say, ratcheting up both the intensity of punishment and widening the ambit of behaviours or offenders to which it applies – is illustrated in two pieces of legislation passed over the last decade or so. The first and arguably most infamous was the *Tobacco Control Act of Bhutan 2010*, which criminalized many people, and especially youths until amendments were made. Now, however, the much tougher *Narcotics Drugs and Psychotropic Substance Act 2018* is leading to much higher and longer levels of imprisonment for even minor drug offences. The number of arrests for the offence of substance abuse under s.152 of the *Act* are an example. In 2020, arrest for substance abuse accounted for 78 percent of all arrests.[13] According to the *Office of the Attorney General*, the number of cases related to drugs increased more than 76 percent in 2018,[14] opining that "the strict laws were not effective to curtail the issue."[15]The quantification of drugs has resulted in sending many behind bars. The current drug law does not

National Assembly of Bhutan. (2004). www.nab.gov.bt/assets/uploads/docs/resolution/2014/82nd_Session.pdf.

11 Phuntsho, K. (2014). *History of Bhutan*, Haus Publishing, Chicago, p. 342.

12 Dubgyur, L. (2006). *Criminal Justice System of Bhutan*, *A Handbook on Criminal Procedure*, Royal Court of Justice, Thimphu, p.120.

13 Royal Bhutan Police. (2020). Statistical Yearbook. https://www.rbp.gov.bt/Forms/Statistics.

14 Palden, T. (2019, April 27). *The laws and drugs*, The Kuensel. https://kuenselonline.com/the-laws-drugs/.

15 Ibid.

differentiate between a drug trafficker and a drug abuser if the minimum quantity is exceeded. Further, even if the quantity is beyond 20 and 30 tablets of medicine that can be abused, a person would be sentenced to a minimum of five years in prison.

Overall, what we find in contemporary Bhutan is a *Penal Code* that emphasizes reform that deterrence, though arguably there has been a greater, and increasing emphasis on the latter. One of the characteristics of deterrent thinking is a presumption that if increasing severity does not reduce crime, then it is not severe enough. And thus, a kind of vicious cycle emerges of harsher punishments, producing little effect on crime, followed by harsher punishments yet. We move next to a technical analysis of what works and what does not as far as deterrence is concerned, with the hope that his may underpin rational and informed public and professional debate, and policy making.

II. Deterrence: What do we know about its Effectiveness?

No research has yet been conducted in Bhutan to determine the deterrent effect of criminal sanctions or to ascertain the likely outcome of longer prison sentences on the level of crime. However, and as indicated in the *Royal Bhutan Police*'s letter to citizens cited in the introduction to this article, at least certain categories of offence have seen a steady increase in arrests over the period 2015-2019.[16] While this has been uneven, and recognizing that the figures reflect only recorded offending and are not transformed into per-capita rates (i.e., they do not control for population increase over time), it certainly appears that offences in important classes of offending subject to deterrent punishment have increased over the period. For example, arrests in the class *'Narcotic Drugs, Psychotropic Substances and Substance abuse'* rose from 216 in 2016 to 667 in 2019, an almost tripling in number.

Do these figures reflect underlying crime patterns? There is some data to suggest so. For example, in the case of the *Tobacco Act* (where arrest

16 Royal Bhutan Police. (2018). Statistical Yearbook. https://www.rbp.gov.bt/Forms/SYB2018.pdf.

numbers have also increased, albeit far more modestly), the *Global Youth Tobacco Survey* conducted in 2013 found the prevalence of tobacco use increased significantly by 28 percent in 2009 to 52 percent in 2013, a figure that was among the highest in the region as well as globally.[17] At the same time, however, a 2015 survey carried out by the *National Statistical Bureau of Bhutan* found 49 percent of youths surveyed felt injustice prevails in society, with the prevailing feeling being that "the country's laws discriminate between the poor and rich and the powerful and powerless."[18] Thus, not only are tougher penalties apparently having no effect, but this regime of deterrence is undermining the sense of Bhutan as a just and fair society among important sectors of the population.

Faced with such figures and the lack of research in Bhutan on deterrence, the key public and penal policy question that emerges is 'why are our deterrent strategies failing, and what can we do to deter crime more effectively in Bhutan?' Accordingly, we have undertaken a comprehensive review of the international literature on deterrence. We recognize that all this literature comes from studies undertaken in wealthy western nations, but we suggest that at least a cautious case can be made for generalisation of the findings. Why so? Primarily, we think because the basic processes under study, such as people's sensitivity to increases in penal severity, should be reasonably generalizable across societies. Additionally, the punishments studied – mainly imprisonment, and increases in the length of it, as well as contrasting effects of alternatives to it, such as community-based penalties – are reasonably comparable between Bhutan (which uses these sentencing dispositions) and the study sites. Some caution is needed in cross cultural interpretation and in the vastly different social and economic circumstances of those countries studied, but we believe there is merit nevertheless in considering the findings seriously. The question that follows, of course, is what we should do next. We do have some ideas in this respect, and they will form the third and final section of the paper.

17 Ibid.

18 Dorji, L. et al. (2015). *Crime and Mental Health Issues among the young Bhutanese people,* Monograph Series No. 8, Thimphu, p.73.

Deterrence: Key Features

At its heart deterrence presumes that perfect punishment would perfectly deter crime. To achieve such perfection, punishment should be (i) certain, (ii) swift and (iii) severe. In some instances, such as parent-child interactions, punishment can meet all three criteria and has some hope of effectiveness. Yet the failure of at least the first two requirements in the case of societal-level punishment – its certainty and swiftness –is widely seen to account for the failure of even radical punishments, such as the death penalty, to deter criminal behaviour.

Deterrence in criminal justice is conceived as being of two types: **general** and **specific**. General deterrence presumes that the threat of punishment will deter would-be offenders from committing a crime. Specific deterrence hopes that for those convicted and punished the experience will be sufficiently negative to dissuade them from repeating such behaviour in the future. In its classical form then, deterrence is a theory of avoidance: if we increase the certainty, swiftness, and level of pain then people will change their behaviour to avoid it. The first section below deals with what we know about general deterrence (i.e., the threat of punishment communicated to would-be offenders). Specific deterrence, and the question of whether offenders who receive more punishment (as measured by sentence length) are in fact dissuaded by it, or indeed by prison instead of a community-based alternative, is examined in the section that follows.

General Deterrence

General deterrence has a long tradition within economic theories of individual and group behaviour. Here the potential criminal is viewed as a rational, choice-making actor who weighs the costs and benefits of different courses of action. Rather than focusing simply upon the cost side, economic deterrence theory asks us to think about how the cost-benefit equation can be structured and managed and how alternatives might be constructed to encourage behavioural change. Yet whether deterrence focuses purely on avoidance (of pain) or on a more nuanced

cost-benefit analysis, it still makes some common *assumptions* and many of these assumptions have been shown to be wrong, which thus explains its ineffectiveness. Among the more important at play here are: (1) a. the assumption that people actually know what the law is (ie., what they should not be doing); b. what their chances are of being caught and; and c. what punishments are actually available if they are caught; (2) the assumption that given knowledge of the risks of committing a crime (e.g., how likely they are to be caught, or what the punishment is) a person will act rationally in response to that knowledge; and (3) the assumption that other intervening factors, such as drug consumption, impulsivity, poverty, cultural attitudes, social mores or other factors like group or gang affiliation, will not impinge upon the rational choice process. For the most part these assumptions have been proven wrong. What, then, do the data tell of the effects of deterrent crime policies given these problems with its fundamental assumptions?

General Deterrence: Can It Work?

The area to which deterrence logic has been most consistently applied, historically all around the world, is capital punishment. There seems to be an innate, intuitive, rationality to the proposition that the threat of death by execution should deter behaviour more than the threat of imprisonment. Thus, the ultimate punishment should presumably provide the strongest evidence that deterrent sentencing works. Estimating deterrence effects is complex, however, and here it is possible and indeed important to distinguish between first- and second-generation work on deterrence.

First generation research examined what can be referred to as blanket deterrence, such as the blanket application of the death penalty to the crime of murder. Another example of blanket deterrence is the increase in sentence lengths for certain crimes (e.g., drug use), or the introduction of mandatory sentencing options. A common intervention of this type is the introduction of, say, mandatory prison sentences for repeat drug, or gang-crime offenders. Does this deter gang membership or gang related offending? There are three take-away points from this literature. First, despite both common and theoretical thinking that deterrence 'should'

work, most potential offenders in fact are not very sensitive to deterrence strategies and the crime-reduction impacts of mandatory penalties are therefore modest at best. Second, deterrence ultimately rests upon changing potential offenders' perceptions of the cost-benefit equation, so changing these *perceptions* as much as changing the real risks they face (of arrest, prosecution, among others) is key. Finally, strategies that focus upon increasing *actual risks* of apprehension and *perceptions of the certainty of punishment* are more powerful than those that simply increase the punishment *level* or *magnitude* itself.

A few relevant studies are worth citing here. First, with respect to the general deterrent effect of the death penalty, Texas has emerged as a key research site globally. Texas accounts for more than a third of all US executions and that regularity should, theoretically, make the threat of death much more than just an abstract possibility. Fagan, Geller and Zimring in 2012 reviewed evidence from different studies using different statistical estimation methods to determine the *marginal* deterrent effect of the threat of death *over* the threat of life without parole (a whole-of-life imprisonment penalty). They conclude that 'The most sensitive test of the marginal deterrent effect of executions in Texas … provides no evidence that death-eligible cases are execution-sensitive'.[19] Quite what is – or is not – driving sensitivity remains unclear, yet the overall findings are robust. This Study joins a large body of work that finds *the deterrent effects of the threat of death to be either minimal or non-existent*. If the threat of death by execution does not deter, then what will?

This brings us to the second key finding. The same difficulties encountered in finding deterrent effects of capital punishment are found when looking at imprisonment more generally.[20] There is a very large literature in this area and much of it is econometric in nature. Lee and McCrary review it before reporting a unique estimation method that capitalizes on a one-off

19 Fagan, J., Geller, A., & Zimring, F. (2012). Impacts of executions upon homicides: The Texas deterrence muddle, *Criminology and Public Policy*, *(11)* 579-91. p. 587-88.

20 Chalfin, A., & McCrary, J. (2017). Criminal deterrence: A review of the literature, *Journal of Economic Literature*, *(55)* 5-48.

and logically uncorrelated discontinuity in punishment risk to estimate effects of increased penal magnitude (i.e., longer prison sentences). Drawing on high frequency data, including arrests, in a large sample of Florida offenders, they examine the impacts of a step-change increase in punishment that occurs as young people cross the threshold of age 18 and thus move from juvenile to adult jurisdiction. Summarizing, they observe that 'point estimates from our discontinuity analysis indicate an approximately two percent decline in the rate of criminal offending when a child turns eighteen, when the expected incarceration length conditional on arrest jumps [increases] discontinuously by roughly 230 percent.'[21] In other words, more than doubling potential punishment length has barely any discernible impact – just two percent – on behaviour. They then develop a stochastic dynamic model to fit the empirical regularities. This suggests that, at an individual level, behaviour is consistent with impatient or even myopic behaviour on the part of criminal offenders.[22] The take-away point here is that increasing the amount of punishment "as a deterrent" has no real effect. As Lee and McCrary showed, even a *230 percent increase in sentence length* only reduced offending by 2 percent. Clearly, if deterrence is to be pursued then its leverage on the potential offender must be achieved by some other means.

