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PLEDGE

Holding of compassions of Buddhas and Bodhisattvas
Blessings of the deities
The unchanging embodiment of natural perfection
The constant source of happiness, to the noble being, we bow down.
The reflection of perfection, the face of natural perfection
The parameters beyond indication
The actuality is incommunicable.
Perfect in one, perfect in two, perfect in all
Embodied as Buddha's reality
The perfect amalgamation of conduct and fruition.
The source of calculated effort and approach
The undivided wisdom and stainless virtue
A leader with a pure vision.
The Righteous King, God-King
Field of great faith, fully endowed and virtuous
The precious Jewel.
The embodied union of joy, peace, and compassion
The emanation of Timeless Wisdom
To the King of Virtues, we bow down.

On this Glorious 68th Royal Birth Anniversary of His Majesty The Fourth Druk Gyalpo, the Bhutan National Legal Institute takes this precious time to offer our solemn prayers and profound respects and celebrate His visionary propensities as a King and His miraculous feats and extraordinary destinies and peerless leadership.

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PREFACE

Legal scholars and legal practitioners in other countries have conceded that the Law Review is a notable species of publication. All elsewhere, it primarily exists to be written and not be read (Cane, 1981). The style and content define the institution of law reviews and its role in the pattern of legal education and the legal profession. The communication between law review and legal, judicial, and scholarly professions is a basis for carrying talent and positions. The study of law requires the profusion of legal knowledge and knowledge sharing as a paradigm of accepting legal change.

In other jurisdictions, Christopher Columbus Langdell revolutionized the study of law through a case method. Here, law is perceived as a science and not as a collection of isolated facts and circumstances, where legal principles are debated, established, and cherished. The conception of a legal laboratory consists of using formidable analytical tools to carry a system inquiry into lawmaking and legal prudence. The intellectual system of laws and principles requires the analysis and scholarly testing of legal paradigms and hypotheses that intend to counteract the established legal norms and processes.

It requires a system of scientific intervention, and law reviews as a medium should serve as the source to stimulate the constant flow of ideas and jobs. The role of legal scholarship as an institution within legal learning intends to provide a firm basis to practice the profession of the law through scholarly practice and erudition. It has to give credence to the emerging face of the law, legal system, and legal scholarship.

The Bhutan Law Review is seen as an important publication in Bhutan. It serves as the foundation for legal education and legal testing of scholarship through participation in academics and academic discussions through the process of writing. Law is a rich discussion topic requiring constant vigilance, analysis, and apt application. The contours of law require laws

to be discussed orally and argued through legal academics and writing. Legal writing is emerging as a reliable yardstick for measuring the rule of law and quantifying legal practices. The use of intellectual rigour analysis and academic prudence begins to serve as a platform for a new model of legal education.

While laws require the support of the best legal conscience, this consciousness must be tested through a parallel legal analysis model. The academic competencies and testing of legal theory and precepts of law enable the development of a common bond, shared values, and mutual recognition of legal deficiencies, as well as its capacities as an instrument of legal reform. Legal education and legal practice should always go together. The best legal minds are set through the practice of academics and writing and a shared skill of debate, argumentation, and analysis.

Crawford (2015) discusses redefining legal education through strict legal scholarship. The role of development and lawmaking and the initiation of pluralistic avenues to test legal paradigms confront the tests of various natures. Legal scholarship is an essential element of the modern legal education mix, as we may call it, which requires the amalgamation of various expertise and techniques to sharpen legal consciousness. Legal conscience requires support from all sectors: practice, academia, and other fields of jurisprudence so that it meets the criteria of modernity, which is multi-facility.

Bhutan is developing at a very fast pace. However, the practice of legal writing and legal academic orientations have been lacking. This robust culture must be re-cultivated through a scheme of innovation in legal thinking design. This design thinking should be supported by adequate legal resources and legal research designs that can serve the interests of modern legal thinking. Legal thinking and design are crucial to modern-day legal knowledge and academics. The art of legal knowledge is based on re-thinking, re-designing, and re-creating new avenues of legal

discussions. These forums should be able to respond to the legal needs of the people, and more importantly, legal topics must be discussed as part of the quality improvement in the interest of justice and researched legal thinking. The multidisciplinary approach to law secured on the foundations of contemporary legal values is critical.

McGee (2023) has identified another complex and easy paradigm of legal thinking. Law review publications are highly regarded in the legal profession as they are often seen as a symbol of scholarship, expertise, and a commitment to excellence. Therefore, it is crucial to evaluate law review publications when considering promotion and tenure for legal academics. Several factors must be considered when assessing law review publications for promotion and tenure. The quality and impact of the publication, the journal's reputation, the peer-review process's rigour, and the author's contribution are among the essential factors to consider. One of the most critical factors in evaluating law review publications is the quality and impact of the publication. In legal academia, publications are evaluated by their impact factor, which measures the frequency with which articles published in a particular journal have been cited in other publications.

Thus, a high-quality law review publication will have a high impact factor, which measures its importance in the field. Another important factor to consider is the reputation of the journal. A well-respected journal is more likely to attract high-quality submissions, and the articles published in it are more likely to be cited by other scholars in the field. Thus, publishing in a prestigious law review will be a significant accomplishment for a legal academic. The rigour of the peer-review process is also an essential consideration when evaluating law review publications. Journals with a robust peer-review process are more likely to publish high-quality articles and are more respected in the field.

Finally, when evaluating law review publications, it is essential to consider the author's contribution to the publication. For instance, the

author may have contributed original research, provided new insights into an existing legal issue, or advanced a new theory or framework. The author's contribution is crucial in determining the impact and value of the publication. Law review publications play a critical role in legal academia, and evaluating them accurately is essential when considering promotion and tenure for legal academics. Factors such as the quality and impact of the publication, the journal's reputation, the rigour of the peer review process, and the author's contribution to the publication should all be considered. By evaluating law review publications carefully, universities can recognize and reward legal academics who have made significant contributions to the field.

Legal education is a technical proficiency. Technical proficiency requires the support of legal education and academics. The role of modern legal knowledge must be centered around a new legal paradigm: re-thinking and re-innovating legal thinking methods. With the evolving role of law, both decisive and influential, legal education based on data, analytics, and critical thinking is the most responsive strategy to modern judicial and legal governance. Justice should be argued, and arguments should not only be based on the 'inner sanctum of the courts' but also on 'the outer sanctum of the courts', which should be supported by legal academia. Legal academia should be profoundly based on new design thinking that is critically further enhanced through new models of analysis: legal literature and contemporary legal thinking. The art of thinking is a new field for creating new legal knowledge, capacity, and legal contests. Legal contests are important as laws are sometimes an unseen face of arguments and a new direction of thinking and argument. The basis of the argument here is that laws are becoming a new ground for contentions, analysis, and debate. Laws can be argued, in one way, from different facets and perspectives, and this requires a new level of thinking and argument model.

Arguably, the law reviews are a good forum for arguments, keeping the centrality of the idea. It should focus on positive role modelling

of law and legal thinking, and the critical analyses of the laws should be designed to invigorate new dimensional legal insights and reviews. The proficiency of the arguments and repositioning of the ideas and legal ideals are best done through a legal analysis theory founded on the quantum of legal, social, political, and other literature that discusses 'how design thinking should focus.' As a growing nation, Bhutan has steadily picked up legal education and is progressively progressing. The national and institutional initiatives of legal education and legal publication through a multi-faceted approach have been muddled by a lack of critical approach to law and legal scholarship. As legal scholars argue, the critical approach to law and legal arguments should be equally supported through the paradigms of law design, lawmaking, and its applications in theory and practice. What is lacking in theory should be supported by practice, and what is lacking in practice should be supported by theory, enabling a legal development continuum.

In a traditional legal sense, the art of legal development has been the formulation of legal documents through the acts of Parliament. However, with the increasing speed of development in technology and law, legal academia, and jurisprudence, legal analysis through legal scholarship has become a new seed for legal intervention. This intervention perspective should be designed so that legal writing becomes a part of the legal profession that can be legally mandated. Unless such proactive measures are undertaken, legal writing and academic analyses in Bhutan may drag on for the foreseeable future. It can negate the positive initiatives conducted over the years; in the long run, this may become a customary practice of a legal profession that can seriously repudiate the sense of effective legal customization.

On some fronts, the 'central path approach' that has become a new modular co-design has also inhibited the prowess of legal writing and analytical academic contributions. Many writers argue that the centrality of the idea and the arguments they have fostered would render them answerable. This 'answerable paradigm' juxtaposed with the need for

professional academic contributions creates a 'legal gap.' This 'gap' visibly widened to suppress the non-ideal conditions of academic writing, and 'it had become a ground for hiding academic deficiencies.'

One of the most important parts of the development of law is the 'assertion and development of responsive legal literature.' Legal literature that promotes new legal insights and legal conscience that supports the rule of law and administration of justice is pivotal. Justice is an argument; sometimes, it is how the Royal Courts of Justice place, advance, and receive arguments. Some legal scholars argue that laws should be a mixture of 'theory, academics, practice based on evolutionary theories.' Like human development, the evolutionary theory of law must be a primal basis for the progression of laws. In progressive discussions, progression should be determined on the quality of arguments, not on a quantitative basis. For a developing country like Bhutan, even in legal thinking and design, we must be specific on quality rather than quantity, and this yardstick should serve as a new lens of development thinking. The concept of knowledge creation and sharing, the building of legal expertise from various fronts, judicial and academic, should foster a newer lens of creation and co-creation.

This creation and co-creation should be centered around a new thinking design: collective promotion of the rule of law. The collectivism of the rule of law is created to allow many fronts of arguments to a singular law. In the administration of justice, a 'singular letter of the law' can change the direction of justice, arguments as justice, and judicial conscience. The conscience of the law and lawmaking must be based on critical and reasonable thinking that is premised on professionalism and strengthening the rule of law. The conception of the rule of law in modern society. Wagnier, et al. (2013) state that the growth and strength of the law reviews has resulted in social justice. In Western countries and jurisdictions, the scholarship writings have included all topics that may consist of a right-based approach in some instances. It contains the foundations for realising social aspirations, justice, and the rule of law.

More importantly, the concepts of 'thick law' and 'thin justice' by Macklem (2015) suggest the academic minimum required of a legal professional. Legal research as part of judicial interventions is a must for the legal professional to develop and advance. The better the legal research interventions that aid the administration of justice and the expansion of scholarly publications on legal matters help to expand the legal, social, and conceptions of law, justice, rule of law, and other legal paradigms. The expansionist vision of legal scholarship and the foundational principles of justice based on study, analysis, and research are becoming critical pivots for modernism and modern legal and judicial prudence.

The purpose of the law lies in the ability to pursue prudence and active scholarship. The role of scholarship in law lies in its ability to resolve collective problems. Fisher (2020) notes that law is the basis for expanding legal scholarship. It is argued that law is a legal text for further contemplation, analysis, and review. It must be analyzed through the dimensions of social, political, economic, and other factors to consolidate the idea of 'holistic justice' that has a prospective view and provides prescriptive remedies to realize the interest of justice and strengthen the rule of law.

The role of legal literature is directly related to the ability to undertake independent studies that help consolidate various views into a singular legal learning dimension. Further, justice is a relative term, and it requires the fulfilment of multiple conditions of studying, analyzing, and adding 'other views' concomitant to the present case. Willinsky (2022) notes about law and scholarship. He identifies the role of scholarship and how courts have identified it as a singular piece of academic expression. He discusses authorship and law besides the enriching experience of legal scholarship. Legal scholarship and its determining factors contributing to the academic repository have been recognized through authorship contributions. The field of legal scholarship and education about statutory licensing and copyright has gained recognition as a contemporary avenue for enhancing personal collections and repertoire.