It is for these reasons that what is now termed 'second generation' work on deterrence has examined the potential of *focusing* deterrence efforts rather than applying them in blanket fashion. Such work has its origins in targeted law enforcement programs developed mainly in the US in the 1980s and 90s and is referred to now as focused deterrence. Here the aim is to concentrate scarce resources on specific groups or key players in the wider crime problem and to leverage the important perceptual feature of deterrence by communicating risks more effectively to known or would-be offenders. Evaluations (and meta-analyses) of focused deterrence

21 Lee, D., & McCrary, J. (2017). The deterrence effect of prison: Dynamic theory and evidence, in Cattanao, M., & Escanciano, J. (Eds). Regression Discontinuity Designs, *Advances in Econometrics, 38*, Emerald Publishing Limited, p. 30.

22 Ibid., p. 31.

policing projects show encouraging results.[23] Selective targeting of certain high-violence geographic areas, the targeting of key individuals and increasing the number and visibility of law enforcement personnel appear to produce a cumulative effect of reduced crime. More recent work has stressed the strategic nature of focused interventions, wherein intelligence-led problem mapping leads to a progressive, rolling assault upon the lawlessness problem.

Yet the power of focused deterrence has also been suggested to lie in the fact that targeted interventions of this type rely on a more holistic set of processes. Atomizing the problem of crime to the level of the individual or group neglects the wider social context that generates, allows, and sustains criminal activity. One of the virtues of focused deterrence in practice has been its emphasis upon changing the *opportunity structure* for would-be criminals. That is to say, the repressive power of law enforcement has been combined with *positive, strengthening and facilitating strategies* that aim to provide valued and valuable alternatives to criminal activity. This has worked particularly well in relation to problems such as gun crime and related gang participation.[24]

Specific Deterrence

The prison is not a passive institutional structure but rather a tool. It follows that governments have experimented with ways to use this tool to effect a variety of social ends, mostly related to crime control. Two primary forms of experimentation can be identified. These involve (1) experimenting with 'dose', or the amount of prison time and its effects on prisoners' post-release behaviour; and (2) experimenting with targeting, i.e., who is sent to prison or who prison space is reserved for.

23 Braga, A. (2012). Getting deterrence right? Evaluation evidence and complementary crime control, *Criminology and Public Policy*, *(11)* 201-10.

24 Braga, A., Weisburd, D., & Turchan, B. (2018). Focused deterrence strategies and crime control: An updated systematic review and meta-analysis of the empirical evidence, *Criminology and Public Policy*, *(17)* 205-50.

Sentence Length: Is More the Better?

It will be recalled from the above that deterrence theory posits two relationships between punishment and crime. First, that there should be a general deterrent effect of the *threat* of punishment; and second, that prisoners who *experience* punishment should experience a deterrent effect, thus reducing their post-prison level of criminal involvement. Questions of sentence length effects upon the individual prisoners who experience them are thus also, crucially, tests of the specific deterrence hypothesis.

The initial difficulty in untangling the relationship between sentence length (which we can understand technically as imprisonment 'dose') and an individual's reoffending or non-reoffending response should be immediately apparent: more serious offenders also tend to receive longer sentences. Or, put another way, people more likely to reoffend tend to be given the long sentences while people less likely (i.e., minor, less serious offenders) tend to be given shorter sentences. Work in this area thus involves complex statistical modelling to separate out a variety of confounding co-variates. These include the seriousness of the individual offender's criminal history, but also extend to the range of known correlates of offending, such as age. Here, regardless of sentence length, an offender becomes less likely to offend each year he or she ages from sometime around the middle of an offending career. Comparing prisoners thus requires controls to take account of these known exogenous factors as we search for the effect of our experimental variable: prison 'dose.' A first, rough, approximation of these effects has been looked at in studies evaluating non-custodial penalties or alternatives to imprisonment. In these studies, it has been shown that those sentenced to short sentences of imprisonment (and the effect is particularly strong for those sentenced for less than six months) reoffend at a markedly higher rate than the broadly same type of offender or offence profile who instead received a community-based penalty. There is a strong body of evidence that short prison sentences, as compared to community-based sentences, are *criminogenic*: i.e., they increase post-sentence reoffending behaviour, and they are many times more expensive than community-based alternatives.

For example, a review by the Australian Productivity Commission in 2020 found the costs of community-based punishments may be as low as 1/10th or 1/15th of a prison sentence.[25] With respect to reoffending itself, UK Home Office research has found 12-month proven reoffending to be on average 3.85 offences for those serving sentences in the community, against on average 5.19 offences for those who have served a term of imprisonment. More troublingly, the latter figure masks a rate of 6.0 offences for those imprisoned for less than 12 months, an effect that was robust when controlling for relevant confounding factors.[26] So, clearly, short sentences of imprisonment are costly and appear to have no deterrent effect at all. But what of increasing sentence lengths for more serious offences and offenders?

In fact, there are surprisingly few studies of sufficient statistical sophistication to make a clear pronouncement as to whether an *increase* in prison 'dose' *decreases* individual-level recidivism responses. Further, and to compound the complexity, a large sample study of 30 US states by Tiedt and Sabol in 2015 found that state-level heterogeneity – that is, differing effects at the level of all those offenders in one state, versus all those in another – was a major driver of any observed effects. Thus, depending upon where you look, the picture somewhat changes, though not fundamentally.[27] Reviewing the existing literature, Wermink et al. in 2018 concluded that 'Overall, findings of the limited number of second-generation studies suggest that there is little evidence of a relationship between time served and recidivism'.[28]

In other words, longer sentences appear not to deter the specific offenders to who receive them (and we already know they don't deter would-be

25 Productivity Commission. (2020). *Report on Australian Government Services: Justice*. Canberra, Government Printer. Online: datacube.

26 Beard, J., Sturge, G., Lalic, M., & Holland, S. (2019). *General Debate on the Cost and Effectiveness of Sentences Under 12 Months and Consequences for Prison Population*, London: House of Commons Library.

27 Tiedt, A., & Sabol, W. (2015). Sentence length and recidivism among prisoners released across 30 states in 2005: Accounting for individual histories and state clustering effects, *Justice Research and Policy*, *(16)* 50-64.

28 Wermink, H., Nieuwbeerta, P., Ramakers, A., de Keijser, J., & Dirkzwager, A. (2018). Short-term effects of imprisonment length on recidivism in the Netherlands, *Crime and Delinquency*, *(64)* 1057-92, p. 1062.

offenders, from the findings on general deterrence). Wermink et al. attempted to address some of the existing studies' shortcomings by using a large and representative dataset of Dutch prisoners and some complex analytic methods. Even with these in hand, however, their 'findings suggest that length of imprisonment does not have a significant effect on recidivism in the first 6 months after release, and that this conclusion holds across various measures and types of recorded recidivism, that is, reoffending, reconviction, and re-incarceration.'[29] These findings also confirm an earlier study based on the same nationally representative Dutch prisoner dataset that found that subjectively-experienced severity of imprisonment – something deterrence theory predicts would reduce post-release offending proclivity – had no effect on measured recidivism.[30]

At around the same time in the US, Rhodes et al. in 2018 recognized and cleverly exploited a natural discontinuity produced by the *Federal Sentencing Guidelines* tables. They hypothesized that offenders sentenced just-under or just-over a bar in the sentencing table will be essentially similar in most respects yet will be subject to different sentence lengths. Applying appropriate statistical controls, they then sought out dose effects on recidivism on a sample of 348,000 offenders sentenced between 1999 and 2014. What they found was that their data:

> *Provide no evidence that an offender's criminal trajectory is much affected by a 7.5 month increase in the length of a prison term. If anything, longer prison terms modestly reduce rates of recidivism beyond what is attributable to incapacitation. This "treatment effect" of a longer period of incarceration is small. The 3 year base rate of 20% recidivism is reduced to 19% when prison length of stay increases by an average of 7.5 months. We are inclined to characterize this as a benign, close to neutral effect on recidivism. From a policy perspective, prison length of stay can be reduced with minimal effects on recidivism.*[31]

29 Ibid., p. 1079-80.

30 Raaijmakers, E., Loughran, T., de Keijser, J., Nieuwbeerta, P., & Dirkzwager, A. (2017). Exploring the relationship between subjectively experienced severity of imprisonment and recidivism: A neglected element in testing deterrence theory, *Journal of Research in Crime and Delinquency*, *(54)* 3-28.

31 Rhodes, W., Gaes, G., Kling, R., & Cutler, C. (2018). Relationship between

Other studies seeking to exploit sentencing discontinuities in US jurisdictions' guidelines or court allocation approaches have reached similar conclusions. No across the board effects appear and where effects can be found they are highly specific to narrow offence types (e.g., shoplifting) in specific.[32] The failure to find much sensitivity among offenders to the deterrent effects of prison 'dose' in all but long prison sentences led Mead et al. in 2012 to conclude that 'sentences less than five years may be reduced in order to save costs without a substantial threat to public safety.'[33]

Conclusions about Deterrence Relevant to Bhutan

The research reviewed above includes the results of dozens of the highest quality and most sophisticated studies undertaken by criminologists and policy makers. Over decades of research, all studies seem to point to a single and simple conclusion: despite our intuitive sense that penal deterrence 'should work', there is little if any evidence to show it does, at least in marginal terms. In other words, the *marginal gain* of increasing penal severity – indeed, even of adding a death penalty to a crime – is either low or non-existent. Further, the specific offenders who receive more severe penalties are no more deterred by the additional 'penal pain' than is the would-be offender. The question we are left with, however, is whether these findings make sense in the context of Bhutan, a country that is economically, socially, culturally, and religiously very different to the US and those European societies where these studies have been undertaken.

We have already suggested above that a case can be made for cautious interpretation of these findings based on the similarity of the sentencing

prison length of stay and recidivism: A study using regression discontinuity and instrumental variables with multiple break pointism, *Criminology and Public Policy*, *(17)* 731-69, p. 758-9.

32 Estelle, S., & Phillips, D. (2018). Smart sentencing guidelines: The effect of marginal policy changes on recidivism, *Journal of Public Economics*, *164:* 270-93.

33 Mead, B., Steiner, B., Makarios, M., & Travis, L. (2012). Estimating a dose–response relationship between times served in prison and recidivism, *Journal of Research in Crime and Delinquency*, *(50)* 525-50, p. 526.

alternatives and, indeed, the ubiquity of imprisonment as the headline deterrent sentence in most jurisdictions internationally. To this we might add, now that we are more familiar with the nature of the research itself, that an arguable case can also be made that the problems with deterrence's broad assumptions – such as that potential offenders are aware of the law, aware of the chances of being caught, or of the punishment they might receive – would seem *prima facie* to be generalizable. So too can we probably say that broad trends in findings, even if not the specific detail, should have some generalisability. For example, we can probably accept that deterrence will be more effective as a policing and prosecution strategy (e.g., through focused deterrence approaches) than as a punishment strategy (e.g., through increasing severity of sentencing). Thus, if we are to leverage the power of deterrence, we should focus on increasing the *certainty* (likelihood) of apprehension and the *swiftness* of any punishment that the court decides is due, as opposed to the actual *severity* of that punishment. Severity is much less important than we intuitively believe. That's what the data reveal.

Further to that, we also recognize the importance of the reform and rehabilitation of offenders in the *12th Five Year Plan* (reflected in *NKRA 16*) and the potential for new thinking on the nature and form of custodial punishment options, and the possibilities of new alternatives to imprisonment (community-based sentences), to reshape the impacts of punishment. To the extent that such reform and fresh thinking is possible, we feel that deterrence research focusing on penal severity may mask potential for punishment to have positive impacts. In other words, we recognise the need for punishment of some sort to be a consequence of law breaking: if nothing less than to communicate censure of that kind of behaviour. But we suggest that the evidence of deterrence's failure as a penal policy – that is, its failure to reduce offending and make communities safer – strengthens the argument for doubling down on the search for innovative, effective, reform-focused penal approaches tailored to the social, cultural, and religious context of Bhutan. These of course must connect with reformed, focused and more effective policing and prosecution measures, for it is there that deterrence's strength lies.

III. Conclusion

In this short article, we have examined the reliance on deterrence as a mainstay of sentencing and crime control in Bhutan, revealing not only how penal severity has increased in recent years but also, as reflected in the appeal by the *Royal Bhutan Police*, how harsher sentencing has failed to affect crime rates, particularly those in the area of drugs and prohibited substances. To answer the question of how effective we should expect deterrent punishments to be, we next reviewed international evidence on the effectiveness of deterrence, both as a *general effect* (i.e., deterring would be offenders) and as a *specific effect* (deterring future offending among those who are more severely punished). What we found was consistent with the experience of the *Royal Bhutan Police:* more severe punishments do not seem to deter behaviour. Looking at only the highest quality, most statistically sophisticated studies, drawing on large data sets across many jurisdictions we found that the marginal benefit of more severe sentences is vanishingly small. Instead, where evidence of deterrence does exist, it is in the area of policing and prosecution practices. Essentially, increasing the odds of an offender being apprehended, and then the swiftness with which they are then brought to court and receive any punishment they might be due.

We have suggested therefore that if offenders must be punished – as indeed they must in most circumstances – then we may be better off seeking out and leveraging reformative opportunities within a penal sentence. We have not had an opportunity to think through what this might entail in Bhutan, but it almost certainly involves far greater and more varied non-custodial options. However, there are also some closing points to be made about custodial sentencing as well that would merit further reflection and debate. First, if Bhutan is to have rational and consistent sentencing then data on deterrence's effectiveness such as we have reviewed here should carry some weight. We would encourage further debate around the applicability of international research to the Bhutan context and how it might form part of the rational evaluation of sentencing, if indeed it should at all.

Secondly, we suggest some renewed attention to long established rule of law principles and conventions and the way in which deterrence policies affect their expression. In terms of principles, we note for example that while a constant ratcheting up of sentence severity might be consistent with the internal logic of deterrence, it quickly risks violating other principles such as the principle of proportionality. This can be seen, for example in the treatment of possession of minor quantities of drugs that, in falling under the widely cast net of drug trafficking provisions, exposes often very young people with little if any criminal history to very severe penalties. In terms of rule of law conventions, it is longstanding convention, reflected for example in the *US Model Penal Code*, upon which the *Penal Code of Bhutan* is based, that strict liability offence constructions should not be used as a basis to deprive a person of their liberty. Severe approaches to drug possession would in this respect warrant further reflection on their need and appropriateness, quite apart from questions of their effectiveness.

Third and finally, while the purposes of Bhutan's *Penal Code* as described by the Chief Justice on the *Code*'s adoption in 2004[34] seeks to balance reform and deterrence, in practice the former has largely given way to the latter. Questions such as those around sentencing guidelines, or articulation of a primary rationale around which all sentencing revolves, are beyond the scope of this article. Nevertheless, what these topics point to and what we might retain from this discussion is the question of how to balance what might be termed the two great poles of penal policy and sentencing practice: reform and penal severity. This article has demonstrated that experiments with the latter in international experience have shown negligible benefits in terms of the marginal gains they offer. What small data we have in Bhutan point in the same direction. Perhaps then, it is time to return to the idea and purpose of reform, to seek out creative and specifically Bhutanese alternatives to imprisonment, ones that address social problems, such as rising drug use, through means that are appropriately social and supportive rather than severely penal.

34 *The Constitution of the Kingdom of Bhutan, 2008*, Art. 7 (17).

Theory of Change and Human Behaviour[1]

Introduction

Human beings are complex social animals. They rely on an intricate set of human thinking and pattern of behaviour that is expressed through the map of mental and cognitive human thought processes and psychology. The idea of *"id"* or the *self-identity*, *self-growth* and *self-preservations* are dominant normative source of human behaviours. Human behaviours are preset human intuitions and comprises of complex chain of reactions and responses to an outer stimuli or the environmental relationships. Human intuition and complex thought modelling processes reshape the relativity of human behaviour[s] and psycho-social reactions: depending on sensory and emotional experiences. Human behaviourism and behavioural sciences represents an inter-generational discipline. The behaviour of a human being arises as a response to external circumstances, intrinsic and extrinsic influences. These are variables that allows a human being to interact with two definite spaces: physiological and psychological influences.

The cognitive framework of human behaviour[s] are influenced to some extent, by inter-generational traits of human behaviours. It is defined by reasons and *self-interest theories.* These theoretic grounds guarantee that interactions are defined by specific goals, ambitions and pursuits. Persons distinctly classifies various *'interaction phases'* with *'substantive aims.'* These are naturally inclined positivist approaches which human behaviourist[s] describes as *objective lists theory* or *desire-fulfilment theories.* T[his] new thinking, influenced by 'set of values,' has made the *human behavioural ecosystem* an interesting area of research. More importantly, jurisprudence and effect of laws on human behaviour[s] has ultimately grounded the universal phenomenon of human reaction[s] where the faculty of moral

1 Contributed by Kinzang Chedup.

judgment exceeds the *natural sociability of men*. All stimulus has an effect that generates immediate human responses. The prevalence of *'liberty of will'* and *'harmony of self- preservation'* are misdirecting the telos of rational and social nature of human being. These 'contingent values' are one directional and can violate the natural and inviolable principles of duty, *rule of law* and legal values.

More often, a simple initiative leaves an ocean of arguments and contestations. These are premised on challenge to values with non-mobility of our values and norms. Human minds are reclusive repositories of primordial beliefs and traditions. Human possesses the cognitive intelligence which employ[s] rationality as a medium for "rational interactions" to avoid pain or displeasure. These are human instincts: that has been described by psychologist many decades ago from the perspective of both social and legal sciences. The article intends to collect various research ideas and academic works to provide a linear understanding of how a human person interacts, reacts, and responds. It intends to explore the domains of human behaviours to new changes and understand 'social mobility' in context to new changes. It further intends to explore the science of human behaviours: to provide a demonstrative analysis of the genres of human interactions.

Today, with complexities at many levels of social and human interactions, it exposes a distinct facet of 'human behavioural automation.' *Human actions are voluntary actions of man under imputation of their effects.*[2] Many social sciences believes that man is a risible animal since they are rational based on threefold distinctions: material, fundamental and formal. They argue that reason is the freedom of choice introduced by human will.[3] World is governed by complexities: at many levels- with interior complexities designating how each human beings are made of and external complexities determining how each circumstance evolve based on these complex ideas and facts. With "complexity" at a centre stage of

2 Pufendorf, S. (2009). *Two Books of the Elements of Universal Jurisprudence*, Liberty Fund Inc, United States of America, p.13.

3 Ibid., p. 9.

evolutionary social dynamics: it necessitates simplicity. The conjoint of these two moral and philosophical doctrines produce impulses of human behaviour- an amalgamation of rationality and irrationality. Unless human behaviours, reactions and impulses are understood correctly, it fails to understand the rational irrationality.[4]

The Faculty of Sense and Reason

Human senses are the first gateways to information and information interpretations. The sense organs receive ideas and the brain analyzes it to produce *'sets of reactions.'* Reactivity is a complex human behaviour; and is influenced by degree of natural human reflexes. Reflex is an "intuition" and is influenced by *consequentialism*. It covers desires, dispositions, beliefs and emotions. It basically, tremors the restive mind and induces fear and threat of consequences. These processes are varied on the particular stimuli that invigorates a process of thinking or 'waking of the deeper human conscience.' This is the relativity of human behaviours: human behaviours and cognitions are subjective to factors that collectively shapes human responses and reactions. Nurturing the best mental models as well as enabling [the] best experience – by shaping the particular 'stimuli' is an important *median approach*. The interpretation of the senses are pathways to 'manufacturing of human reasons.' From an analogy, we can say that the smell of smoke or the sight of a plume of smoke is an indication of fire. Consequentially, since there is a smell of fire, the olfactory senses signals and interprets that there is fire. These psychological interpretations are natural outcome of culmination of analyses and reasons. It converges human reasons which later [act] to justify with further human reasons and cognitive details. Therefore, *'human reasons and human intentions'* conjoins to validate human actions, interactions and responses.

This is a discipline of psychology. Importantly, it throws the question of social and clinical sciences from a genre of *change perspective:* the theory of change. Concurrently, it echoes the modern use of psychology and social

4 Parfit, D. (1984). *Reasons and Persons*, Clarendon Press, p.9.

science research by a legal system, if the change is in the legal system.[5] This is called as relationship science.[6] Change is an expression of change in relationships. Social cognition states that the cognitive processes by which individuals perceive, interpret, and respond depend on their social environments.[7] In that sense, the faculty of sense and reason are limited to the precincts of five *skandhas*[8] or aggregates of individual or social experiences.[9] These aggregates explains, at least from a Buddhist theological lens, how human opinion and experiences are formed through various psychological processes. These experiences or social processes or interactional practices leads to formation of 'solid ideas or opinions' that perceptibly affects perceptions, which later influences human feelings, consciousness, reasons and behaviour. These are neurobiological systems which suggest that responsiveness to relationship contexts is deeply wired into human architecture.[10]

More importantly, the interface between the *faculty of senses* and *reason* is interfered by series of cognition processes or neurological disturbances. The formative elements, discernments, consciousness, forms and [other] feelings are also influenced by external factors.[11] Today, human interactions are explained from the perspectives of human psychology, human mind, human traits, genetics and neuroscience. Importantly, the view of human behaviour and responses are categorically based on

5 Levine, D. et al. (2007). *Psychological Problems, Social Issues and the Law,* United States of America.

6 Relationship science affects how humans interact and how we correspond.

7 Colins, A., & Reis, T. H. (2004). Relationships, Human Behavior and Psychological Science*, American Psychological Society*, *13* (6).

8 In Buddhist philosophy, *Skandhas* refer to *'heap of aggregates'* or *'Phungpo'* that consist of the form *(rupa)*, feeling *(vedana),* perception *(samjna),* formation *(samkara)* and consciousness *(vijnana).*

9 Dorji, C.T. (2005). *The Heart of Wisdom*, Prominent Publishers, Delhi, p.139.

10 Colins, A., & Reis, T. H. (2004). Relationships, Human Behaviour and Psychological Science.

11 The relationship between neuroscience and ancient Buddhist philosophies from *Sherab Nyingpo* or the *Heart of Wisdom* proliferates an idea that, before advent of modern social sciences, ancient theological processes have discovered the normative thought processes, the processes of human interactions, human cognitions and the science of the mind. They illustrate how five senses lead to formation of mental – objects, how visual elements lead to formation of mental elements and how it forms consciousness and human reasons.

psycho-social analysis. This provides analysis as to how a normal human being 'reacts,' how 'impulses' integrate with 'changed values' in light of their normative personal life cycles. These factors are basically influenced by *externalism* or *personal psychological inhibitions* - the incapacity to accept the change. This is reinforced by basic structure of human reason and psychological effect called the *self-referential effect*.[12] This is the enhancement of memory when information is encoded with reference to the self, rather than, for example, another person. In any analyses, the *'self-concept theory'* pivots around basic human reason and actions. The architecture of human reason at very complex levels, pivots around the description of a *self-ideology* or theory a person has developed overtime based on his or her experiences and values. Human interactions, responses and psychology are a complex branch consisting of psychology, sociology, social psychology and anthropology.[13] It is pertinent to understand all aspects to integrate a holistic view of a human person. We cannot understand nor evaluate a human person immediately.