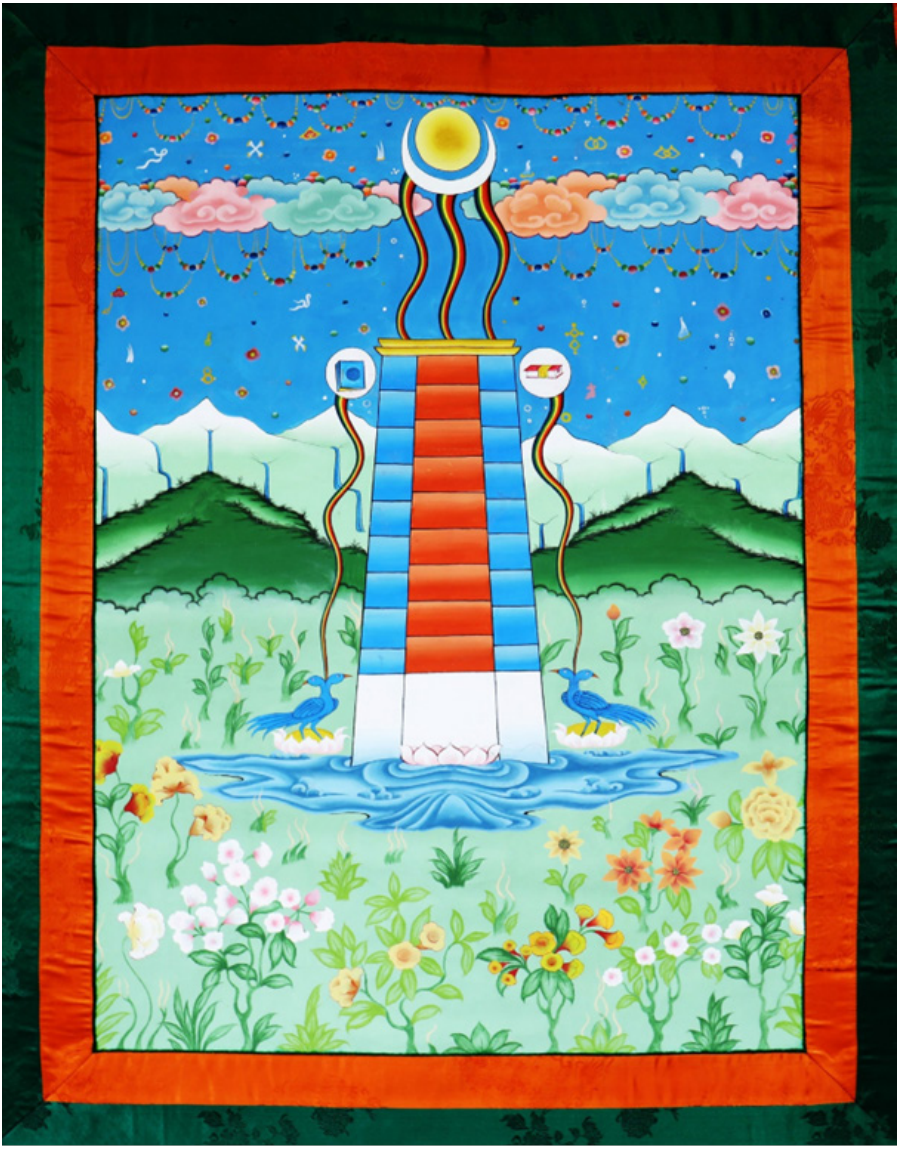
In modern days, with the concept of contemporary communication scholarship, social justice, and the evolving role of law, the role of scholarship in modern jurisprudence is becoming critical. Neoliberalism mandates the openness of society, which requires the prudence of law and legal scholarship. However, the weight between neoliberalism and the emergence of 'opinion-based idealism' generates a need for renewed scrutiny. 'Scrutiny' requires 'things to be more competitive' and globally relevant. Jansen (2022) identifies law as legal science. They compare the legal system to organic culture, legal Justice, and narrow science, which stipulates a legal culture's 'organic growth' based on study and legal knowledge expansion.

The Bhutan Law Review intends to capture the changing paradigms of law and other legal sciences to ensure that law and legal scholarship are viewed from a contemporary perspective and lens. Now, another line of legal scholarship posits the concept of academic lawmaking (Jansen, 2022). The development of legal science has become a topic of innovative legal research. The development of legal scholarship has created a new pathway to learning, which requires integrating science, law, learning, and academics. It is an opportunity to present technical doctrinal jurisprudence that encapsulates modern legal reason and analysis. As a developing country, one of the most critical aspects of development is the creation of advanced jurisprudence that respects scholarship and modernity. While ancient scholarship is important, integrating a 'mixed culture of learning infused with modern thinking is critical.' Legal science must be argued and tested, as hypothesized, based on modern legal thoughts and legal operation principles. [This] will provide a comparative solid legal foundation, essentially built on logic, science, and welfare model of legal approach.

Most intrinsically, the development of law should always give way to positivist thinking. The positivist thinking model and approach help to stimulate a legal scenario that helps to promote a 'development-based philosophy and ideal.' However, it juxtaposes the idea of development

thinking, innovative legal research, and a new perspective of legal research design. Legal research is an exciting area of discussion that postulates the existence of favourable grounds for legal discussions. The standard legal culture and intellectual unity positions itself as a 'great arm of developing a working legal culture.' As legal professionals who initiate research and enable the practice of law based on modern legal precepts and arguments, legal research and analysis have become a new testing ground for theory and practice. The role of new legal thinking and an expansionist idea of legal knowledge and scholarship recalls the need to refer and engage in new legal scholarship and analysis and undertake a study culture based on the ideals of modern jurisprudential requirements.

Research shows a strong connection between legal scholarship, practice, and academia. The Bhutan Law Review is an interesting legal research forum. As part of engaging the legal professionals on the Bench and the Bar, expanding legal scholarship shows that an enriched legal analysis forum expounds legal thinking and writing. The current edition of the Bhutan Law Review aims to compile scholarly perspectives that elaborate on national and international legal practices, perspectives, and legal academic contributions. However, one of the most critical challenges facing the Bhutan Law Review is the absence of scholarly contributors. Legal research in the Bhutanese jurisprudence has not gathered a 'collectivist approach' that intends to refine and redefine legal analysis and scholarship. In this edition of the Bhutan Law Review, the authors describe various aspects of legal scholarship, the administration of justice, and the rule of law. There are contributions from scholars outside Bhutan who have made important academic research on various aspects of law and polity. These parts of the articles are expected to provide comprehensive academic ideas on justice and other aspects of the administration of justice to enhance legal analysis and scholarship on law.



THE EXPOSITION OF CONSTITUTIONAL KUTHANGS

The Constitution refers to the nature of a country with its political conditions and the laws that concern itself. Grimm suggests that the Constitution has always existed in the empirical sense, but it is a relatively modern phenomenon in the normative sense. The concept of the Constitution has emerged towards the end of the eighteenth century. The Constitutions were a result of the French Revolution. Ginsburg & and Elkins (2021) note the recent experiences of the Constitution and that Constitutions are key institutions underpinning governance.

They are crucial in providing political stability, protecting democracy, and undergirding economic performance. In many countries, constitutions have been the sole structure that built societies. In many countries, there is a reconceptualization of the constitutions, constitutional order, and constitutional elements. The sharpened understanding of the written constitutions, as Ginsburg notes, is how we conceptualize the basic ideology of constitutional arrangements. Constitution, in one way, is the tight web of legal ties. The spread of constitutionalism has necessitated the emergence and effectiveness of modern constitutionalism. Many consider the Constitution as a novelty that balances traditions with innovation and provides the rightful emphasis on normative and symbolic effects of the Constitution. Ginsburg notes the elements of the constitutional order and brings a conceptual stretching between text and practice.

Grimm (2016) states that the Constitution is a novel development premised on the fact that the Constitution development rests on the legal binding of the power of rule in itself. In ancient times, the conditions for the emergence of constitutionalism were the demand for ideas of a just society that required the support of positive law. Thus, the Constitution is conceived as an evolutionary legal instrument that restores the bond of political rule fitting the modern state and transitions to a functional state of society. It integrates social autonomy and harmony and fulfils the

fundamental legal order of the state. It helps to combine and bring the best culture of law that rests on the principles of equitable development and legal paradigm shaping.

In the international arena, the Constitution is the merger of natural law and positive law; thus, it sets a primary function of the Constitution that identifies the Constitution with the rule of law. It designed and created institutions that model the society that rationalizes law and legal order. Further, legal scholars argue that the Constitution is just a blueprint and a normative framework that progresses to achieve a constitutional goal rather than something already achieved. Constitutional jurisprudence is a mixture of theory and vision. The value of the Constitution depends on who has the power to determine who is correct and what the correct interpretation through a methodological theory is. Stanton (2023) notes that the Constitution is the arrangement of formal relationships. It conceptualizes the collective identity and organizational identity, the so-called communicative organization of constitutions. It sheds light on how identity claims contribute to the communicative Constitution of fluid social collectives.

With the emergence of populist leaders in the West, the Constitutions have been wielding populist discourses and their impacts on democracy. It provides the contrast between different aspects of the world constitutions. Authors on Constitutions offer a detailed analysis of the emergence of modern Constitutions and constitutional changes that have reshaped the social and political order. These aspects of the Constitutions provide a rare glimpse of how Constitutions are reshaped and inherited. Comparatively, the constitutional premise is set on constitutionalism and liberal democracies.

Peterson & and Farah (2020) discuss the expounding of the Constitution. It outlines how judges should interpret the Constitution, providing its interpretative prescriptions based on modern scholarship and contemporary constitutional theory. It states that every modern

constitutional interpretation delights in finding the precedent and the originalists. The dependence on texts has singularly resulted in oversights and makes legal thinkers shallow and unsophisticated. The concept of textualism does not lead to the interpretation of the Constitution as per the law's purposes. Judges and politicians of the early Republic had heated exchanges over the importance of hewing to the text in constitutional interpretation, and they advanced dualling interpretive prescriptions. Founder's debates expound on the theory of interpreting a Constitution, either making it static or living within the established paradigms. The issue of whether the Constitution can be widely or narrowly construed is becoming a contemporary theory of constitutional law and premise.

How constitutions are interpreted is based on various rules and laws. It amalgamates the public and private acts and the principles of decisions. Further, the conscience of justice, the rule of law, equal justice, and equitable society are also premised on how Constitutions are interpreted, thus giving a popular constitutional conscience. The character of the laws in modern legal regimes supposes that interpretations should be specific. The public laws are interpreted broadly, with purpose-directed interpretations. On the other hand, private acts receive strict and literal interpretations. [T]his has been the most formative moments of legal history. It has created the laws' doctrinal heritages and an essential framework of a precedent era. Further, it expounds the motivation of the interpretations and provides the judiciary with the metes and bounds. Another paradigm is that the Constitution is a compact legislation that has to be guided by compact theory and strict interpretation theories.

Ginsburg (2019) identifies that constitutionalism has been the integration of social sciences into law. The interdisciplinary nature of the Constitution brings a comparative analysis of social psychology and the law. Constitutionally, institutionalism and individualism have been contrasted, bringing the path of constitutional dependencies. The role of scientific inquiry in the Constitution and law analysis is an important

factor. Constitution is a meta-analysis of the institutions and the rules whereby the rules are made. Ginsburg (2019) further notes that analyzing the legal institutions and order is important to understanding global public law. The role of academics and constitutions and the emergence of empirical science and law have called for collective scholarship on the constitutions. The rational study of the law and experimentation are specialized fields that need dynamism and enriched scholarship.

Lin & Ginsburg (2023) study the constitutional wisdom and interpretation of the Constitution. It also discusses constitutional enforcement mechanisms. Further, he discusses the pitfalls of measuring the rule of law within the constitutional paradigm. In the era of quantification and measurement, numerical indicators provide the measurement for constitutional paradigms and the rule of law. In one way, the measurement of constitutional successes and the measurement of the rule of law offers the new social sciences rules. The conceptualization of what is being measured and the level of abstraction has to be annexed together within the features of coherence, utility, and measurement principles. [T]he constitutional success has to be measured through an empirical research design. The efforts to measure the rule of law through governance indicators and the rule of law indexes have a discreet element in a single overarching concept. The World Bank's definition of the rule of law states that the rule of law is the 'extent to which agents have confidence in and abide by the rules of the society.' Therefore, the authors agree that measuring the rule of law is complex and requires indicators to be distinct and constructed on fair rationality.

Grimm (2016) notes that the modern Constitution is regarded as one of the greatest achievements of modern times. It states that the Constitution is the law that distinguishes a civilization, and constitutionalization has been the precondition for modern constitutionalism and the rule of law. However, Bhutan has made unique progress in enhancing value-driven legislation.