Scientifically, the nature of interpersonal behaviour, response and transactions depend on self-awareness and the concept of *ego-states*.[14] Relationship is a direct result of how humans use the faculty of sense and reason to form connection between two factors so that there is a *sphere of commonality*. The *sphere of commonality* can be called as *acceptance*. George Levinger[15] proposed a model of development of relationship that consist of five stages:

a) Acquaintance
b) Buildup
c) Continuation

12 People centres their justifications or contentions about how they view or opinion. For every reason or an explanation, be it knowingly or intuitively, people view "things as they see it" whether it is latently or patently discernable.

13 How each human interacts and responds depends on a particular society, on race and culture and social psychology [how the general society thinks] in a particular area or region.

14 Sikkim Manipal University. (2011). *Organizational Behaviour and Management,* Directorate of Distance Education, Manipal Technologies Limited, Manipal, India, p.41.

15 George Levinger was Professor of Psychology at the University of Massachusetts in Amherst.

d) Deterioration

e) Termination

These stages form a *behavioural* or *response compass.*[16] While some call it *'responsible thinking'* that constitutes of circumstances, thoughts, feelings, actions and results, listening to language and integrating the algebra of thought model, changing the mindsets is a basic foundation to consolidate plurality. The *modular model of mind* [17] dictates that it exist on status, affiliation and kinship. On the same line, it invigorates the *'auto pilot traits,'* natural culminating unconscious reflexes that provides attention to the past based on *reactive model*.

In a scenario of a practical drama by Derek Parfit, he demonstrate the cases where the effect of each person's acts depend on what others do. This is a pluralistic principle in which it considers the '*Positive' and 'Negative' Conditions*.[18] This is sometimes referred to as 'moral mathematics' which involve various motions of calculative judgment. However, the *'fatal attribution error'*[19] mostly rest on reactive thought models, unique personal characteristics, and following the crowd temperament. When such errors occur, it interfere[s] with careful transactional analysis that distorts the nature of the response to stimuli. More so, the concept of *ego-state* influences behavioural personality. *Ego-state* is a pattern of behaviour that a person develops as they grow up, based on their accumulated network of feelings and experiences. These *ego-states* influence transactions- resulting in non-complementary transactions. A non-complementary transaction is when stimulus and response are not parallel.

This is normally associated with negative responses. It is determined by psychology of human thought and different theories of personality. The psychoanalytical theory stresses that the unconscious part of human

16 These are compasses that revolves around self-awareness, self- directions or 'turning forks,' and emotional guide.

17 Governance and Strategic Studies. (2018). Session on Emotional Intelligence, Leadership Programme for Judiciary (LPJ), Phuentsholing.

18 *'Positive Condition'* is 'all receives a greater benefit' and *'Negative Condition'* is there is no benefit.

19 *'Fatal attribution error'* is the process of reaching a judgment without an analysis.

brain determines human behaviour. It is *Id,* the psychological trait of human behaviour from birth that determines how individuals expresses and provokes a person towards its ambitions.[20] The *'trait theories'* also affect how each human reasons and exhibit emotional intelligence and stability of feelings. The intensity of emotions, be it positive or negative, affect long-term and short-term personal goals and aspirations.

The Logic Rubric

Rationalism and rationalist are like *block of wax* as propounded by Socrates. He says that the *blocks of wax* can also differ in hardness, moistness, and purity. He suggests that when the *wax* is pure and clear and sufficiently deep, the mind will easily learn, retain and will not be subject to confusion. It will only think about things that are true, and because the impressions in the *wax* are clear, they will be quickly distributed into their proper places on the *block of wax*. But when the wax is muddy or impure or very soft or very hard, the defects of the intellect occur.[21] The idea of 'logic rubric' depends on various factors and pre-determined considerations. The rubric analogy of decision-making, logic and interpretation of circumstances are further influenced by primary assumptions that *'all things should fit within the sandboxes of circumstances,'* thus proposing a 'perfection-based view of reality.' Logic require every circumstance to be perfect and pragmatic based on *cognitivism*.[22] It also relies on *associationism*, in which ideas and events are associated. 'Logic rubric' involves the use of adaptive decision making skills showing people to use logic and conscience to decide on different parameters of facts. The ideas of *embodied cognition* believes that *mental representations* are shaped and constrained by the experiences. It is influenced by what we perceive, how we act and how emotive we are about it. These embodied dimensions are often incorporated in representations when we comprehend situations.[23]

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20 Sikkim Manipal University. (2011).

21 Funke, J., & Stenberg, J.R. (2019) (Eds.). *The Psychology of Human Thought: Introduction*, Heidelberg University Publishing.

22 *Cognitivism* is the understanding the mental processes and representations underlying thought.

23 Funke, J., & Stenberg, J.R. (2019) (Eds.). *The Psychology of Human Thought:*

The influence of logic and reason to decision-making and decision-making skills affects calculative approaches. The use of 'inductive' and 'deductive reasoning' abilities are influenced by experiential self-investigatory approaches.[24] Pattern assessment determines the pattern of behaviour that estimates the different level of responses. The idea of utility-valued logic for decision making depends on logical structure of human behaviour and response.[25] Social preferences and the intentional state represents its conditions of satisfaction.[26] The so called logic rubric of human psychology is based on differential models of thinking, analysis and perceptions. More importantly, as all things has to pass through the human cognitivism, which is absolutely subjective as well as directive in some cases, human logic itself is a subjective mental phenomenon. In this case, as it may be, the reasons, unless justified by logical sequences of substantial projections of sound judgment, also becomes contentiously non-objective. Human rationalism and objective cognition of the circumstances and the surroundings are dependent on the frame of the human mind.

Human Response to Stimulus

Human behaviour and response is a psychological and behavioural science. Why each human reacts differently to 'different objects or stimuli' depends on the receptivity scope of each individual. People interpret the same situations differently and the *'impact phase'*[27] differs to each individual. Behaviour and 'response rate' depends on how each individual perceives and integrates the risk and the loss they [may] suffer. The 'objects of change' critically determines how each individual or a group responds so that, it satisfies and seals their 'innate gap' or a 'void' that is introduced by the changes. The longer the perimeter of the

Introduction.

24 Khaddaj, S. (2011). *Logical reasoning and decision making*, Kingston University, London.

25 Starks, R. M. (2019). *Logical Structure of Human Behaviour,* ResearchGate.

26 Ibid., p. 52.

27 *'Impact phase'* refers to a situation in which a victim do not panic and may, in fact, show no emotion.

change, the more stressed the human response, and human behaviours are equitably designed to garner satisfaction and close the 'emotional gap.' This is a normative or routine human response and behaviour and are aimed at creating self-satisfaction and cushioning the impacts.

The 'external stimulus' and the 'internal stimulus' are two categorical sets of 'stimuli' that triggers a response. The hemostasis or 'balanced approach' is disturbed by certain factors. Action as 'stimulus control' is dependent on variables and human beings are constrained by evolutionary processes. The 'bottom up processes' and 'top-down processes' of 'thought analysis' and perception illusions theoretically underpins how each human reacts.[28] The theoretical underpinnings of how each human and the society behave is a complex social science; and it cannot offer an objective solution to various research queries. In light of these issues and facts, human responses to stimulus can be reactive or be greatly influenced psychomotor skills and effects.

For this purpose, [any] change is a stimulus. It animates a response. Bloom reminds that humans do not take kindly to change. Wild ideas scare people, they fill them with anxiety and doubt. Straying grotesquely from the beaten path makes humans fearful and even self-destructive. Data indicates that change [organizational] results in fear, stress and anxiety. Fear of the unknown, habit, self-interest, economic insecurity and failure to recognize the need for change, distrust, perceptions and skepticism were all identified as factors that may contribute to the individual's resistance to change.[29] The data findings by researchers further confirmed that all of these factors are influenced by increased stress levels which, in turn, result in stress-related behaviours, coupled with decreased cognitive capacity. It seems that elevated stress levels could hamper individual's acceptance of change.[30]

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28 For any stimulant, it involves adaptive thought processes that is adulterated by perception illusions.

29 Tonja, B., & Viljoen, R. (2016). *Human Reactions to Change*, South Africa, ResearchGate.

30 Ibid.

The stimulus has to be planned to provide 'scope for basic elements of whole person'[31] which in other words, means that the approach should be holistic and consistent. It should incorporate the bio-psychosocial systems in humans comprising of physical, emotional, mental and spiritual elements. When one of these elements are burdened, the other will also be troubled. Only when all these elements receive equal attention or are balanced can there be coherence. The whole individual should be considered to ensure cohesion, optimal functioning and minimal resistance.

Positive responses include understanding, engagement, discussion and involvement. *Away responses* comprise the negative circle of stress, fear and anxiety. Continuous flux and lack of understanding result in disconnect and reduced cognitive capacity. These vicious cycle[s] create stress, anxiety, fear and resistance. Stress creates fear, which creates more stress, which then creates anxiety and resistance which again results in increased fear and stress. These stresses, anxieties, fears resistance cycles are fueled by the individual's *away responses*.[32] As varied as human beings are: they are categorically varied in their responses. The basic continuum of human expressions and responsive behaviour is that it is directly influenced by the link between *'clear begin'* that allows equilibrium between *predictability, meaning and order*.[33]

Positive and Negative Response

Human beings are variables with least constancy. They are affected by emotional upheavals and the centre of emotional gravity is influenced by the pivots of change in circumstances, emotions and social scenarios. Positive reactions are influenced by positive emotional backgrounds while negative responses are categorically influenced by imbalanced

31 The person should be viewed as holistic. For example, if we talk about emotional, the emotions affects his physical attributes and these bodily functions are all correlated to provide a synthesis of physical functions.

32 Ibid.

33 This is an organizational change behaviour which determines how an 'individual' or a 'social group' respond to change based on various factors of *predictability, meaning and order.*

negative emotional reactions. The primacy of human reactions are dependent on various stages or factors through which a human expresses their inclinations, desires or the *'negativity bias.'* It is based on innate predispositions and experiences. The *'positivity bias'* denote three phenomena: a tendency for people to report positive views of reality, a tendency to hold positive expectations, views, and memories, and a tendency to favour positive information in reasoning.[34] Both *positivity* and *negativity bias* provides basis of human expression- and it qualifies how each individual feel, express and respond to categorical impacts- which is either *positive* or *negative.*

While the *'inherent negativity'* cannot be erased off a person, it generates 'a negative view and thinking' be it consciously or subconsciously, thus promulgating an idea resisting change. For many human beings, the idea of change or change dynamics and circumstances force a human being to assess it with emotional intelligence- that identifies itself with pre-determined emotional and mental setups. If a person is inherently negative, with a pessimistic orientation, the person generates a *'cloud of negativity'* while, on the other hand, the person with *positive demeanour* promote *'automatic optimism.'*[35] *Positivity bias* denotes a tendency for people to judge reality favourably thus bringing in positive judgements to reflect genuinely held positive views.

Negativity in human reactions are influenced by many factors. While some reactions may temporarily last, some negative reactions are 'self-generating.' The 'negative bias effect' demonstrate the ability to introduce negative asymmetry and impression formation.[36] It generates *negative potency, negative gradients*, *negative dominance* and greater *negative differentiation.*[37] These connection of negative domains are determined

34 Hoorens, V. (2014). *Positivity bias.* In: Michalos, A.C. (n.d). (Eds.). Encyclopedia of Quality of Life and Well-Being Research. Springer, Dordrecht, The Netherlands.

35 This is an evolutionary based emotion generation, in which a person is always positive.

36 Rozin, P., & Royzman, E. (2001). Negativity Bias, Negativity Dominance, and Contagion, *Personality and Social Psychology Review,* p.297.

37 In this scenario a person sees more negativity than he can see the positive aspects.

by senses, emotions, memory, impressions and moral judgments. The human taxonomy differential[s] results in different emotions and unique pre-conditioned personal biases and circumstances. However, both positive and negative human responses are a part of the domain of 'human reaction chain' dominated by personal character traits and emotional adaptations. This is a natural evolutionary of human behaviour and experiential response.

The Analysis of Evaluative Conditioning

Human psychology is evaluative in nature. One of the most influential ideas in psychology is that human behaviour is, to a large extent, governed by likes and dislikes.[38] The persuasive effective of preferences as well as the pre-cognition for only 'good mentality' and the requirement for only 'conditioned stimuli'- that is, only good stimuli is required, makes the human being an evaluative social being. These evaluations are based on *self-assessment for self-benefit* and *harm*. This is further based on the hypothesis that 'all human avoids pain and seeks pleasure and happiness.' These established assumptions are intrinsically affected by self-interest theories and pursuits. Moral quantity of things also determines how a person or group of persons perceive things. Self- evaluation and evaluation of circumstances are critical to act as 'evaluating points.'

Based on different personality traits, human beings evaluate 'every inch of circumstance' from the views of self-interests. They do not gauge and calculate things to a larger extent, if it does not pertain to their interests or if it is not beneficial. More so, when the benefits and damages are remote, human's evaluation indexes are least used. These 'evaluations' and critical appraisal of both the issues and facts, are considerably influenced by personality traits including self-interest based analysis.

Critical Appraisal

The role of critical appraisal is a functional modality for contemporary governance and modern human behaviour. While critical review of the

38 Hoffmann, W. et al. (2010). Evaluative Conditioning in Humans: A Meta-Analysis, *Psychological Bulletin.*

issues, facts and circumstances are relevant, it requires to be contextual. If critical appraisal and review becomes a pervading facet in all interactions: it diminishes the return of the circumstances and loses the locus. When the locus of the issues are misplaced: it revolves around unfounded criticism and transforms the facts of issue into a *social gossip*. This is when strategic role of critical review and appraisal is centered on miniscule and irrelevant facts and circumstances. The human evaluative process can be assumed to involve a wide range of mechanisms including perceptual, emotional, experiential and symbolic dimensions. *Resourceful, Evaluative and Maximizing Model (REMM)* postulates that every individual is an evaluator and it involves 'trade-offs' and the value of the evaluation is relative.[39] It also stipulate that each individual wants are unlimited and each individual is a maximizer.

The requirement for critical appraisal for any issues amongst human beings are categorically self- directed. This is intended to change the directions of the benefit- and avert harm and non-beneficial occurrences: so that human beings only reap the 'good and avoid the bad.' The choice between 'good' and 'bad' is a directional step to ensuring choice: which requires the intervention of the most prudent human reason and evaluation. These 'critical appraisals' are inductive as well as deductive. The impact of just and moral actions are two prominent aspects how human interact and respond. The role of 'critical evaluation' in both the actions include the need to justify the ends: in just actions, if the act is in line with justice and on the other, if the act is line with moralities. The 'universalism' of human thought is directed by human power of intellect. These faculties are called as the 'representative faculty' and the 'adjudicative faculty.'[40] Through the adjudicative faculty of intellect, it determine the just and unjust; good and the evil and employs prudence for profitable judgment. [41]

39 Jensen, C.M., & Meckling, W.H. (1994). The Nature of Man, *Journal of Applied Corporate Finance, 7* (2).

40 Pufendorf, S. (2009). *Two Books of Elements of Universal Jurisprudence, Natural Law and Enlightenment Classics,* Liberty Fund, Indiana.

41 Ibid.,p. 300.

Human conscience involves the judgment of the intellect: it approves things done well and condemns things not done well. This is called as *consequent conscience* as it follows the deeds of man and subjects them to scrutiny.[42] The question of probable conscience positions in which a person chooses the probable issue that gives positive result. The search for right reason, will, good and just actions are basis for self-review and analysis. Human attitudes towards objects and attributes is critically influenced by their tastes and self-knowledge. Self-knowledge describes about one's likes and dislikes. Every person has a psychological tendency that is expressed by evaluating a particular entity with some degree of favour or disfavour.[43] The target of evaluation: object and attributes and attribute preferences distorts the description of the object itself. Critical appraisal is an important subject: that requires thorough assessment. The role of psychological judgments are mainly aimed to ensure that [things] are within the domains of self-benefit.

The degree of psychological judgments are dependent on number of factors. More recently, the *emotion-versus-reason* debate has been incorporated into the field to assess how judgments can be governed by two fundamentally different processes, such as intuition [or affect] and reasoning [or deliberation].[44] This is called as neuro economics- in which a person determines, the economics in light of neuroscience. Psychology research shows that overall, judgment *per se* can be characterized as the thought, opinion, or evaluation of a stimulus, and the decision is the behaviour of choosing among alternative options.[45] Since 'critical appraisal' is a decision-making process, it involves a series of normative rules of choice making and rational choice theories. 'Transitivity of the choices,' which means if a person chooses apples over pears and therefore, true critical appraisals are based on the nature of preferences. Rationality, economics and social analysis play a role in determining how an individual

42 Ibid.,p. 301.

43 Ledgerwood, A. et al. (2018). Toward an Integrative Framework for Studying Human Evaluation: Attitudes Toward Objects and Attributes, *Personality and Social Psychology Review, 22*(4).

44 Reya, F.B. et al. (2021). *Judgment and Decision Making,* ResearchGate.

45 Ibid., p. 2.

responds. The decision making skills are influenced by generic theories of economics and rationality- that directly influences how each individual responds and correlates.

The 'bounded rationality' stipulates that people tend to find solutions that are good enough instead of 'optimizing.'[46] Heuristics and biases describes the psychology strategies and identifies itself against coherence. Heuristics are categorized as representativeness, availability, anchoring and adjustment. In representative heuristics, people judge by similarity; while availability refers to information in the memories which easily create biasness. In anchoring and adjustment, people make preferences and adjust to it. These are various models of how critical thinking and rationalized design thinking pervades to allow the capitalization of best alternatives and experiences. Therefore, the concept of 'framing effect' also comes into play in which a person takes risks even if there are quantitatively equivalent options. The modern use of 'rationality and intuition' a subdiscipline in psychology, recognize the influence of both rational thoughts and irrational intuition on judgment and decision making.

The Psychomotor Concept

Unless determined, human reactivity, responses and behaviour are affected by forces called as psychomotor system. This is how the mind influences the reactions: reflecting the state of mind through the domain of human behaviour. If a person is angry, he has grimaces and pounds his hands onto a table. This exhibitionist character of human mind is called as psychomotor: how the mind makes the body to move. In relation to human behaviour to new influences and changes, it is how a human controls the relationship between the mind and the body. The *psycho-physical parallelism* argues that every mental event is linked to a physical event so that when one occurs, so does the other. The psychophysical parallelism states that mind and body exist in a harmony.[47]

46 Ibid.

47 Tan, U. (2007). The Psychomotor theory of human mind, *International Journal of Neuroscience*, Turkey.

In this concept, we are not arguing how humans should react to mental frameworks and influences, but mostly talks about reactivity and normal human responses to new sets of instrumentalities. It is the stimulation of the sensational consciousness and human automatism. While the psychomotor theory relates to the relative responses of human beings, it mostly deals with body responses. Therefore, human responses are categorical representations of mental abilities as well as the frame of the mind. The 'motorization of psychology' is the ability to institute action-oriented movements that is categorically responsive. In basic human psychology, 'responses' are triggered as part of human-reaction chain. The psychomotor skills are generally controlled by 'response skills' which is controlled by psycho-social analytics.

The cognitive and affective combines analysis and information synthesis to integrate in decision-making and domains of response.[48] At the affective domain level, the level of responding and characterization affects how decisions are made and set out psychomotor interpretive responses related to perception and guided response. The cognitive levels of evaluation, analysis and synthesis[49] is affected by how an individual comprehend and apply the knowledge. It also affects how a society receives, value and responds. Authors provide that 'mental logic' and 'mental models' differ on how they perceive the world. The processing capacity of human working memory is limited. Our intuitive system of reasoning makes no use of it to hold intermediate conclusions. This is further defined by who a person is: an optimist, pessimist or otherwise.[50] Basically, it connects induction, deduction, logic and rationality. The effect of contents, for example,[51] affects all aspects of reasoning: the interpretation of premises, the process itself, and the formulation of conclusions. Human reasoning

48 Hoque, E. (2017). Three Domains of Learning: Cognitive, Affective and Psychomotor, *The Journal of EFL Education and Research, 2*(2).

49 Hall, C., & Johnson, A. (1994). *Module A5: Planning a Test or Examination.* In B. Imrie & C. Hall, *Assessment of Student Performance*, Wellington, New Zealand: University Teaching Development Centre, Victoria University of Wellington.

50 Laird, J. (2010). *Mental Models and Human Reasoning*, Department of Psychology, Princeton University, Princeton.

51 Ibid. p. 3.

is difficult as well as tacit. In light of these, the psychomotor concept, which basically interprets the view and motion, conceptually represents, how each human being responds.

How a human psychology or a human being reacts is a controversial topic. How a human respond depends on the degree of stressors, and the type of stressors which induces the psychomotor effects. The meta-motor abilities and metacognition[52] are affected by series of spatial development and neural scientific fundaments or multiple intelligence.[53] These intelligence also affects how human responds and decides. Lateral thinking is also responsible – that affects decision making and its abilities. More specifically, human reactions to change in laws, morality and attitudes, for example, have been categorically emphasized by different writers. How humans react to different changes in laws and systems for that matter, are shaped by people's everyday experiences with law through interactions with the institutions such as police and government agencies.[54] These interactions shapes perceptions, and the way in which people experiences law or other stimuli and other institutions in their everyday lives. Research and desk review reports show that legal content, the idea of Justice, and the reliable source of morality transforms the idea of credibility and influence. This also produces the idea of legitimacy and authority.[55]

The Mechanism of Influence

Various scholarships and writings on various institutions has described values, which in turn influence behaviours. In many cases, the 'motivational influence' are leveraged to bring social meaning of

52 Martini, R. et al. (2004). Metacognitive Processes Underlying Psychomotor Performance in Children with Differing Psychomotor Abilities, *Adapted Physical Activity Quarterly*, Human Kinesthetic Publishers.

53 Martínez, A.C. (2014). *Cognitive, visual-spatial and psychomotor development in students of primary education through the body percussion* – BAPNE Method, Social and Behavioural Sciences, Department of Innovation and Didactic Training, Universidad de Alicante, Spain.

54 Nadler, J., & Bilz, K. (2014). *Law, Moral Attitudes, and Behavioral Change*, The Oxford Handbook of Behaviour Economics and the Law.

55 Ibid.

behaviour; and this is affected by social psychology that successfully influences moral attitudes. The mechanisms of influence should be gently nudged in particular direction. This is a research suggestion based on social psychology concepts that can subtly prompt people to take the path of least resistance.[56] Research shows that if any object makes an undesirable behaviour, people can be persuaded to do less of it. And more so, if the regulatory nudge is forceful, rather than by free will, attitude change is unlikely to occur. One of the best example can be the use of legal architectural means to prompt a behaviour change was the case of smoking ban in the United States.