The Constitution of Bhutan reflects the unique character of Bhutanese lawmaking, and a sense of legal architecture provides a legal, social, and political dynamism that encapsulates the theories of law, wisdom, and justice. Perpetually, no Constitution can enable a polity based on good conscience, the rule of law, and compassion. Literature reviews from different constitutional theory and practice aspects show that constitutions are born with 'skeletal legal norms' entrenched with competition values and legal and normative constitutionalism. One of the paradigms of modern constitutionalism in countries outside Bhutan has been the push for legal reforms embedded in the principles of democratic rules and constitutional acts. The natural law theory of human dignity and principles of responsibility and rights have underscored how constitutions are drafted, interpreted, and legally enforced.

The novelty of the constitutions has been discussed. It emphasizes the natural theory of the Constitution, in which the Constitution has sprung up due to political and social reasons. Comparatively, the Bhutanese design of the Constitution has been unparalleled, representing the 'purest sense of wisdom, human diligence, and benevolence.' In many parts of the globe, the animation of the laws and the representation of the laws as a simple guide towards human behaviours and the path of peace have always met with resistance. Further, the constitutional guarantees that respect human persons as an intelligible identity in the universe have been destroyed, and constitutional rights and remedies have become mere mute spectators to the global change in law and warfare.

It is not the time that Bhutan has to enchant itself with the best of what we have, but these rattling times bring us closer to productive constitutional conscience. In many legal jurisdictions, laws represent a norm of a group of humans, and they simply reflect how they feel, think, and, more importantly, become an instrument for the few to act. The best protection of human dignity and conscience lies with constitutionalism and the rule of law that is premised on modern

governance and modernism ideals. The precondition of contemporary constitutionalism is that it provides 'higher legal norms.' The ideals of governance and the best-fitted principles of compassionate governance are within the paradigm of the Bhutanese Constitution. There are two constitutional paradigms: drafting and implementing the Constitution to fulfil the people's aspirations. The drafting requires legal prudence, and so does it require active legal prudence in implementing it.

Today, many countries around the globe view the Constitution as a [simple] legal right document. Elsewhere and in many countries, people are beginning to use the Constitution as the legal basis to assert rights, demand justice, and enforce the rule of law. More than a sacrosanct legal document, it serves as a means to social empowerment and, to some extent, social discord. More than the premises of 'duties,' 'right' and 'right-based norms' with 'rights perpetuating modalities' begin to steer the doctrines of constitutions into constitutional formalism, where rights supersede duties. These are aspects of varying social dimensions of the laws. In many countries, the virtues of laws are used to seek the expansion of rights and pluralistic rights through propagating a legal theory of expansionism and formalism. The concept of "Constitutional Justice," legal pluralism, and 'right-based approach' is one of the fundamental precepts of constitutional law and norms prevailing today. The law of the Constitution provides nations with the best legal, social, and political precepts. The content and nature of a particular constitution and how it relates to the rest of the legal and political order vary considerably between countries, and there is no universal and uncontested definition of a constitution.

The Constitution of the Kingdom of Bhutan reflects and mirrors the best constitutional principles and norms. It signifies the best legal support and national legal conscience, proposition, and jurisprudence. Reflectively, it echoes the non-conventional aspects of truth, law, justice, legal legitimacy, and legal philosophy. It brings critical changes to legal meaning, unveils the compendium of modern legal views, and sets the

post-modern theory of legal relationships, legal rights, and duties. It enshrines the basic Bhutanese legal principles of coherence through a contemporary theory of jurisprudence. While principles and norms exist, it has to exhibit their constitutional-legal powers to enable the administration of justice and secure the rule of law.

His Majesty The Fourth Druk Gyalpo is an unparalleled personality. He symbolizes wisdom, good governance, virtue, justice, the rule of law, compassion, leadership, benevolence, and the spirit of divine thinking and analysis. His Majesty The Fourth Druk Gyalpo has been the vision of Bhutan, and the Constitution as the gift and emanation from the Golden Throne is both sacrosanct and divine. Comparatively, it is as heavy as the mountain and precious as gold. It is an incomparable document, and it signifies Bhutanese laws, leadership, and compassion that best define the innate values of Gross National Happiness (GNH). The Constitution recognizes the relative nature of happiness. With each individual aspiring for happiness as a means to fulfilment, it provides us with the balance of values and priorities that will enable and enhance the greatest good of all - unity, well-being, and contentment. Recollecting the wisest commands of His Majesty The Fourth Druk Gyalpo:

It is the cherished goal of the people of Bhutan to build a self-reliant and prosperous nation. Further, His Majesty The Fourth Druk Gyalpo, on His Royal Address to the Nation on the occasion of National Day at Mongar in 1980, commanded that:

Our greatest strength lies in our people. United as one, no goal cannot be achieved, and no problem cannot be overcome. In this royal address, His Majesty The Fourth Druk Gyalpo emphasized Bhutan's national policy to remain a sovereign and independent country and to develop and achieve economic self-reliance, prosperity, peace, and happiness for our people. In light of these golden words, the Constitution of Bhutan has been built on the principles of sacrifice, determination, loyalty, and unity to serve the people of Bhutan.

Further, His Majesty The Fourth Druk Gyalpo said:
As long as the people and government work together, hand in hand with one thought and direction, with a willingness to make sacrifices, show loyalty, and dedication dearer than our own lives, then no objective cannot be achieved…

In stating the deeper roots of the Bhutanese nation and the people, His Majesty shared that we believe that the people's roots must be carefully nurtured and traditional values fostered so that material change does not destroy the people's cultural identity. More so, the timeless values and ideals of rich and ancient culture must inspire and sustain us through life to enable us to meet its many challenges. In light of [all] these aspirations and speeches of His Majesty the Fourth Druk Gyalpo, we can consolidate the firm foundations of the Constitution of Bhutan to create a legal document to embark on a collective voyage of cooperation and national governance with the vision of creating a new order based on mutual respect, equity, and shared benefits. On the occasion of the Silver Jubilee celebrations of Sherubtse College, Kanglung, in 1993, His Majesty The Fourth Druk Gyalpo reiterated His belief that the greatness of a country is determined by its people. The quality of education determines the people's productiveness and character they receive. On the National Day celebration at Wangdue Phodrang in 2001, His Majesty shared that Bhutan has decided to draft a Tsa-Thrim for the Kingdom of Bhutan. His Majesty, the Fourth Druk Gyalpo, shared that one of the most important responsibilities of a King is to enable the people to govern and look after the country through the establishment of a dynamic political system.

Aligning the best constitutional mandates at that time, His Majesty commanded that while drafting the Tsa-Thrim, it is of utmost importance that we safeguard our nation's security and sovereignty, ensure our people's well-being, and establish a democratic political system that will best serve the interest of our country for all time to come. More so, it is the sacred responsibility of the King, the government, and the people

of twenty Dzongkhags to bring forth a Constitution that will serve the best interests of our country. Fundamentally, the government and the people need to work closely together in bringing forth a Constitution that will fulfil the aspirations of the Bhutanese people, promote our national interests, safeguard Bhutan's security and sovereignty, and provide a strong foundation for a political system that is most suitable and beneficial for both the present and future well-being of our people and the country. These words of His Majesty The Fourth Druk Gyalpo echo the national aspirations and constitutional mandates. Today, the unifying document guides us to follow a path that will ensure a peaceful and balanced coexistence and progress as a nation.

These are constitutional mandates and aspirations. These aspirations must be translated into credible legal and social instruments by the judiciary through the aid of justice and justice institutions. Fundamentally, the words of the Constitution are echoed in the best precepts of national laws and legal and non-legal interventions. This primary guidance should dictate the balance between constitutional aspirations, legal and social norms, and administrative norms to ensure that we promote a national legal norm based on respect for the law and preponderance of the rule of law theory. While [all] theories may not be suitable to dictate the legal practicalities based on national and international political, economic, and legal systems, the best interest principles of the Constitution and the people must prevail to allow systemic governance and strong polity based on popular will. The Constitution is an organic document premised on liberty, equality, and justice principles. It is the synthesis between individual freedom and social justice. It is the testator of the future. It reflects the Bhutanese constitutional jurisprudence and equal protection of the laws.

Natural Justice is an important component of the Constitution. Natural Justice also rests on the basic postulate of the rule of law that "Justice should not only be done, but it must also be seen to be done." It expounds the doctrine of substantive legitimate expectations based on the principles

of rationality. Moreover, the constitutionality of reasonable restriction and new dimensions to freedom, public order, and administration of justice are also becoming a new legal norm. Under various changing socio-legal norms, the Constitution of Bhutan is a very dynamic legal document to secure justice, enhance the rule of law, and promote the happiness and well-being of the people. The Constitution provides us with a constitutional era that is evolutionary with the emphasis that:

The destiny of the nation lies in the hands of the people; we cannot leave the future of the country in the hands of one person. The Passing of Bills establishes the basic legislative procedures for Parliament. This is undertaken based on the Rules of Procedure established under the respective Houses. Laws are the voices of the people and the legislature. They shape how nations are governed and how 'rules are formatted' to contemplate a society based on the rule of law and the best social ideals and conscience.

The laws govern society, and society should be governed based on the best ideal of promulgating the laws as lawmaking procedures also determine the voices and the procedures on how the voices in the Parliament are shaped and reshaped. As a social norm, laws and legislative processes provide a coherent paradigm to shape the voices of the people. The Legislative Rules of Procedures provides a guide that will stimulate discussions and integrate popular consciousness values. The 'popular consciousness' is, in one way, the balance of power between different lawmaking chambers. These chambers provide that 'national importance' theory rules the command of the lawmaking, and the Assent of His Majesty the King provides the controlled and logical step where lawmaking is initiated, performed, maintained, and finalized.

The Constitution of Bhutan has adopted a legislative paradigm of law-making with legislative powers divided between two chambers of the Parliament and His Majesty the King. This is to create an independent lawmaking process and a 'circuit' to test the reliability of the lawmaking

and the law itself. His Majesty the King has the power to grant the Royal Assent. This strategic intervention is a process to avoid lawmaking errors and ensure truth, accuracy, and recollect the 'perfect voices of the people' so that laws are a compendium of legal reflections, experiences, and lawmaking processes. Article 13(1) of the Constitution states that the Bill passed by the Parliament shall come into force upon the Assent of the Druk Gyalpo. This Article of the Constitution is deemed as the most important part of lawmaking. His Majesty the King is an unparalleled visionary leader with charismatic vision, foresight, and national reflections. His Majesty the King commands Royal vision, which, if distilled with accurate and greater human conscience, is associated with future leadership, national development strategies, and long-term goals of Bhutan. From the short-term goals, long-term visions are essential to uphold the future of Bhutan, and one of the strategies is to pass good laws.

The concept of mindfulness in lawmaking helps to make responsive laws. The judgmental attention to lawmaking that is centered on awareness and mindfulness is critical (Gupta, 2021)—this is integrated adaptation, capability, and evolution. The lawmaking in the Bhutanese legislatures ensures that democracy rebalances the different branches of Parliament. It enhances the opportunity to 'control and prevent' the larding of inappropriate lawmaking processes.

Further, Money Bills and Financial Bills are mandated to originate in the National Assembly. This section enshrines the initiation of the legislation in the Parliament. The Money Bills and Financial Bills consolidate the Bills that pertain to the expenditure and fiscal matters. It further pertains to the regulation or alteration of any tax, regulation of monies, and the use of monies from the Consolidated Fund. Aside from the definition of Money and Financial Bill, the underpinning prudence use theory and paradigm of controlled manoeuvres enables a Money Bill to be initiated in a relevant House.

Laws are important, and they affect the lives of the people. They are carriers of legal values as well as strict legal effects. Therefore, strict and elaborate discussions and deliberations are essential to ensure that laws are passed only after careful national scrutiny through the views of necessity, legalism, and the dimension of proportionality, good human conscientiousness, and rationality. Although laws are needed to secure the rationality of society and enforce social conduct that is in line with national visions, no laws can be passed without the testing of legal prudence, deliberations, and contestations. These processes are streamlined to gather the best human intelligence in lawmaking so that the long-term effects of the laws are already tested through a national legal impact hypothesis. Sufficient time for sensible lawmaking is required to give adequate time for applying human reasons and the best legal judgments. A law passed without testing the popular consciousness of the people can be legislatively correct; however, it may not be judicious in the nation's long-term interest. Deliberations in lawmaking should always be associated with long-term legal, social, and political goals. Deliberation of the laws without 'these' considerations may ill-shape a law and may not protect people and advance justice. Therefore, the judicious deliberations are one of the most important parameters in passing the Bills. The term 'judiciousness' refers to the prudent use of legal reasons and arguments that are directed toward the popular good. Popular consciousness should determine the vitality of lawmaking, the interest of public welfare, and the common purpose of the people.