In 1964, the US Surgeon General's Report established the scientific basis for supporting the claim that smoking carries grave health risks. In the following year, the Congress mandated health warnings on cigarette packages. This had the least impact on the smokers. On the other hand, when the non-smokers were informed of the impacts of passive smoking, it challenged the individual smoker's liberty as an issue. This took on the moral dimensions, and reinforced legal restrictions on smoking. So the law, with the support of the people took effect and local smoking bans[57]could be easily proliferated by strengthening the architecture to discourage harmful behaviours. The law should encourage prosocial behaviour through positive incentives by removing barriers. More than sanctions, the desire for rewards work.

The idea of social meaning changes requires the domain of non-morality into the domain of morality to increase prosocial behaviour and response. The same example of recycling is relevant; and if people perceive that their neighbours are recycling, it is more likely they will recycle too. This behaviour is influenced by the norm of cooperation and this suggests that

56 Ibid., p.248.

57 The social dimension of the law requires influencing the public and gaining public support by promoting prosocial behaviour through the law and the legal system. This can be applied to waste management, the concept of waste segregation, for example, instead of making waste management mandatory, providing an infrastructure for recycling naturally helps to reduce waste and people come to use it. Once the behaviour becomes a regularity, it develops positive attitude with an individual commitment.

physical and cognitive inertia is not only a barrier to increase in prosocial behaviour. So the cooperative behaviour is important; and if a single person does it, without others doing it-it will be seen as a substantial sacrifice.[58] Various research studies suggests that [any] changes should transform the social meaning of behaviour, changing people's perceptions regarding the desirability of a behaviour. Generally, people resist changes when they see it as a fundamental change in the status. In the United States, the gun, for example is seen as individualistic cultural symbol- courage, honour and prowess; and in this matter, the regulations to curb gun use is associated with risk perceptions. They feel their status is threatened. Therefore, the gun laws are not very effective in the United States.[59] This shows that any changes should be viewed through changing human perceptions and behaviour dimensions so that it engage experiences in social psychology and human behaviour.

Changes are part of dynamism. Organizationally, changes are made so that the organization remains dynamic, while at the same time improve organizational progress and performance.[60] *Rule of law* and good governance are a consolidation of common values and aspirations. Basically, the mechanism of influence has to be appropriate and supportive. These mechanisms determine the outcome of any interventions. Research suggests that the best summation of an intervention's ability to change and move public opinions depend on circumstances. The social psychological processes, importantly behavioural psychology is reinforced by the *'just-world hypotheses,'*[61] that create a space for a 'psychology of accomplishment.'

The Role of Affect and Theory of Change

Until recently, the role of emotions attracted little attention from decision making researchers. While they viewed decision-making and sharing of

58 Ibid., p.252.

59 Ibid., p.253.

60 Damawan, H.A., & Azizah, S. (2019). *Resistance to Change: Causes and Strategies as an Organizational Challenge,* 5th ASEAN Conference on Psychology, Counselling, and Humanities.

61 The tendency for people to base causal attributions on the belief that the world is a just and fair place; hence, the suffering of a victim is rationalized in terms of the person having behaved in a way that made them deserve the injustice.

the opinions as a cognitive process, and decision-makers were assumed to evaluate the consequences dispassionately to maximize utility.[62] In this category, it emphasizes on emotions which serve as an essential function in decision making. Considerably, the concept of *expected emotions* consisting of predictions about emotional consequences of decision outcomes and the *immediate emotions* drive the behaviour. The reactivity theoretic and rationality assumptions also affects decision-making. Here, decision-making shall be construed as the methodological acceptance of any intervention. Exploring the relationship among the psychometric constructs help to enable a change through the dynamics of positive change. The above statements or suggestions are based on the calculus of human thinking and psychology which affects how decisions are made.

Basically the theory of change and non-statics explains how an intervention, or set of interventions, are expected to lead to specific development change, drawing on a causal analysis based on available evidence. Change is directed by continuous learning approach based on equity, competitive advantage and feasibility.[63] The decision making or for that matter, the different responses that is enumerated above, is related to the degree of change as well as the theory of change. While acceptance, attitude, change, comprehension and adaptation to new ways of thinking and working plays a vital role in psychophysiology, it is relative. More than how a person or a society responds to a stimulus, it categorically requires the connection of various positive factors to enable the positive embrace of change.

The relationship between the theories of change, emotional synthesis, the effect of affect are a contagious chain. While the theory of change affects emotional synthesis of the change, the affective emotions changes the course of incidental influences.[64] This will relate to behaviour change

62 Lerner, S.J., & Loewenstein, G. (2003). *The Role of Affect in Decision Making*, Handbook for Affective Sciences, Oxford University Press.

63 United Nations Development Group. (n.d.) *UNDAF Companion Guidance: Theory of Change.*

64 Lerner, S.J., & Loewenstein, G. (2003). *The Role of Affect in Decision Making*, Handbook for Affective Sciences, Oxford University Press.

that is defined by key elements that is associated with threat, fear, response efficacy, and self-efficacy. Barriers, benefits and subjective norms and reactance serve as the important variables that evoke a behaviour change.[65] The theories of change influences the theory of behavioural change[66] that is modelled on cognition, planned behaviour and stages of change.[67] More succinctly, various drivers of change with different degrees of change and other social and psychological elements determines how a society or a person reacts to a new sensitivity.

In this, like the above, let us consider realistically how a person would interact to **Intervention X.** Different theories explains how a person would react. Based on *Social Cognitive Theory*,[68] the **Intervention X** would be viewed from a personal factor and environmental perspective that represent situational influences and environment in which behavior is performed. This is affected by self-efficacy, best outcome expectations, self-control and emotional coping. In this scenario, the person will be very careful, and would strive to perform the best with emotional stability to cope with the change. However, applying a different theoretical perspective, the behaviour or acceptance of the change is pivoted to the 'intention' which is further influenced by subjective beliefs and behaviour is affected by his perceived behavioural control, which is the individual's perceptions of their ability or feelings of self-efficacy to perform behaviour.[69] These behaviour models or theories including the *trans-theoretical model* emphasize on the stages of change which results in different aspect of behaviour based on models of thinking and behavioural pattern.

65 Communication for Governance & Accountability Program (CommGAP), World Bank, Washington DC.

66 Communication for Governance & Accountability Program (CommGAP).

67 *Social Cognitive Theory, Theory of Planned Behaviour* and *Transtheoretical* are the theories of behaviour change.

68 Bandura, A. (1986). *Social Foundations of Thought and Action*. Englewood Cliffs, New Jersey.

69 Armitage, C., & Conner, M. (2001). Efficacy of the theory of planned behaviour: A meta-analytic review. *British Journal of Social Psychology* as cited in Communication for Governance & Accountability Program.

Another context here is the finding of the **Intervention X** as irrational. Research positions that irrationality concept is guided by lack of information and rationality should be the central of any intervention. However, if a person or a society perceives that the **Intervention X** is irrational, it sometimes exists as a reflection of personal trait of some persons or societies. It is distinct feature of human psyche and researchers say that 'irrationality' is guided by self-deception. These, however has serious limitations, and cannot be concluded has a definite human response paradigm.[70]

Another theory which expostulates acceptance of change[71] is dependent on: independent variables [how different society or people think] and dependent variables on how each individual or a society responds called as the *Logic Model*.[72] Measuring psychological constructs of how a person or a society accepts changes: unfreeze, change and re-freeze models offers a categorical posit of change based on standard structural approaches.[73] It entails recognizing the change as imperative, and develop a common direction and implement the changes and consolidate the changes to sustain it by reinforcing the change.

Choosing strategies for change is critical. One of the greatest pains to human nature is the pain of a new idea.[74] Authors suggests that dialectical thinking[75] that synthesizes any compromising thinking in which people

70 Toth, C. (2013). Rationality and irrationality in understanding human behaviour. An evaluation of the methodological consequences of conceptualizing irrationality, *Journal of Comparative Research in Anthropology and Sociology, 4*(1).

71 Brian, D. (2015). *Acceptance of Change: Exploring the Relationship Among Psychometric Constructs and Employee Resistance*, [Dissertations Paper].

72 Logic model for hypothesized relationships among Psychometric Constructs, Demographic Controls, and Degree of Resistance to Change as adopted in Brian, D. (2015). *Acceptance of Change: Exploring the Relationship Among Psychometric Constructs and Employee Resistance*.

73 Brian, D. (2015). *Acceptance of Change: Exploring the Relationship Among Psychometric Constructs and Employee Resistance*.

74 Walter Bagehot, English Economist, Physicists and Politician, 1872.

75 Refers to a cognitive tendency to concentrate, contemplate and transcend contradiction in ideas or perspectives in a manner that cannot be reduced to mechanistic logic.

accept the contradictions as a natural process including the opposites.[76] Changing behaviour is a human dimension. In this context, integrative model of behaviour – which focuses on community organization and development is important to self- regulate, self-reflect and connect with the situation.[77] The determinants of human behaviour is a confusing aspect of anthropology and it is influenced by cultural and social values. The socio-cultural values affects how each individual behaves in a society. The theory of mind, self-awareness and consciousness are also [best] guiding factors that affect[s] how human interpret and interact. These interactional theories helps to understand the qualities and characteristics of the individuals and communities. Importantly, behaviour change theories positions that behaviour is influenced by three significant factors, including personal belief, personal belief about what other believes [social norms] and behavioural control.[78] Attitudes, social norms and behavioural controls affects behavioural intent and influence[s] the behaviour action.

With a linear thought, it understand[s] how a human reacts- with an application of both models and theories of behaviour, in context to time, hierarchy of behaviour, belief about control and power vis-à-vis the analysis of the needs and interests, preferences and barriers. With a specific connection to a 'problem,' 'intervention,' the 'people' and its 'impacts' it amplifies the 'environmental situation.' The innovation, a change in a law, for example **Law Z,** has to be analyzed from following social and legal dimensions. It has to for instance, connect with people through:

a) Selecting the target audience;
b) Segmenting the audience;
c) Employing social assessment tools;
d) Assessment with concrete indicators of change;

76 Teece, J.D., & Nonaka, I. (2001). *Managing Industrial Knowledge: Creation, Transfer and Utilization*, Sage Publications, London.
77 Changing Public Behaviour. (2015). *Behaviour Change Theories and Techniques*.
78 Ibid. p. 3.

e) Creating a change; and

f) Applying education and communication techniques with social marketing tools.

While understanding human behaviour is critical, making the best out of human behavioural studies is another. Background influence consisting of past behaviour, demographics and culture, attitudes difference variables and contexts affects normative behaviour[s], diffusion of innovation, self- efficacy and stages of change. The reasoned actions are associated with value belief norms. More critically, any intervention is characterized by 'cognitive dissonance,' 'diffusion,' and 'self-efficacy' in which they determine behavioural change.[79] Whatever the theoretical underpinning[s] on changing human behaviour, an integration of understanding is pertinent to link between relevant behaviour, social norms and control from the perspectives of the people involved. More than the individual behaviour, 'social behaviour' also illustrate the reasonable 'judgment theories' based on premise that collectivism is a result of individual representation. Social, political or legal changes are interesting part of change. The *new ideas, new scientific and technical developments, and new patterns of social life are sometimes resisted even in the rapidly changing societies*.[80] Mostly it is attributed to the cost of change**,** compatibility with existing culture, attitudes and values, vested interest and social status quo, and technical difficulties to adapt to change.

Resilient Adaptation to Change

Physically or psychologically, adapting to change is a new set of skills in itself. Communities are dynamic and complex systems in a constant state of flux and all are used to adapting to some form of adversity. In some societies, they adopt the resilience approach or survival approach. Adaptive resilience[81] is more than an individual person's goal; but a

79 The trans-theoretical model that involves pre-contemplation, contemplation, preparation, action, maintenance and relapse.