Inaction and silence, mis-deliberation, and legislative misdirection can have serious consequences. Collective rationality, individual preferences, and social alternatives should govern a social state. Social state refers to the description of the state of affairs in the society. It can be further interpreted as the description of the rights structure. Constitutional congruence in lawmaking, inclusive social aspirations, and concurrence of three wings in passing the Bills allow the penetration of public opinion, sovereign power, and sensible responsibility towards making a responsive law that respects and fulfils the people's aspirations.

As a tribute to His Majesty The Fourth Druk Gyalpo on His 60th glorious Birth Anniversary, the Supreme Court of Bhutan and the Bhutan National Legal Institute, under the noble guidance of Her Royal Highness Princess Sonam Dechan Wangchuck initiated the paintings of 34 Kuthangs corresponding to the 34 Articles of the Constitution. Each Kuthang captures the essence of the Article, its significance, and its purpose. The Bhutan Law Review aspires to embrace and emulate such profound representations of wisdom and methods in its successive volumes as a continued tribute to His Majesty the King, His Majesty the Fourth Druk Gyalpo, and the Tsa-Wa-Sum.

Article 13
Passing of Bills

1. A Bill passed by Parliament shall come into force upon the Assent of the Druk Gyalpo.

2. Money Bills and financial Bills shall originate only in the National Assembly, whereas any other legislative Bill may originate in either House.

3. A Bill pending in either House shall not lapse by reason of the prorogation of either House.

4. A Bill shall be passed by a simple majority of the total number of members of the respective Houses or by not less than two-thirds of the total number of members of both Houses present and voting, in the case of a joint sitting.

5. Where a Bill has been introduced and passed by one House, it shall present the Bill to the other House within thirty days from the date of passing and that Bill may be passed during the next session of Parliament. In the case of Budget and Urgent Bills, they shall be passed in the same session of Parliament.

6. Where the other House also passes the Bill, that House shall submit the Bill to the Druk Gyalpo for Assent within fifteen days from the date of passing of such Bill.

7. Where the other House does not pass the Bill, that House shall return it to the House in which the Bill originated with amendments or objections for re-deliberation. If the Bill is then passed, it shall be presented to the Druk Gyalpo for Assent within fifteen days from the date of passing of such Bill.

8. Where the House in which the Bill originated refuses to incorporate such amendments or objections of the other House, it shall submit the Bill to the Druk Gyalpo, who shall then command the Houses to deliberate and vote on the Bill in a joint sitting.

9. Where the other House neither passes nor returns the Bill by the end of the next session, the Bill shall be deemed to have been passed by that House and the House in which the Bill originated shall present the Bill within fifteen days to the Druk Gyalpo for Assent.

10. Where the Druk Gyalpo does not grant Assent to the Bill, He shall return the Bill with amendments or objections to deliberate and vote on the Bill in a joint sitting.

11. Upon deliberation and passing of the Bill in a joint sitting, it shall be resubmitted to the Druk Gyalpo for Assent thereto, whereupon Any bill passed by Parliament shall come into force only upon the Assent of Druk Gyalpo. Like how the warmth of these two elements supports the growth of flora and fauna, it symbolically represents the unceasing benevolence and immaculate conduct and the exemplary leadership of His Majesty the King.

From the celestial water bodies, radiant pillars with nine layers signify the nine vehicles (yana). This pillar and its layers signify that all the orders of proceedings are intended to upscale the legislative process, which is imbued in the progression of social, legal, political, and other governance ideals. It represents the aims of lawmaking and the law as a noble cause for the upward movement of good thinking and actions. It shows the strategic progression of values that govern the goodness and merits of society.

The Swan

Swan represents exaltation. The Swan represents the *Dharma Chakra* (Wheel of Laws) turned by *Khen Lop Choe Su*m at the Samye Monastery.

It symbolizes nobility and enlightened actions. The lotus with a two-headed swan signifies King Trisong Deutsen, Guru Rinpoche, and other venerated translators. The painting represents the objective and philosophy of the two Houses of Parliament. The two heads on a single bird signify that any Bill pending in either of the Houses shall not lapse. It is represented by the different representations, which signifies unity on the plane of awareness.

The Tripitaka Scripture

Section 6 of this Article states that where one House passes the Bill, that House shall submit the Bill to the Druk Gyalpo for Royal Assent within fifteen days from the date of passing of such Bill. In line with this, Embodiment of Scripture states:

> *The Volume of Holy Scriptures is the representation of Dharma,*
> *It generates virtues*
> *And liberates the sense faculties of all beings.*

It signifies that the Bill approved through consensus of the two Houses is submitted to the Druk Gyalpo in the form of scripture volumes to receive his blessings.

The Land and Flora

The layered land and flora are formed as the four kings of jewels through the noble intention of Buddha and the common karma of sentient beings. Manjushri Nama Samgiti states:

> *May the sound of Dharma emerge*
> *Continuously from rays and trees*
> *And even from the sky.*

Since all the temporal and spiritual affairs depend on the condition of the outer world and the inner conscience of the sentient beings, this strategy of progression and upward movement of best legislative and lawmaking ideals.

The Deep Ocean

The structure of reflection is placed in the middle of the ocean under the lines of Embodiment of Scriptures of Kama, which states:

> *The ocean whose depth is difficult to fathom*
> *Is beautiful in the hue of the wish-fulfilling jewel.*

The vast and deep ocean signifies that the four noble activities are considered as profound as the ocean and represent the dual system of governance. It is compared to a lotus, which blooms unstained.
King Songtsen Gampo said:

> *The binding laws of ten virtuous actions result in happiness equal to that of gods*
> *The powerful decrees of the Lord result in the people's peace and happiness*
> *The dominion of the King increases like a lake of summertime*
> *One experiences peace after having placed trust in the Dharma*
> *No dispute arises in the knowledge that all beings are one's parents*
> *And one obtains the jewel of ten virtuous actions without evil friends.*

Likewise, this image symbolizes the pervading purpose and the sublime continuum of the dual system of governance, thus representing a river that quenches the thirst of all.

The Jewel and the Cloud

Section 8 of this Article states that where the House in which the Bill originated refuses to incorporate amendments or objections of the other House, it shall submit the Bill to the Druk Gyalpo, who shall then command the Houses to re-deliberate and vote on the Bill in a Joint Sitting. This pictorial art represents the continuum of justice and the spring of compassion from His Majesty the King.

ENVIRONMENTAL, SOCIAL AND GOVERNANCE (ESG): WHAT BHUTAN HAS TO OFFER

*ANIL CHANGAROTH & ONG XIN WEN

Abstract: Environmental, social, and governance (ESG) is the fundamental framework and/or set of standards that an organization relies upon or refers to in managing risks and opportunities related to sustainability, ethical impact, and corporate governance on the environment and society. This article provides the views on how Bhutan should provide a critical analysis of the Bhutanese economy, hydropower, tourism industry, agriculture, and the infrastructure industry from the purview of Singapore. This paper discusses the opportunities within the environmental, social, and governance (ESG) dimension.

Keywords: Environmental, social, governance

I. Introduction

The existing ESG models are limited in terms of applicability and predictability.[1] This study and analysis aim to assess how Bhutan can different aspects of development within the ESG paradigm so that it can leverage the environmental, social and governance advantages to use the paradigm of good governance and the *Gross National Happiness (GNH)* to guide the development in various sectors including hydropower and agriculture, mineral, and infrastructure. It also assesses the impacts of ESG on Bhutan's industries and proposes the adoption and streamlining of Bhutan's well-established system within the international standards, carbon disclosures, and international sustainable accounting standards among other international parameters.

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1 Park, S.R., & Jang, Y.J. (2021). The Impact of ESG Management on Investment Decision: Institutional Investors' Perceptions of Country-Specific ESG Criteria. *International Journal of Financial Studies, 9* (48). https://doi.org/10.3390/ijfs9030048.

II. Environmental

The environmental pillar refers to an organization's environmental impacts and risk management practices, which include direct and indirect greenhouse gas emissions, the management's stewardship over natural resources, and the overall resiliency against physical climate risks, and often considers its environmental disclosure, impacts and efforts to reduce carbon emissions, which are issues that represent tangible risks and opportunities for stakeholders and stockholders. The social pillar refers to an organization's relationships with stakeholders such as employees, customers, contractors, sub-contractors, investors, local communities, and human rights. It covers all the way an organisation interacts with these parties in which the organizations operate, and considers equality, working conditions, health and safety record, its policies on diversity, equity and inclusion and its labour relations between management and workers. External issues include the company's relationship with local community leaders, whether its suppliers use forced or child labour, and product safety. These indicate how well an organization is meeting its human obligations in operations and local communities. Potential ESG social threats are labour disputes, policy changes and consumer sentiments.

III. Governance

The governance pillar refers to governance factors of decision-making, from policymaking to the distribution of rights and responsibilities among different participants in corporations, such as the board of directors, essentially how the organization is led and managed. Organizations must understand governance risks and opportunities in decision-making as poor corporate governance practices have stood at the core of some of the biggest corporate scandals. Accordingly, research has shown that organizations that rank below average on good governance characteristics are particularly prone to mismanagement and risk their ability to capitalize on business opportunities over time. The governance performance of an organization can be assessed using factors such as structure and oversight, code and values, transparency and reporting, and cyber risk and systems.

IV. Bhutan's Economy and the Gross Domestic Product[2]

While Bhutan's annual real *Gross Domestic Product (GDP)* growth averaged 7.5 percent since the 1980s, driven by the hydropower and tourism sector, its real *GDP* is projected to decline in FY 23/24 to 4 percent. It is expected that the overall growth rate for the real *GDP* will be supported by increased growth in the tourism sector. The demand will be supported by private and public consumption which will reflect in higher government spending.

a) Hydropower Industry

Bhutan is a landlocked country in the Eastern Himalayas, bordered by China and India. Its varied topography includes subtropical lowlands, temperate valleys, and mountains. Bhutan receives abundant rainfall, which feeds the many rivers that flow through the country. These rivers and the country's mountainous terrain give Bhutan immense potential for hydropower development. The energy sector in Bhutan is comprised almost wholly of hydropower and accounts for a fifth of the country's *GDP*.[3]

Bhutan is estimated to have a hydropower potential of 30,000 MW, of which only a fraction has been developed so far. It is a clean and renewable energy source that can help Bhutan meet its growing energy needs and reduce its reliance on fossil fuels. It can also generate revenue for the country through electricity exports.[4] Bhutan's ability to harness its hydropower resources has been made possible by its close relations and ties with India - the lead donor in providing both technical and financial assistance to develop Bhutan's hydropower projects. By helping Bhutan to develop its hydropower resources, India has been able to secure a reliable source of clean energy, while Bhutan has been able to

2 The World Bank. (2023). *The World Bank in Bhutan.* https://www.worldbank.org/en/country/bhutan/overview#1.

3 Worldwide Fund for Nature. (2016). *Water in Bhutan's Economy: Importance to Partners.* https://wwfasia.awsassets.panda.org/downloads/water_in_the_economies__policy_brief_for_development_partners_2.pdf.

4 Tshering, S., & Tamang, B. (n.d.). *Hydropower - Key to sustainable, socio-economic development of Bhutan.* https://www.un.org/esa/sustdev/sdissues/energy/op/hydro_tsheringbhutan.pdf.

generate revenue and boost its economy.[5] Major hydropower projects have come up and are expected to come up such as Punatsangchhu-I (1,200MW), Punatsangchhu-II (1,020MW), Sunkosh (4,060MW), and Kuri-Gongri (1,800MW). There are also joint-venture projects such as Kholongchhu, Chamkharchhu-I, Wangchhu, and Bunakha Reservoir are aided by India.[6] Bhutan's strategic export of surplus hydropower to India has fuelled substantial investments in human capital development, yielding remarkable advancements in service delivery, education, and healthcare.

The nation has triumphantly combated poverty and championed gender equality, while persistently striving to bridge social inequality gaps and regional disparities. However, despite the economic benefits generated by these hydropower projects, they have also contributed to Bhutan's mounting debt issues. According to Bhutan's Annual Financial Statement for 2018, hydropower-related debt amounted to Nu. 132,532.919 million (S$2.58 billion), constituting 74.4% of the country's total external debt. In contrast, non-hydropower debt stands at Nu. 44,619.477 million (S$0.87 billion), representing 25.57% of the nation's GDP. The loan from India, as per the 2018 Annual Financial Statement, totals approximately 133,190.701 million (S$2.59 billion), with 119,452.841 million (S$2.32 billion) designated as hydropower debt, making up 89.7% of Bhutan's overall outstanding debt to India.[7]

b) Tourism Industry

The tourism industry in Bhutan is an important source of employment for locals and accounts for around 20% of the country's non-hydropower revenues.[8] Bhutan deliberately sets high daily visitor fees to ensure that

5 Tshering, S., & Tamang, B. (n.d.). *Hydropower - Key to sustainable, socio-economic development of Bhutan.*

6 Ranjan, A. (2020). *Structural Transformation of Bhutan's Economy: Challenges Remain.* ISAS Insights. https://www.isas.nus.edu.sg/papers/structural-transformation-of-bhutans-economy-challenges-remain.

7 Ranjan, A. (2020). *Structural Transformation of Bhutan's Economy: Challenges Remain.* https://www.isas.nus.edu.sg/papers/structural-transformation-of-bhutans-economy-challenges-remain.

it never receives more tourists than its population can handle. Before the COVID-19 pandemic, tourists were required to pay a fee per day, which included an organized tour and a *Sustainable Development Fee ("SDF"),* allowing the country to receive no more than 315,000 tourists per year before the pandemic. After the pandemic, tourists no longer had to join an organized tour, but it was increased to $ 200. In 2023, Bhutan further lowered the SDF and tourists paying the daily fee can stay in the country for four days instead of one day. Bhutan uses funds collected from the SDF to invest in programs which will preserve Bhutan's cultural traditions, protect its heritage and environment, upgrade infrastructure, and create opportunities for their younger generations while building resilience.[9]

c) Agricultural Industry

The Agricultural Industry in Bhutan contributes over 15% of the country's GDP and employs over 50% of its population. It also consumes over 90% of the water resources in the country. [10] There are however challenges from climate change, natural disasters, declining farm productivity, human-wildlife conflict, water scarcity, labour shortages, limited post-harvest management, and market access barriers. Climate change is already affecting Bhutan's agricultural productivity. Some of these effects are altered water availability, extreme weather events, and shifts in agroecological zones. This is detrimental to the nation's development efforts as Bhutan's socio-economy depends on its agriculture, water resources, and forests.[11] Additionally, there seems to be a need for greater access to technology, private sector investments, business development services, fair markets, and affordable credit placing major constraints on rural agro-enterprise development.

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8 The World Bank. (2023). *The World Bank in Bhutan.*

9 Bhutan Travel Bureau. (2023). *Bhutan Tourism Policy.* https://www.bhutantravelbureau.com/getting-to-bhutan/bhutan-tourism-policy/.

10 Worldwide Fund for Nature. (2016). *Water in Bhutan's Economy: Importance to Partners.* https://wwfasia.awsassets.panda.org/downloads/water_in_the_economies__policy_brief_for_development_partners_2.pdf.

11 Cooke, R. (n.d.). *Bhutan Country Strategy Note.* IFAD. https://www.ifad.org/en/web/operations/w/country/bhutan.

d) Private Sector and Infrastructure Industry

Bhutan's rugged mountainous terrain poses a significant challenge in establishing comprehensive infrastructure across the nation, particularly in transportation. A 2010 World Bank investment climate assessment report revealed that 52% of surveyed exporters incurred losses attributable to ground transport difficulties. Hence, it is unsurprising that Bhutan found itself ranked at the 172nd position for the time and cost involved in cross-border trade, as indicated in the 2013 *Doing Business Report.*

As a landlocked country, Bhutan faces intricate complications in accessing international markets since its goods must traverse neighbouring nations, resulting in elevated transportation costs and diminished competitiveness in the realm of exports. Furthermore, according to the World Bank's 2012 logistics performance index, Bhutan's overall logistics performance ranked relatively low at 107th out of 155 countries, and it stood at the 117th position in terms of the quality of trade and transport-related infrastructure.[12]

e) Mineral Industry[13]

The mineral industry in Bhutan is still relatively underdeveloped, as compared to its major industries like tourism and agriculture. Bhutan produces mineral commodities such as silicon, cement, coal, dolomite, granite gypsum, limestone, and others in 2019, the mineral industry contributed 4.8% to Bhutan's GDP, and employment in the industry accounted for less than 0.5% of the country's labour force. Furthermore, in 2019, exports of mineral products accounted for 73.6% of Bhutan's total goods exports.

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12 Asian Development Bank. (2023). *Bhutan Private Sector Assessment Summary.* Country Partnership Strategy 2014-2018. https://www.adb.org/sites/default/files/linked-documents/cps-bhu-2014-2018-psa.pdf.

13 Moon, W.J. (2023). *The Mineral Industries of Bhutan and Nepal.* U.S Department of Interior & U.S Geological Survey. https://pubs.usgs.gov/myb/vol3/2019/myb3-2019-bhutan-nepal.pdf.

V. ESG Intertwined with Bhutan's Economy Gross National Happiness[14]

Gross National Happiness (GNH) first coined in the late 1970s by His Majesty the Fourth King of Bhutan, King Jigme Singye Wangchuck, is a concept which implies that sustainable development should take a holistic approach towards notions of progress and give equal importance to non-economic aspects of wellbeing and happiness – being the foundation and core of Bhutan's development strategies. Equitable socio-economic development, conservation of the environment, preservation and promotion of culture and promotion of good governance are the four pillars on which the *GNH* philosophy is based.

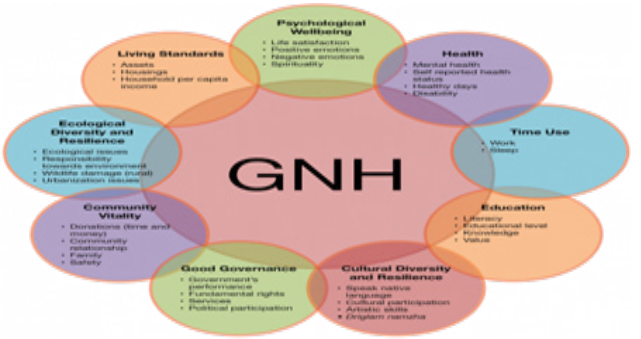
These four pillars align with all three aspects of ESG. In respect of equitable socio-economic development, Bhutan promotes social harmony, stability, and unity to contribute to the development of a just and compassionate society. The nation also ensures equity amongst individuals, communities, and regions. Under the conservation of the environment, Bhutan ensures that developmental pursuits follow the limits of environmental sustainability and are carried out without impairing the biological productivity and diversity of the natural environment.

Bhutan's pillar of preservation and promotion of culture aims to foster appreciation for the country's cultural heritage and preserve spiritual and emotional values that contribute to happiness and well-being, helping to cushion the people from the negative impacts of modernization. In respect of the pillar of promotion of good governance, Bhutan works to develop its institutions, human resources, and systems of governance. It also seeks to enlarge opportunities for people at all levels to fully participate and effectively make development choices that are aligned with the circumstances and needs of their families, communities, and the nation.[15]

14 Oxford Poverty and Human Development Initiative. (2023). *Bhutan's Gross National Happiness Index*. Oxford Department of International Development. https://ophi.org.uk/policy/bhutan-gnh-index/#:~:text=The%20results%20of%20the%202022,2010%20to%200.781%20in%202022.

VI. The Gross National Happiness Index[16]

The *GNH Index* gauges happiness through periodic surveys involving around 10% of the population, categorizing individuals into four distinct groups: those who are unhappy, those with narrow happiness, those with extensive happiness, and those experiencing deep happiness. The *GNH Index* comprises nine core domains that collectively constitute *GNH.* These domains include psychological well-being, health, time use and balance, education, cultural diversity and resilience, good governance, community vitality, ecological diversity, and resilience, and living standards. These nine domains are given equal weight, as each is considered intrinsically vital to the concept of *GNH.* Within these domains, 33 *GNH* conditions are expressed as indicators.



The findings from the 2022 *GNH Index,* drawing from a sample of over 11,000 people, reveal a significant enhancement in the collective well-being and happiness of the Bhutanese population. The *GNH Index* value increased from 0.743 in 2010 to 0.781 in 2022. This positive trajectory underscores Bhutan's unwavering dedication to nurturing an environment that fosters well-being and happiness, even amid economic challenges such as the COVID-19 pandemic. The 2022 results show that

15 Royal Government of Bhutan. (2012). *Bhutan In Pursuit of Sustainable Development.* National Environment Commission, Thimphu. https://sustainabledevelopment.un.org/content/documents/798bhutanreport.pdf.

16 Oxford Poverty and Human Development Initiative. (2022). *Bhutan's Gross National Happiness Index.*

9.5% of the Bhutanese population experienced deep happiness, 38.6% were extensively happy, 45.5% found themselves in the narrowly happy category, and 6.4% fell into the unhappy category.

VII. Effect of ESG on Bhutan's Industries

The Effect of ESG on Bhutan's industries is limited to the following domains:

a) Hydropower Sector

As Bhutan has been unwavering in its dedication to environmental preservation and the promotion of eco-friendly practices, the country has become the world's first and only carbon-negative country. Bhutan's hydropower industry has helped the country achieve this impressive feat with its commitment to exporting the renewable hydroelectric power generated from its rivers effectively offsets millions of tonnes of carbon emissions each year.[17] While the hydropower industry has immensely benefitted the country, Bhutan must improve its environmental checks and balances on the hydropower sector. For example, the development of two Punatsangchu Hydropower Projects is said to possibly destroy the habitat of about 10% of about 200 critically endangered White Bellied Heron in the world.[18]

b) Tourism Sector

Bhutan's tourism industry is firmly grounded in sustainability principles, emphasizing its environmental and ecological friendliness, social and cultural acceptance, and economic viability. The Royal Government of Bhutan acknowledges the global significance of tourism as a catalyst for socioeconomic development, especially in a developing nation like Bhutan[19]. To achieve this objective, the Royal Government of Bhutan has adopted a very cautious approach to the growth and development of the tourism industry in Bhutan.

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17 Global Vision International. (2022). *How Bhutan Became a Carbon-Negative Country.* https://www.gvi.co.uk/blog/bhutan-carbon-negative-country-world.

18 Mehta, S. (2013). *Dam Building Damages Bhutan's Green Image. The Third Pole.* https://www.thethirdpole.net/en/energy/dam-building-spoils-bhutans-green-image-1.

Furthermore, Bhutan utilizes funds from the *Sustainable Development Fee (SDF),* collected from tourists, to mitigate the carbon footprint of visitors. This includes initiatives like tree planting, trail maintenance, and electrifying the transportation sector. The *SDF* also supports cleaning squads responsible for monitoring and removing litter left by tourists on forest and mountain trails.[20] According to C.B. Ramkumar, Vice Chairman of the Global Sustainable Tourism Council, the *SDF* is "sustainability fee is one of the ways to ensure a destination does not degrade" and is a *"good tool for conservation."*

c) Agriculture Sector

Bhutan is actively pursuing the implementation of Climate Smart Agriculture (CSA) to minimize the adverse effects of climate change and contribute to the broader goals of food security and self-sufficiency through resilient farming practices. CSA is built upon the pillars of productivity, adaptation, and mitigation. Measures such as sustainable land management, plant breeding, crop varietal selection, cropping patterns, ecosystem management, and the conservation and sustainable use of genetic resources for food and agriculture are some of the adaptive strategies being employed. These efforts are crucial, given that Bhutan's agriculture is highly susceptible to the impacts of extreme climate events. Moreover, the adoption of climate-smart water management within CSA is expected to reduce risks to crop yields, particularly considering the shortage of irrigation water that often leaves a substantial portion of rice fields uncultivated.[21]

d) Private Sector

In the private sector, good governance attracts investments and guides the sector towards sustainable development.[22] To create a conducive environment for businesses, Bhutan took a pivotal step by introducing

19 Bhutan Travel Bureau. (2023). *Bhutan Tourism Policy.*

20 Srivastava. R. (2023). *Bhutan seeks to balance economy and environment with tourist tax.* Thomas Reuters Foundation. https://www.reuters.com/article/bhutan-tourism-environment-climate-idINL8N3A93GD.