80 Akujobi, C.T., & Jackson, T.C.B. (2017). *Social Change and Social Problems*. In Abasiekong, E.M, Sibiri, E.A, Ekpenyong, N.S. (Eds.) *Major Themes in Sociology: An Introductory Text. pp 491-526. Benin City, Mase Perfect Prints.*

81 A simple and illustrative example of this thinking is provided in the story of

community resolution. It is said that by focusing on community resilience we emphasize the important role of the community both as geographical territory and as an emotional attachment to a place, in understanding resilience. As we have seen, whether or not individuals are resilient will depend not only on personal attributes and skills, but also on the resilience of the community. This includes the nature of relationships for positive social change. A community can both facilitate and constrain resilience, and it can be an agent for change in and of itself.[82] Adapting to new changes requires the model mindset of which was coined by Charles Darwin[83] when he said *it's not the strongest species that survive, nor the most intelligent, but the most responsive to change.* These requires adaptive skills and resources. If it is an organization, it should have a culture of shared purpose and values rooted in a strong organizational memory, avoiding mission-drift but consciously evolving, predictable financial resources with a strong network[s] with collaboration at all levels to make the organization vital and connected. It should create new assets.[84]

While adaptive skills requires adaptive capacity with innovation, it also requires experimentation with reflective practice[s]. Design thinking, leadership and strong improvement focus are few of them. It has to be more productive, more resilient and impactful. Systems thinking is both a mindset and a set of tools for identifying and mapping the inter-related nature and complexity of real world situations. It encourages explicit recognition of causes and effects, drivers and impacts, and in doing so helps to anticipate the effect of an intervention which is likely to have on variables or issues of interest. Furthermore, the process of applying system thinking to a situation is a way of bringing to light the different assumptions held by stakeholders or team members about the way the

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Abraham Lincoln and his rise from a log cabin to the *White House*. Not only does Lincoln's rise to presidency encapsulate the *American Dream*, but it also adds credence to the idea that people can show extraordinary resilience to life situations, and in doing so improve their lot in life.

82 Barrow Cadbury Trust. (2012*). Adapting to change: the role of community resilience,* Great Britain, p. 33.

83 Robinson, M. (2010). *Making Adaptive Resilience Real*, Arts Council, England.

84 Ibid.

world works. Adaptive resilience is the capacity to remain productive and true to core purpose and identity whilst absorbing disturbance and adapting with integrity in response to changing circumstances.

The useful word is that *change is both necessary and desired tool*. While change can be a 'painful' experience for few, when imbued with doctrinal approach of resilience, change is a progressive episode for new momentum and progress. Adaptability, resilience and careful 'nexus' with a relationship enabling adaptive behaviour and building resilience is a new progressive change.[85] It requires, for example, [organization] or an [individual] in the sphere of change to conceive change and their places in the ecology of responsibilities and impacts. With the shift in the dynamic[s], the change in paradigm has to be re-considered in light of creative ecology, thereby creating their resilience. The *Ecological Business Thinking Model*[86] will require strong leadership, financial flexibility, and strong networking. It has to be marked by change and continuity-driven by innovation, network and evolving environment, without a *'Rigidity Trap.*[87]

The new concept of resilient organization[s] or individual[s] are rather diagnostic than prescriptive. Literature review show[s] that 'fundamental mindset' issues that must be addressed is the ability to face up to the brutal facts.[88] Be it individual or organizational, resilience requires 'taking risks' which are 'considered risk[s]' based on clear business or progress logic. Risk[s] are internal but manageable with a clear vision and purpose with predictable confidence. It require cross-team working with physical and intellectual assets, good leadership and governance and resilient and adaptive capacities. It is marked by situational awareness and management of key vulnerabilities. Mostly, orientation to change leads

85 Ibid., p. 26.

86 The *Ecological Business Thinking Model* requires the resilience to be combination of resources and adaptive skill[s].

87 The *'Rigidity Trap'* refers to organizational inflexibility and vulnerability in the face of change.

88 The concept of 'brutal facts' is when the consequence of change are not admirable or suitable to one's expectation[s].

to following four distinct organizational or individual phenomenon[s]. Descriptively, it can be summated as:

a) Vulnerable dependence [with little orientation towards change and adaptive resources];

b) Coping persistence [with good resources, but with little adaptation to change];

c) Frustrated innovation [with strong orientation towards change, but with little resources]; and

d) Adaptive resilience [with both resources and desire to change].

These quadrants shows that organization[s] or individuals 'when building the capacity to respond to and influence the rapidly changing environment' requires the ability to develop excellence alongside developing new plans and strategies which are key to the health of an organization or individual personal pursuits.[89]

These concept[s] touches to resilient organization[s]. While resilience is a catchphrase, it requires moral, emotional and technical testing. When, in an epoch of change, tomorrow is necessarily different from yesterday, and so new things need to be done. Action learning differs from normal training. And as every organization faces a unique risk landscape, it should adopt resilient thinking to embrace learning. It should supported by creative thinking, innovation and competence, with practiced skill to harness internal and external resources.[90] As organizations build on the past to expand their behavioural repertoires across new competencies the range of possible actions they can take to meet hazards grows in breadth and depth. They are not error-free, yet errors do not disable them: they become high-reliable organizations that continuously focus on performance.

Resilience is neither a series of principles nor an end state: it is a never-ending journey that, within a risk landscape, is conditioned as much

89 Ibid., p. 36.

90 Serrat, O. (2014). *On Resilient Organization[s],* Asian Development Bank, Philippines.

else by organization, people, knowledge, and technology, as well as the interactions among these. Resilience must be an act of mindful, strategic anticipation and active waiting with emergency management. These traits are marked by dimensions consisting of change readiness, networking, leadership and culture.[91] These can be portrayed as an important component to ensure that there is a unity of purpose, planning strategies and stress testing plans to test response and adaptation[s]. However, inching from the responses to change and adaptations, it brings the various dimensions of how organizational resilience, responsibility and trust can enable dynamism and value differentiation.

Conclusion

Generally, human responses are an automation of human thinking, responses are critical to evaluate the nature of human beings. More so, with capital changes in human behaviour that ricochets individual and community responses, it also affects organizational behaviour and response. These are interlinked condition[s] that perpetuate the nature of response and characteristically, resilience. The human characteristics generally underscores how an individual responds, thus marking responses and response systems. The word 'resilience' for that matter had been used to indicate the 'terms' to describe responses to challenges so that we are able to build a stable response that is resolute and determined to enable a sound effect. Unless 'resilience' is used and associated with the ecology of responses, it will go far to build dynamic individuals and organizations. In short, what we require is change and what response we require is resilient responses and resilience has to be structured to serve the purpose of change[s] that enable a change based on just, systematic and sound purpose. Human dynamism and response is critical to ensure that 'collectively,' we are able to usher a transformation based on just human response by understanding both the transformation[s] and the responses about it. The collective 'human and organizational responses' are critical to understand change and relative human behaviours thus positing a positive change with positive interactions.

91 Ibid., p. 4.

Applicability of Smart Contracts in the Bhutanese Legal System[1]

Introduction

With the overwhelming emergence of advanced technology over the years, digital transformation has enormously impacted people. One such technology that has drawn huge attention lately is the blockchain technology. Blockchain technology is an innovative data archiving platform wherein storage of multiple data can be accessed in an interconnected domain, where individual participants can be in possession and maintain the whole record inclusive of updated transcription of the data archived.[2] Indeed, there has been a rife of curiosity and interest in blockchain-based smart contracts, which are known for their reliability, transparency, and trustworthiness, which have consequently increased interest in transforming legal agreements into codes.

Nick Szabo was the mastermind of smart contract technology. He elucidated in his manuscript that the methodology of cryptography has the potential to transcribe the contractual terms agreed between parties into a digital program, which is denoted by computer codes that would narrow the contingency of possible termination of its contractual performance obligation due to immutable characteristics of smart contracts.[3] The parties can take effect of smart contracts by jointly computing and using software to manage contractual performance, with minimum interaction amongst them. A "smart contract" is a digitally signed, computable, and self-executed agreement between two or more parties.[4] Smart contracts

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1 Contributed by Tshering Pem. This article was published in the Thammasat Law Journal.

2 Zubaydi. H.D. et al. (2019). A Review on the Role of Block chain Technology in healthcare Domain, *Electronics 8*(6), p.679.

3 Szabo, N. (1996). *Smart Contracts: Building Blocks for Digital Markets.*

4 Morrison, A. (n.d.). *The end game for public and private blockchains isn't just digital currency—it's digital business flows*, <http://www.pwc.com/us/en/technology-

are an application of the blockchain technology, referring to computer codes, which verify and execute the terms of a contract by an electronic agent, removing the need for humans to monitor compliance and enforcement.[5]

The legal analyses that are often brought to the limelight are the questions relating to whether contractual relations that are built in a smart contract can be legally binding and whether the contractual agreements that are encrypted as codes in a computer satisfy the requirements for the formation of contract and written evidence in the laws governing contract. There are various areas of enforceability of smart contracts that are subject to legal controversy. Some of the issues about the enforceability complex surround the formation and formalities of smart contracts. To synchronize formal requirements under the contract laws making it parallel to the traits of blockchain smart contracts, this article suggests legislative amendments to the laws of Bhutan so that smart contracts may be able to hold legal status in the Bhutanese jurisdiction.

Overview of Smart Contracts

The concept of smart contract was the brainchild of Nick Szabo since 1996. He defines a smart contract as a set of promises, specified in digital form, including protocols within which the parties perform on these promises.[6] He tries to explain the simple operation of a vending machine as the best example of a smart contract, wherein the instructions and conditions are already programmed. For instance, when you insert a 10 Ngultrum note, a bottle of mineral water comes out. However, with the evolution of advanced technology and the emergence of Bitcoin, blockchain and Ethereum, smart contracts are much more than how it was initially conceived. The creation of smart contracts is one of the recent developments in blockchain technology. This technology facilitates the parties in making an agreement by encoding the contractual performances

forecast/blockchain/digital-business.html.

5 Pombejra, B.N. (2016). *The Rise of Blockchain: An Analysis of the Enforceability of Blockchain Smart Contracts,* Faculty of Law, Thammasat University.

6 Szabo, N. (1996). *Smart Contracts: Building Blocks for Digital Markets.*

into the blockchain. This can be performed on a decentralized distributed ledger, which is one of the most special characteristics of blockchain technology, alongside the use of digital signatures and computer codes.

According to Szabo smart contracts could improve the execution of the four basic contract objectives, i.e. observability, verifiability, privacy, and enforceability. Among other uses, smart contracts would enable both parties to observe the other's performance under the contract, verify if and when a contract has been performed, guarantee that only necessary details required for completion of the contract are disclosed to both parties and be self-enforcing that would save the time spent in monitoring the contract.[7]

The development of smart contracts has been one of the significant technological inventions of the latest blockchain over the years. The application of smart contracts to traditional contractual agreements will have more value by minimizing risk and ensuring security. To better fathom the correlation between smart contracts with blockchain, we need to know the process of how smart contracts work. For instance, a typical contract for buying land entails a lot of paperwork and interaction with numerous individuals and requirements to visit numerous agencies and authorities. More often than not, these transactions involve the risk of financial scams, ownership transfers, and fraud amongst others. However, to eliminate the burden on such transactions, people prefer to get the deal executed through real-estate dealers who generally bear the responsibility of paperwork and relevant services. This results in lesser hassle and risk, although there remain some grey areas with enforcement of such transactions especially when it involves financial issues.