21 (2019, August 18). Bhutan looks to a smart climate for resilient farming. *The China Daily.* https://www.chinadailyhk.com/articles/101/3/219/1566126343507.html.

its *Economic Development Policy* in 2010. This policy aims to boost economic productivity and provide a strategic roadmap for economic growth until 2020. Its vision envisions a self-reliant, eco-friendly economy underpinned by a knowledge-based society driven by information technology. The objectives are geared towards achieving economic self-sufficiency and full employment by 2020. Key strategies to realize these objectives include diversifying the economic landscape while minimizing ecological impact, sustainable harnessing of natural resources, expanding and diversifying exports and fostering industries that enhance the Bhutanese identity, and reducing reliance on fossil fuels in the transportation sector.[23]

To help implement the *Economic Development Policy* 2010, the government has formulated new laws and policies since 2010. The most important was a revision in 2010 of the *Foreign Direct Investment (FDI)* Policy of 2002. Since the revision, more than 18 FDI projects have been approved, compared with 19 projects in nine years under the original policy. These FDI projects have been concentrated in the hotel, mineral, and metal-based industries; agribusiness and dairy products.[24]

VIII. Adopting the Belt and Road Cooperation and Partnership Model Agreement[25]

The Belt and Road Cooperation and Partnership Model Agreement on the back of the *Belt and Road Initiative* provides a framework for strengthening economic cooperation and development between contracting parties with clearly defined goals, guiding principles and areas of priorities that build a sense of community among the

22 Asian Development Bank. (2014). 20th by 2020: *Bhutan's Drive for Improved Governance.* The Philippines.
https://www.adb.org/sites/default/files/publication/59695/bhutan-drive-improved-governance_0.pdf.
23 Country Partnership Strategy: Bhutan, 2014–2018. (n.d.). Private Sector Assessment: Summary. https://www.adb.org/sites/default/files/linked-documents/cps-bhu-2014-2018-psa.pdf.
24 Country Partnership Strategy: Bhutan, 2014–2018. (n.d.). Private Sector Assessment: Summary.
25 Wang. G.. & Sharma, R. (Eds.).(2023). *The Belt & Road Cooperation and Partnership Model Agreement.*

participating countries. It is this lead author's view that Bhutan should consider becoming a contracting country to adopt the framework that addresses and sets the framework for the right to development; sustainable development; transparency and anti-corruption; facilitation of goods, services, and service providers; digital economy; investment; intellectual property rights; public health; finance; infrastructure; competition; environment; labour standards; and dispute resolution.

IX. Conclusion

While many may regard adopting ESG as a cultural or mindset shift in the way individuals, organizations, communities, and nations function and operate – ultimately leading to greater accountability of each of their respective ethos and operations, it is this author's views that Bhutan seems to already be well entrenched within the ESG framework and strategies and could well be a leading nation showcasing its functioning well within the realms of ESG. To this end, the National Environment Commission, Royal Government of Bhutan's *Third National Communication* from Bhutan to the *United Nations Framework Convention on Climate Change,*[26] 2020 presented further actions proposed to those mitigation measures already in place/taken that are required in addition to emission mitigation and address adverse impacts of climate change in Bhutan - according to Bhutan's national greenhouse gas inventory, emissions are growing especially from energy (fuel for transport and industries) and process emissions from industries.

This *Third Communication,* building on the *Second National Communication,* dealt with the vulnerability and adaptation assessment in the key sectors of water, agriculture, energy (hydropower), human health, forest, and biodiversity, and an additional assessment in the urban development sector was carried out, ultimately requiring the support of the international community to ensure their implementation.[27] What remains to be considered and/or to be adopted may be streamlining Bhutan's well-established systems within for example international

26 United Nations Climate Change. (2023). COP 28- *UN Climate Change Conference.* https://unfccc.int/.

standards such as climate and/or carbon disclosures, international sustainable accounting standards, United Nations principles for responsible investment, global reporting initiatives, and UN global compacts.

JUDICIAL COLLEGIALITY: INDISPENSABLE FOR DECISION-MAKING

*PEMA NEEDUP

Abstract: Judicial collegiality is a fundamental principle in the legal profession that underscores the importance of cooperation, mutual respect, and collaboration among judges within a judicial system. It promotes a unified and consistent approach to decision-making, fostering an environment where judges work together to interpret and apply the law impartially. Maintaining the integrity and credibility of the Judiciary ensuring justice is dispensed fairly and equitably, is essential. Judicial collegiality encourages open deliberation, consensus-building, and the exchange of ideas among judges, ultimately leading to more informed and just legal decisions. This article aims to provide an overview of the concept of Judicial collegiality, its importance and implications for judicial decision-making, how collegiality can impact dissent, and ways to promote collegiality in the Judiciary.

Keywords: Judicial collegiality, decision-making, dissent

I. Introduction

Aristotle said, *"Man is by nature a social animal; an individual who is unsocial naturally and not accidentally is either beneath our notice or more than human..."* From that perspective, man cannot live alone; in the same vein, man cannot work independently; he has to enter into relationships with his colleagues if things has to progress. No man can break the fetters of mutual dependence. Working in silos could result in a selfish motive, and it yields unproductive outcomes. The only way out is to work together in the spirit of collegiality, which is vital in fostering positive work that can lead to increased productivity, creativity, and job satisfaction.

II. What is collegiality, and what does it mean to be collegial?

"Collegiality" is an elusive concept and subject to multiple definitions. "Collegiality" is defined by *Webster's Third New International Dictionary* (1993) as *"the relationship of colleagues."* Working optimally with colleagues is considered a valuable determinant of success, but collegiality is challenging to assess.

Collegiality is the relationship between individuals working towards a common purpose within an organisation. The concept originates in the Roman practice of sharing responsibility equally between government officials of the same rank to prevent a single individual from gaining too much power. Collegiality emphasises trust, independent thinking and sharing between co-workers. It encourages autonomy and mutual respect and can impact organisational efficacy (Donohoo, 2017).

Collegiality is the relationship between colleagues.[1] Colleagues are those explicitly united in a common purpose. In a good organisation, colleagues respect each other's abilities and are responsible for working toward that purpose.[2] Collegiality is defined more specifically as 'supporting each other to succeed.'[3] Collegiality is *"a form of social organisation based on shared and equal participation of all its members. It contrasts with a hierarchical, pyramid structure...." Villanova University states, "Collegiality entails mutual understanding, respect, and trust among all the groups, based upon their shared sense that it is in the common interest of all to cooperate in promoting the general welfare and the mission of the academic community."*[4] In this vision, collegiality involves people cooperating in the interest of some greater group rather than pursuing their self-interest. Collegiality is thus the interaction between equals in decision-making in the pursuit of the greater good.[5]

Collegiality is different from congeniality (enjoying each other's company) and distinctive from, but a feature of, collaboration or

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1 Colleagues are associate[s] or co-worker[s] typically in a profession or a civil or ecclesiastical office and often of similar rank or state.

2 Retrieved 6.10.2023, from https://en.wikipedia.org/wiki/Collegiality#:~:text=Collegiality%20is%20the%20relationship%20between,to%20work%20toward%20that%20purpose.

3 Casci, T. (n.d.). *Collegiality is the means to effective teamwork.* Retrieved 6.10.2023, from https://realisingourpotential.russellgroup.ac.uk/collegiality-is-the-means-to-effective-teamwork/index.html.

4 Cross, B. F., & Tiller, H. E. (2008). *Positive approaches to constitutional law and theory: Understanding collegiality on the Court.*

5 Turenne, S. (n.d.). *Institutional Constraints and Collegiality at the Court of Justice of the European Union: A sense of belonging?*

teamwork (working with others). Being collegial involves building a rapport and learning about and from each other (Hoerr, 2005). Being collegial means cooperating and helping out in informal ways. When people are collegial, the office functions better, and everyone is better off. In contrast, "office politics" usually refers to using informal relationships to get ahead, most often at the expense of others, creating resentment and dysfunction. Collegiality is productive, while office politics is destructive.[6]

III. Judicial Collegiality

Judicial collegiality is a synonym for *'judiciality.'* Collegiality is a fundamental principle of court organization. Collegial deliberations are the heart of appellate decision-making. Because appellate judges in the Supreme Court and the High Court make decisions only in the collegiate, the study of collegiality is essential to understanding appellate courts. The Supreme Court also confronts the burden of having to sit *en banc* in every case. The Supreme Court, however, is a collegial body,[7] meaning all justices are mandated to sit *en banc* in all cases if there is no conflict of interest. It implies that collegiality on the Supreme Court operates very differently from the collegial process at work in the lower appellate courts, where judges only rarely sit *en banc.* Thus, my discussion of collegiality does not refer to the Supreme Court.

The most comprehensive definition of collegiality is by Judge Frank M. Coffin:[8]

The deliberately cultivated attitude among judges of equal status and sometimes widely differing views, working in intimate, continuing, open, and non-competitive relationships with each other, which manifests respect for the strengths of others, restrains one's pride in authorship

6 Weisback, S. M. (2021). *In Praise of Academic Collegiality.* Retrieved 6.10.2023 from https://www.insidehighered.com/advice/2021/11/05/importance-collegiality-academe-opinion.

7 By “collegial body” here, I mean only that it takes a vote of majority to decide a case, not that collegiality is necessarily present on the Supreme Court.

8 Frank Morey Coffin (July 11, 1919 – December 7, 2009) was an American politician from Maine and a United States Circuit Judge of the United States Court of Appeals for the First Circuit.

while respecting one's own deepest convictions, values patience in understanding and compromise in non-essentials, and seeks as much excellence in the court's decision as the combined talents, experience, insight, and energy of the judge's permit.[9]

Some individuals are naturally inclined to consult with others and work collegially. However, collegiality cannot depend on individual temperaments and personalities. Collegiality is vital for the court's success and must be promoted institutionally through proactive efforts.[10]

IV. Indispensability of Judicial Collegiality

Judicial collegiality is essential for several reasons in the context of the Judiciary and legal systems. It refers to judges working together harmoniously and respectfully, often within a multi-judge panel or court, to make decisions and administer justice. Here are some key reasons why judicial collegiality is indispensable:

(a) Collegiality on the Appellate Courts

The very nature of an appellate court, a collection of judges jointly resolving individual cases and controversies, suggests the need for collegiality. Judicial collegiality is vital, especially for the appellate courts, which decide cases in a panel of judges. I do not mean that all judges are friends when discussing a collegial court. And I do not say that the court members never disagree on substantive issues. That would not be collegiality but homogeneity or conformity, making for a decidedly unhealthy Judiciary. Instead, I mean that judges have a common interest, as members of the Judiciary, in getting the law right and that, as a result, they are willing to listen, persuade, and be persuaded, all in

9 Benton, Duane. (n.d). Mike Wolff: Chief of Collegiality; Coffin, M. F. (1985). *The Anatomy of Judicial Collegiality;* Murphy, R. M. (2000). *The Journal of Appellate Practice and Process*: *The Changing Culture.*

10 Appleby, G., & Lynch, A. (2021). *The Judge, the Judiciary and the Court: Individual, Collegial and Institutional Judicial Dynamics in Australia.* Cambridge University Press.

an atmosphere of civility and respect.[11] The collegiality of which I speak embodies an ideal of diversity and envisions judges drawing on their differences in working together to get the law right.[12] And getting the law right is the mission of a genuinely collegial court.

The product of a collegial court, its opinions are better in substance, style, and tone than those of a court that expends little effort to harmonise diverse views. Thus, a collegial court better manifests the bedrock principle upon which appellate courts rest: multiple minds are better than one[13] or three heads are better than one. Most succinctly stated, collegiality on an appellate court is knowing his fellow judges so well and respecting their intellects and work patterns so much that he is willing to listen and consider carefully their perspectives on each legal issue that they confront. It is a personal understanding that transcends political backgrounds, personal idiosyncracies, and the natural tendency to adhere unyieldingly to one's personal opinions.[14]

(b) Collegiality on the Trial Courts

For a court, collegiality consists of the relationship among equals in rank. Usually, it carries positive connotations of cooperativeness and joint efforts toward achieving appropriate aims, operations, and functioning of the court as an institution. Trial court judges sit alone, so they usually do not experience the sort of collegial deliberations at the core of appellate judging. But that does not mean that the trial court judges cannot consult with their colleagues on substantive issues and matters affecting particular cases, such as sentences, admissibility of specific evidence, or the like. It does not amount to interference with personal decision-making independence. But it is a collegiality of a different kind from that of appellate judges.

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11 Edwards, T. H. (2003). The Effects of Collegiality on Judicial Decision Making. *University of Pennsylvania Law Review.,* & Cross, B. F., & Tiller, H. E. (2008). *Positive approaches to constitutional law and theory: Understanding collegiality on the Court.*

12 Edwards, T. H. (2003). *The Effects of Collegiality on Judicial Decision Making.* University of Pennsylvania Law Review.

13 Murphy, R. M. (n.d). Collegiality and Technology. *The Journal of Appellate Practice and Process.*

14 Tacha, R. D. (n.d). *The "C" Word: On Collegiality.* Ohio State Law Journal.

Law clerks can also contribute positively and negatively to collegiality among judges because they assist judges in understanding their colleagues better and help them find ways to reach common ground and communicate their ideas effectively.[15] Without support from their colleagues, the judges alone cannot accomplish the intended outcomes. The same is true with the appellate judges. Judges can also become too comfortable in the hierarchical fiefdoms of their chambers, with law clerks and staff who can sometimes unconsciously promote judicial insularity. At the bottom, law clerks follow the lead of their judges. If the judges become too insular, it is because of an absence of collegiality among the judges and is not the fault of law clerks.[16]

(c) Effects of Collegiality on Judicial Decision-Making

Central to this argument has been whether judicial collegiality enhances the quality of appellate decision-making. My answer is an emphatic "Yes." Appellate judges need collegiality to decide particular cases. Generally, in a group or a panel of three or more, an effort is required to decide cases, to decide whether to hear arguments or to write opinions or summary orders, as well as how to write them, to fashion relief to the parties; to give guidance to the trial courts or the bar or the public, and, in a difficult or complex case, to reach a workable result. Three judges can sometimes approach a case with different viewpoints, resulting in different outcomes yet needing resolution. Something has to give in such a situation, and collegiality helps bring about a resolution.[17]

It would save significant time to have appeals decided by one judge. But, in my view, the reliance on collegiality among appellate judges undergirds our belief in the fairness of the appellate process and our

15 In the case of judges, good relations with colleagues, law clerks, other staff, and lawyers add to their utility, while animosities, usually from or toward judicial colleagues and usually resulting from disagreement, subtract from it.

16 Edwards, T. H. (2003). The Effects of Collegiality on Judicial Decision Making. *University of Pennsylvania Law Review.*

17 Oakes, L.J. (2000). *Judicial Collegiality.* Retrieved 16.7.2023 from https://www.encyclopedia.com/politics/encyclopedias-almanacs-transcripts-and-maps/judicial-collegiality

confidence in fully informed and thoughtful appellate decisions. Collegiality improves the quality of judges' decisions and enables courts to make better decisions.

First, collegiality removes the determinism of politics and ideology; then, collegial decisions are necessarily better regarding the rule of law. Second, since collegiality enables intelligent people to fully lend what they have to offer to the deliberation process, judicial decisions made in a collegial environment invariably will benefit from the full range of expertise, experience, intellectual ability, and differing perspectives on a court. The deliberative process is richer and fuller because of collegiality, so the decisions are the product of more rigorous, challenging, and thorough discussions. Third, since collegiality fosters better deliberations, collegial judges are likelier to find the correct answer in any given case. Collegiality prevents judges from going astray in "hard" cases and facilitates finding the right answers. In short, in a collegial environment, both judges and their decisions become more "objective."[18]

It is clear from the preceding discussions that collegiality significantly affects judicial decision-making. It is also clear that judges are the instruments of collegiality. Ultimately, collegiality mitigates judges' ideology preferences and enables us to find common ground and reach better decisions. In other words, collegiality determines whether the judges decide cases on their legal merits before the court. Ultimately, collegiality invokes the highest ideals and aspirations of judging because it enables better decisions.

(d) How does collegiality impact dissent?

Let me examine the effect of collegiality on a judge's decision to dissent. Judges in appellate courts resolve cases based on majority rule, and they have the opportunity to explain their disagreement with the majority's

18 Edwards, T. H. (2003). The Effects of Collegiality on Judicial Decision Making. *University of Pennsylvania Law Review.*

decision in a written dissent. There are two reasons to suggest that increased collegiality concerns will lead to fewer dissents. First, colleagues in collegial environments care more about personal relationships and maybe, on the whole, less likely to dissent because their increased collegiality concerns raise the cost of a dissenting opinion. Second, colleagues in collegial environments may be able to reduce disagreement before an opinion is issued, negating the need for dissent. Third, collegiality may also reflect an increased colleague's ability to reach a consensus. Collegial environments foster free and open decision-making brought about by increased trust among colleagues. Fourth, the increased collegiality can reduce the frequency of dissent and dampen the effect of disagreement on the probability of dissent. Studies have found that decreased frequency of communication among appellate judges leads to less consistency in their decisions. Likewise, where judges interact less with their colleagues, they may feel freer to dissent from a colleague's majority opinion.

Judges incur costs when they write dissenting opinions.[19] First, a judge risks the goodwill of other judges when they file a dissent. Furthermore, the judge must spend time and effort drafting a dissent. While judges may derive some expressive benefit from publicly stating their dissent, they rarely cite dissenting opinions because they are not legally binding. This way, dissenting opinions have little to policy benefits but potentially significant collegiality costs. Thus, collegiality may cause judges to fail to voice disagreement.[20] In the case of a panel of two judges, there cannot be a dissent, only a concurring opinion. And if there is to be a dissent in

19 A dissenting opinion is written by an appellate judge who disagrees with the majority opinion in a given case. A judge who writes a dissenting opinion is said to dissent. Within the dissenting opinion, the judge gives their reasoning as to why they believe the majority opinion is wrong. The opposites of a dissenting opinion are majority opinions and concurring opinions. A majority opinion is an opinion that is agreed upon by the majority of the judges regarding a particular verdict. A concurring opinion is written by a judge or judges in which they explain why they agreed with the majority opinion. Still, they may provide further details for the reasoning of the majority opinion.

20 Hazelton, W. L. Mo., Hinkle, K.R., & Nelson, J. M. (n.d). *The Elevator Effect: How Collegiality Impacts Dissent.*

a case, the majority opinion has to be followed by the dissenting opinion in the same judgment. But there cannot be a parallel judgment in the same case.[21] In short, positive judiciality is a source of much joy and fun as an appellate judge. It needs cultivation. But concurring or majority opinions are not always the golden rule. A diversity of opinions in a single case can contribute to confusion about the law. When individual judges write dissenting opinions, it is more likely to indicate the presence of critical competing legal arguments that they should present to the legal community, the legislature, and the public.

Judge Pamela Harris[22] said that when courts write strident dissents that conflict with the majority opinion, some might think there is interpersonal tension among the judges. But that isn't always so - and disagreement isn't always bad – meaning dissenting is not always bad. Some studies have revealed how dissenting opinions shape the law and impact collegiality among judges. However, a dissenting judge should not make personal criticisms in dissent.[23]

(e) Judicial Independence and Judicial Impartiality

Collegiality is fundamental to judicial independence and judicial impartiality. The principle of collegiality governs the functioning of the Judiciary. The principle is based on the equal participation of the judges in the adoption of decisions, which entails, in particular, that judges should collectively deliberate on decisions and that all the judges should collectively bear responsibility for all decisions rendered.[24] Since judges come from diverse social and educational backdrops, collegiality also supports unity in diversity. Further, the court does what it can to ensure

21 There was an incident in the High Court where one of the benches consisting of two judges delivered distinct and contrasting judgments in the same case, leading to confusion regarding which judgements should be upheld and followed.

22 Judge of the United States Court of Appeals for the Fourth Circuit since 2014.

23 Levine, M. (2016). *Inside the Fourth Circuit Court of Appeals: How Collegiality Works.* Retrieved 24.10.2023 from https://www.law.uchicago.edu/news/inside-fourth-circuit-court-appeals-how-collegiality-works

24 Turenne, S. (n.d). *Institutional Constraints and Collegiality at the Court of Justice of the European Union: A sense of belonging?*

the equal assimilation of judges in the workings of the court, and it can achieve this with the constitutive value of collegiality. Collegiality acts as a positive mechanism to enhance judicial impartiality.

(f) Consistency and Predictability

Judges are more likely to arrive at consistent and well-reasoned decisions when they collaborate and engage in discussions and deliberations. This consistency helps establish legal precedents and provides predictability for lawyers, litigants, and the public.

(g) Checks and Balances

In a system of judicial collegiality, individual biases and personal preferences are less likely to dominate the decision-making process. It helps prevent any one judge from exerting undue influence and provides a system of checks and balances.[25]

(h) Respect for the Rule of Law

When judges work together with mutual respect and a commitment to upholding the rule of law, it enhances public confidence in the legal system. It demonstrates that decisions are not arbitrary but based on sound legal principles.

(i) Public Perception and Trust

A collegial Judiciary is more likely to be seen as necessary and trustworthy by the public. Trust in the Judiciary is essential for maintaining the rule of law and ensuring that citizens have faith in the legal system.

(j) Efficient Case Management

Judicial collegiality can lead to more efficient case management and quicker resolution of legal disputes. Judges can divide the workload, share responsibilities, and streamline decision-making.

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25 In a recent case involving drugs, one judge could have prevented the influence of another judge. Or, one judge could have chosen not to endorse the decision. The absence of collegiality among judges is a negative consequence, and excess collegiality without disagreements can also be detrimental. Expressing a respectful disagreement in order to uphold the principles of justice should not be seen as a lack of collegiality.

V. How do we promote judicial collegiality?

Developing collegiality at appellate courts is vital for maintaining a cohesive and effective Judiciary, and it has to be promoted institutionally through proactive efforts. But there is no shortcut or secret to collegiality. No court or judge is always collegial. The role of the judge *per se* contributes to the isolation. Collegiality is not instinctive or natural to judges serendipitously comprising an appellate court. Collegiality needs attention, exercise, and development. It is a dynamic, not static, state. Since it is so fragile and delicate, the court should view anything affecting collegiality cautiously.[26] It takes time to be human. One veteran appellate judge summed up their predicament: *"If you are a loner, you can't function on a court of appeals."* Judges should dine together. Spouses should know each other. Judges and spouses should have time to be together.[27]

The necessity of leadership is fundamental to collegiality. People tend to follow the suggestions of their leadership. The leadership of the Chief Justice and the Chief Judge contributes to developing collegiality among the judges. On judicial matters, the Chief Justice or the Chief Judge is merely the *primus inter pares* (first among equals), meaning he would preside at hearings. But, his voice in decision-making carries equal weight as others.

The leader can promote or impair collegiality. A court must have a leader who values collegiality and takes steps to nurture it to bring about a more collegial court. For example, Judge Harry T. Edwards[28] tried very hard to bring his colleagues together outside of their roles as judges. He remembered their birthdays and sent them small gifts. He also arranged private luncheons for the judges, and each term, they had a festive

26 Murphy, R. K. (n.d). Collegiality and Technology. *The Journal of Appellate Practice and Process.*

27 Coffin, M. F. (1985). *The Anatomy of Judicial Collegiality.*

28 Circuit Judge, United States Court of Appeals for the District of Columbia Circuit. Judge Edwards served as Chief Judge of the D.C. Circuit from October 1994 until July 2001.

private dinner with their spouses, during which they shared raucous tales about one another and laughed about the trying moment of the year that had just ended. That way, judges behaved more collegially on the bench due to frequent interactions outside the courtroom and the conference room.[29]

Judge Harry T. Edwards developed *"a model of collegiality"* when serving as Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit. Chief Judge Edwards transformed the court into a model of collegiality and efficiency and steered the court on a course of caring collegiality. Judge Edwards's passion for judicial collegiality has been well-known since he became Chief Judge in 1994. Judge Edwards always clarifies that by "collegiality," he has in mind something more than friendly and civil relationships among judges. According to him, disagreement goes hand-in-hand with collegiality; strong collegial relationships allow judges to express their disagreements and individual perspectives rather than suppress them for fear of being poorly received. A collegial judge has to be willing to engage and able to navigate the inevitable differences of opinion with respect and affection.[30]

Promoting collegiality requires a willingness to find the middle (compromise) ground and a willingness to give and take rather than engage in power struggles. The main challenge for an individual to develop a collegial approach is the willingness to be open to create the trust of others (Jones, 1997). It is because collegiality requires an awareness of each other's strengths to capitalize on them and of each other's weaknesses to shield them. Thus, opportunities to communicate (Lister, 2003) and develop professional intimacy (Rogers & Holloway, 1993) are significant. No miracle can create collegiality among judges. The magic has to emanate from within. For instance, organising social activities and events such as retreats, clubs, games, private luncheons,

29 Edwards, H. T. (2003). The Effects of Collegiality on Judicial Decision Making. *University of Pennsylvania Law Review.* Founded 1852.
30 Edwards, T. H. (2021). *A model of collegiality.* Duke University of Law.

and dinners are some strategies for fostering collegiality where judges can interact outside the formal courtroom setting. These activities can help build personal relationships and enhance collegiality.