However, in smart contracts, the process would be hassle-free and reliable. Smart contracts run on a pre-programmed condition created on the rule of *"if this then that,"* which addresses the transfer of ownership concern when the transfer of ownership gets automatically processed

7 Ibid.

only if the finances and terms agreed upon are met.[8] This is possible when the relevant users on the blockchain have access to detailed information about the land and its rightful ownership in the ledger. Such information and data get stored in an invariably distributed ledger where all relevant participants can have easy access to their computers instantaneously. In addition, there are lesser chances of fraud due to the transfer of payments being seen by parties in the chain. Not only does a smart contract make the entire process of various transactions effortless but also enhances the trust in the contract by removing intermediaries. In a nutshell, the services and communications that require human intervention during making or enforcing a contract are replaced by the codes that are stored in the blockchain.

Comparative study on the legal status of smart contracts in Bhutan vis-à-vis foreign legal jurisdictions

The noteworthy concept of smart contracts, which is not very unfamiliar around the globe, is entirely new in the Bhutanese legal system. This echoes the foremost concerns of His Majesty the King, who during the *Royal Address* on the 112th *National Day* on 17 December 2019, commanded the importance of economic growth propelled by technological advances in artificial intelligence, big data, blockchain, quantum computers, fintech-digital currencies, digital wallets and digital banking, automation, and robotics.[9]

Although it is a worldwide concept and many companies have started to apply smart contracts to remove intermediaries and also to run a cost-effective business, the enforceability of smart contracts has not yet been tested with regard to its legal status. The contract law of Bhutan prescribes that a valid contract can be either in writing, attested by witnesses, or registered or complies with other required formalities.[10]

8 Mearain, L. (2019). *What's a smart contract and How does it work*. https://www.computerworld.com/article/3412140/whats-a-smart-contract-and-how-does-it-work.html.

9 *Royal Address* by His Majesty the King on 17 December 2019, *Kuensel.*

10 Section 19 of the *Contract Act of Bhutan, 2013* provides that "notwithstanding

Further, section 35 of the *Evidence Act, 2005* adds additional conditions for written contract to be valid evidence or admissible in the court. Since the execution of smart contracts is carried out through the use of electronic means, the prescribed formalities of contract for the formation of electronic transaction, laid under section 283 of the *Information, Communication and Media Act of Bhutan, 2018* (*ICMA 2018)* [11] shall be enforceable in the eyes of the law. Execution of a smart contract is an automated process performed by an electronic agent that maintains the digital records, thus the fact that *ICMA 2018* provides legal recognition only for data messages hinders its execution.[12]

The legal question of the enforceability of smart contracts in Bhutan arises in the context of the formation and formalities of existing contract laws, which are not consonant with the formation and formalities of smart contracts and the absence of specific legal recognition of electronic agents. *The ICMA 2018* gives lawful recognition of data messages ensuring the enforceability of the information in the form of electronic and data messages.[13] Concerning the validity of the contract formed by the use of data message[14] as per section 284 of the *ICMA 2018*, legal recognition shall not be denied on the grounds of not having an attested witness or legal stamp affixed. However, this provision solely caters to the data messages, and going by the definition of the data message, contracts formed electronically by the use of data messages shall not be denied

what is stated in this *Act,* if under any law in force in the Kingdom of Bhutan, any particular contract, irrespective of the value of its subject-matter, is required to be in writing or attested by witnesses or registered or comply with any other formality […]".

11 Section 283 of *ICMA, 2018* provides that "an offer and acceptance of offer mandated by *Contract Act Bhutan* to form a contract, may be expressed by means of data messages."

12 Section 284 mentions that "the use of data messages to form a contract shall be given legal recognition and cannot be denied validity on the reasons that legal stamp has not been affixed or has not be attested by witness".

13 Section 279 of the *ICMA* states that "information shall not be denied legal effect solely based on the ground that it is in the form of electronic document or data messages".

14 Section 461 of *ICMA* defines data message as "information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy."

validity, but justifying the essence of program codes in smart contracts within its definition is impractical. In other words, the provision on data messages does not elaborate on the contracts formed by the interaction of automated message systems or electronic agents where no human being is involved. Although the data message could include electronic communication like emails, telegram, and other e-communication models, the provision of data message fails to recognize the contractual transactions by automated message system. For example, a contract formed between two persons doing online business transactions through social media platforms like Facebook by way of electronic means, electronic information, and communication shall not be considered invalid solely because the interaction to form a contract was done by using data messages. In practice, Bhutanese courts have been admitting evidences based on social media messages or email, and other technologically driven evidences. Although such contracts formed using data messages are considered valid by virtue of section 284 of *ICMA 2018*, it fails to cover contracts formed by automated message systems. Therefore, the absence of recognition of interaction between computer programs or electronic agents would hinder the formation of the contract. Thus, the legal issue as to whether it could be judicious to reckon program codes as "in writing" to satisfy the requirement of the formation of contracts remains unanswered.

Hence, this brings about the issue of whether smart contract codes bear legal recognition to enable the enforceability of smart contracts in this context since the legal recognition extends only to data messages as per the *ICMA 2018*. The very name "smart contract" suggests that it should be legally enforceable, replacing ordinary contracts. At the same time, a smart contract is not subject to legal restrictions on transactions with digital assets solely because there was no human intervention. While the implementation of smart contracts has been legally recognized in Australia and Singapore, Bhutan does not recognize the legal force of a smart contract in the existing legislation.

With the enactment of the *ICMA 2018*, Bhutan ventured towards improvising business methods electronically by using digital technologies. Under this law, there is no clear legal effect provided to data messages,

inclusive of contract formation, unlike in Australia and Singapore where the emphasis is given to the regulatory frameworks. The *Act* recognizes any electronic communication through data messages to be at par with the traditional requirement for contractual terms to be written. In other words, any communication of offer and acceptance to form a contract through data messages cannot be denied the legal effect because they are expressed using data messages. However, because a smart contract is run by a computer program where contractual terms are translated into codes and are self-executed with no human involved, a legal debate arises about whether such an automated system can be given legal validity and whether codes in such a system can be considered to be in writing. The enforceability of smart contracts in Bhutan concerns whether the law recognizes the legal validity of the use of an automated message system, where human intervention is not involved in the execution of a such contract. The *United Nations Convention on the Use of Electronic Communications in International Contracts* ascertains a general principle that the legitimacy of communications should not be questioned for the mere fact that it was communicated by electronic method.[15]

Since the Bhutanese law on e-commerce does not legally recognize such an automated message system *per se*, the legality of the contractual agreements formed through such an automated message system becomes questionable. Under the laws of Singapore and Australia, the importance, reliability, and economic dependence on electronic transactions have been reflected. *Singapore's Electronic Transactions Act 2010 (ETA)* governs the use of electronic contracts, electronic signatures, communications, and other electronic transactions in the country. The laws of Singapore are in accordance with the UN practice concerning electronic contracts and transactions. This law not only improves the legal legitimacy of e-transactions but also promotes Singapore-based enterprises to utilize electronic communications and transactions in their daily activities. In this situation, all enterprises and companies in the country must comply with the *ETA* and contribute to Singapore's aim of turning the country

15 *United Nations Convention on the Use of Electronic Communications in International Contracts*, Art. 8.

into a smart nation. Section 15 of the *ETA* provides that the use of an automated system and a natural person or between any two automated message systems is considered valid. The validity cannot be denied only on the basis that no natural person reviewed the contract.[16] Hence, the execution of contractual transactions by electronic or automated means stands valid and enforceable even without the intervention of a human being, thereby making smart contracts enforceable in the eyes of law in Singapore.

Similarly, the underscoring transformation, the amendment of the *Electronic Transaction Act* in Australia accommodates smart contracts by enunciating the importance of the use of an automated message system[17] provided under section 15C to form a contract without any human involvement. The essential feature of smart contracts being "automated" wherein the contractual obligations are performed automatically without any human intervention is well embraced and satisfied by the provision which states that a contract formed by the interaction of an automated message system and a natural person; or interaction of automated message systems,[18] cannot be invalidated merely because of the lack of human intervention during the course of the execution of contracts. Therefore, the execution of contractual transactions by electronic or automated means stands valid and enforceable even without the intervention of a human being, which brings us to the conclusion that smart contracts are enforceable under the laws of Australia.

Although there are various legal issues starting from the formation of a contract to the execution of the contract followed by enforcement of such

16 *The Electronic Transaction Act, 2010.*

17 Automated message systems refer to "a computer program or an electronic or other automated means used to initiate an action or respond to data messages in whole or in part, without review or intervention by a natural person each time an action is initiated or a response is generated by the system."

18 Section 15 C of the *Electronic Transaction Act* provides that a contract formed by:
a) the interaction of an automated message system and a natural person; or
b) the interaction of automated message system;
is not invalid, void or unenforceable on the sole ground that no natural person reviewed or intervened in each of the individual actions carried out by the automated message systems or the resulting contract.

contracts, the comparative study specifically focuses on the applicability of smart contracts in meeting the requirements of the formation of a contract and formalities of a contract in these jurisdictions. It is understood that both jurisdictions give legal recognition to the use of automated message systems, which in turn facilitates the enforceability of smart contracts.

Recommendations and Conclusions

The analysis that can be drawn from the above comparison of legal provisions relating to the application of smart contracts in three different jurisdictions is that there is a need for amendment in the Bhutanese laws for better implementation of smart contracts in Bhutan. The specific area of law that needs amendment is the insertion of the use of an automated message system in the *ICMA 2018*. Both Australia and Singapore already have laws for implementing smart contracts that have validated the contracts formed by using automated message systems. The languages of the provision used in the laws of both jurisdictions are identical to that of the *UN Convention on Electronic Commerce*. The *ETA, 2010* of Singapore confirms the legality of contract formation by a computer program without the involvement of a natural person. Similarly, section 15C of the *Electronic Transaction Act 1999* of Australia also states that no contract formed by the interaction of an automated message system and a natural person or the interaction of automated message systems shall be denied legality solely on the ground that no natural person reviewed or intervened in the activities carried out by the automated message system or resulting contract.

Since the laws of both jurisdictions are in line with the *UN Convention on the Use of Electronic Communication in International Contracts*, the proposed amendment for the Bhutanese laws could be adopted based on these provisions. Therefore, the provision on the use of an automated message system could be inserted as one of the amendments to the *ICMA 2018.* This is to facilitate the adaptation of Bhutanese laws contemporaneous to the development of science and technology and the expanding information technology. This will provide an opportunity for

the Bhutanese to embrace technology as an important component of laws and legal development.

Proposed Amendment of provisions

The proposed provision should be in alignment with Article 12 of the *UN Convention on the Use of Electronic Communication in International Contracts* as follows;

"Use of automated message system for contract formation"

A contract formed by:

a) the interaction of an automated message system and a natural person; or

b) the interaction of automated message systems;

shall not be denied validity or enforceability on the sole ground that no natural person reviewed or intervened in each of the individual actions carried out by the automated message systems or the resulting contract. This means that a contract formed by communication between automated message systems and a natural person or between automated message systems shall not be considered invalid solely on the ground that there were no natural persons involved as it would defeat the purpose of technology and technology-assisted legal communications made between persons, without "human interventions." A contract formed between computer programs where there is no intervention of human individuals shall not be considered invalid solely because there were no natural persons involved.

The proposed amendment to Bhutanese laws on electronic commerce shall be a replica of not just the two foreign jurisdictions that are digitally advanced but will also be in accord with Article 12 of the *UN Convention* which will assist Bhutan to be at par with the international standards. This will help standardize Bhutanese interactions and cope with the evolving influence of science as a medium of modern communication.

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