Familiarity is one of the significant components of collegiality. Collegiality requires familiarity with other judges, which occurs only with regular face-to-face contact. For example, schedule regular meetings or conferences where judges can discuss, share experiences, and provide feedback to one another. These meetings can include discussions about legal developments, case management, and caseload distribution. Another example would be to encourage open and respectful communication among judges. Create a culture where judges can freely express their opinions, concerns, and ideas. Effective communication helps in resolving conflicts and building consensus. Another example would be holding a case conference where judges discuss difficult or complex cases before deciding. These discussions can help judges refine their arguments and reach a consensus.

Merely confining to their respective chambers demonstrates an apparent lack of collegiality, which is not a healthy trend. Judges frequently dining together and otherwise socialising when gathered for terms of court enhance familiarity. Absence does not make the heart grow fonder on an appellate court, and familiarity does not breed contempt. Absence makes the heart unfamiliar, and it does not breed collegiality.[31] Developing judicial collegiality must be an ongoing process requiring all judges' active participation and commitment. By fostering a culture of respect, open communication, and cooperation, appellate courts can ensure that their decisions are fair, well-reasoned, and consistent.

31 Murphy, R. M. (n.d). Collegiality and Technology. *The Journal of Appellate Practice and Process.*

VI. Conclusion

In conclusion, collegiality is fundamental to a fair and effective judicial system. It promotes fairness, consistency, and the rule of law while helping to maintain public trust in the legal system. It is a cornerstone of a functioning Judiciary, allowing judges to work together to administer justice and uphold the principles of law. The court can only be as good as its members can make it, starting with its judges. Judges must work together to deal effectively with their cases and collectively improve the quality of the proceedings and the justice they deliver. Collegiality is the means to effective teamwork. Because judges often make decisions as part of a group.

Collegiality has several benefits. First and most important, according to the Chief Justice of the Supreme Court of Canada, Richard Wagner, is that collegiality can improve the legal profession's image. Secondly, collegiality demonstrates the value of cooperation. In his remarks, Wagner said that collegiality, cooperation and respect among lawyers and judges do not mean that everyone is friends with everyone else or that there is never a disagreement. Thirdly, collegiality improves the judicial system. From a judicial perspective, Wagner said in his speech that "collegiality" evokes "a kind of working method for judges." It is "a process that helps to create the conditions for principled argument by allowing all points of view to be aired and considered."[32] Collegiality also leads to a greater respect for each other's style.

The studies have revealed that judges persistently invoke their judicial independence as a barrier to collegial discussions. However, judicial collegiality is not the antithesis of judicial independence. As demonstrated by collective efforts in recent years, judicial independence is fully compatible with judicial cohesion, which is crucial for improving judicial work and, more broadly, for the efficiency and effectiveness of

32 Retrieved 24.10.2023 from https://www.canadianlawyermag.com/resources/practice-management/why-collegiality-in-the-legal-profession-is-important-for-lawyers-judges-and-the-law/357334.

the institution. Highly competent collegial judges are essential for the court to succeed and thrive.

Creating a culture of cooperation and collegiality among judges, court staff, and justice sector institutions is among the highest priorities for the Chief Justice or the Chief Judge. The Chief Justice or the Chief Judge is uniquely positioned to model this culture by showing respect and civility to everyone. I hope I have conveyed the importance of collegiality to the judicial function. In my view, collegiality invokes the highest ideals and aspirations of judging. Collegiality should not only be professed but also cultivated and practiced by judges.

THE EDUCATION SYSTEM IN GHADEN: A PERSONAL REVIEW

*SONAM JAMTSHO

Abstract: Education in Bhutan is proliferating at a fast pace. The avenues for new learning are entering into the domain of knowledge creation every day. Knowledge management and the creation of the best educational apparatuses ensure that education as a modern instrument of change must be responsive. It requires the union of energy: institutional, legal, and the empowerment of a new domain of learning that is adaptive, relevant, and timely. This is to enable the education system to serve as the bastion of knowledge and values of an evolving society and imbibe the values and theories of change. Education should serve as the determinator of modern change and direction. It should encapsulate the values of change, values of education, values of society, and importantly, values inherent to Bhutan. More importantly, education must integrate modern education parlance and system and provide them with 'know-how' that is sustainable, lucrative, relevant, and contemporary.

Keywords: Education, knowledge management, empowerment

I. Introduction

In the heavenly abode of the blossoming gardens, a beautiful and greenly lush country lies in the direction of the warm westerlies. It is called *Gadhen.*[1] Everything here is unique; government, institutions, organizations, and the people. The schools are all named as the *Gadhen Lobdra.* That unique country has a unique system. Of all, education has the most beautiful and fascinating program responsible for social development. Its institutions have been furnished with all the resources of the country for the development of a good education system. The education system is inevitable for any change in the country. Though a daunting task, it has been shaping up carefully sensing all possible challenges, with the hope to educate its people. Student excels in learning in all fields and the learning is attainable by using the best education

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1 Name of an ideal imaginary country.

policies making it fit to the changing world. Education around the world, in most countries, took shape very late; most countries developed it from a very remote agrarian country into a model knowledge-based society. In this respect, *Gadhen's* education began its journey about six decades back, inspired by the conviction that it was the key to economic and social development. This article tries to embark on analyzing education as a system for institutional and social development in schools through the author's personal experience as a teacher for fourteen years in the *Gadhen Lobdra* with additional qualitative data from other relevant sources.

Education is a subtle idea, that may have been coined by a genius, many centuries back during the Roman Golden Era. Today, understanding education has become a cliché, yet it carries a powerful meaning. The word education stands as it is supported by two pillars in Latin: *educare* and *educere.* The first means, *"To train or to mold."* The second says, *''To draw out or to lead out.''*[2] Education always aims for high-quality outcomes, and in the process, it has modified itself under numerous laws and visionary Kings. In the mainstream education system, everything is important to make a country progress into a knowledge-based society. An independent process of change aligns with the main development agenda. Hence, "education is a game of development." The education system has undergone reforms intended to standardize the mechanism in the development of learning processes, plans, and policies that integrate into 21st century education needs and student and teacher transformation strategies.

Every nation in the world has a competition-driven goal, be it in education; and education is not within four walls today. New inventions, innovations, and artificial intelligence (AI) engulf the world, and there is no place for practicing conventional ways of teaching and learning in schools. The schools and related institutions must multiply the

2 Educare, Educere, Explorare. (n.d.). *Alliance for Self-Directed Education.* https://www.self-directed.org/tp/educare-educere-explorare.

effectiveness and efficiency of the youths. This raises the question of why schools or education in Finland and Japan top the world. The formula is simple; they have a specific education policy that endeavours at every level of the education system through specific targets and goals. Moreover, teachers are highly committed, and they have adequate professional skills and competence even for primary-level teaching. Teachers work for four hours a day with two hours of lesson planning and assessment.[3] Teachers need to be the epitome of knowledge and creation, ironically teachers in most countries including *Gadhen* are selected by chance and from the lowest rung of *merit-wise listing.* They are given the autonomy to create a teaching and learning environment in the class. People are looking for the best; a variety of strategized schools are set up, and academies and institutions are set on a students' need basis. The routine classroom lessons under strict homework rules and a stick for failures as a reinforcement strategy make people more complacent and produce the same outcome throughout the generations.

Gadhen, of course, is proud of universal access to education and afford to always provide free education and has a planned level of education.[4] Education is not only for literacy but cognitive, psychological, physical, and social preparation; a culmination of basic values, *Tha Damtsig* and *Ley Judre* for children is vital. The education policy roadmap, beautifully coined as *Rethinking Education* needs to first revisit and introspect and plan a way forward. A careful amendment and enactment of any document is expected to refine education system user-friendliness, and a farsighted education policy determines all that development. The transitional change is painful, especially for the older generation who were brought up in a disciplined and well-mannered learning environment. Today, a liberal child-friendly system coaxes the social paradigm shift, suddenly waning away the trust of our older generations. This transition

3 Voogt, J. (n.d.). *Finland: Emphasising Development Instead of Competition and Comparison.* https://www.oecd.org/education/ceri/34260381.pdf.

4 Wangdi, P., Sharma, G., Dochu, Phuntsho, L., Wangdi, S., Choden, S., Lhamo, T., Dukpa, P. Y., Wangmo, K., Gurung, A. K., Gyeltshen, S., Tshering, S., Yano, S., Manns, M., & Sigdel, S. (2015). *Bhutan Education Blueprint* 2014-2024: *Rethinking Education.* https://doi.org/10.13140/RG.2.2.12673.92006.

has brought mixed thoughts about school; some embrace the changes as they are needed with the time, and most remark it as losing *Damtsig* of the people taking the scenario of the modern lifestyle- traditionally strict followers of cultures and etiquettes forcefully adapt to the new times, new era and care-free society and people considered as a change.

II. Policy matters

Key policy issues, at times, are a great hurdle in the functioning of the education system, and any education system is under pressure to maintain its high-quality outcomes. Concurrently, there are growing concerns over student performance and high teacher attrition rates. To optimize teaching, learning, and school leadership, there is always a challenge in the field:

First, a fragile Education Policy creates unstable policies and planning. According to the author, the existing draft education policy in the country of Gadhen makes more frequent changes for short-term perspective and benefits. It submerges in the political pledges, and decisions overnight flood through the system based on assumptions. This concludes the status of the education system in the country. The education system creates a battleground where it does not win or lose the war. The study shows it is natural in the democratic world, that every government and leader tries to bring the best of the education system for the people. However, the constant changes disrupt the functioning or confuse the implementers in the field. The specific process and methods in the education system refine and polish young humans, and one who leads forward is expected to be high profile, visionary with high values.

The main features of developing a competitive, well-performing education system are well-guided by the policy, not based on postulations by the intermediate leaders as argued.[5] Policy can be built on common

5 Toom, A., & Husu, J. (2016). Finnish Teachers as 'Makers of the many': Balancing between Broad Pedagogical Freedom and Responsibility. *In Miracle of Education,* Brill. pp. 41–55. https://brill.com/display/book/9789460918117/BP000004.xml.

values and visions sustainably. It is expected that the policy enforcement by policymakers and education reformers is unquestionably focused on the standardization of education- setting up a high-standard testing system for the learner's outcome and a standardized evaluation system for teachers with high-stake academic accountability. This is challenged by authors that a teacher's performance is highly affected by the nature of policy setting, work environment, principal, and different work responsibilities aside from teaching and student assessment in the school. The research also found that the non-curricular responsibilities of the teachers drain the maximum time and energy of the teachers.[6]

Second, the culture of teachers taking up many responsibilities becomes a deep-rooted concern to many educationists in the world, sometimes focusing beyond their job mandates. Teaching is accepted as a noble profession. "Teaching is a rewarding but demanding profession."[7] The current system is, that teachers end up doing a tremendous job; 3-5 levels of classes in a day, 2-3 different subjects, student assessments, and other loads of non-curricular activities including *Individual Work Plans (IWP)* which is sufficed by the daily lesson and activity planning for the class. A sequence of activities after the day's class, and in the boarding schools, a series of programs that hold up to ten at night.[8]

The system has generated carrying out the robotic jobs, and schedule timing under each bell and this does not assure that students engage in quality learning. Teacher accountability and student learning follow-up are out of the question, they must move with the change and the aspiration of a larger progressing system.[9] Understanding this reality,

6 Jomuad, P. D., Antiquina, L. M. M., & Cericos, E. U. (2021). Teachers' workload in relation to burnout and work performance. *International Journal of Educational Policy Research and Review, 8 (2).*

7 Jomuad, P. D., Antiquina, L. M. M., & Cericos, E. U. (2021). Teachers' workload in relation to burnout and work performance.

8 Kaka, K. (2017). *Teacher workload in Bhutan: An analysis and proposal.* https://doi.org/10.13140/RG.2.2.34589.67040.

9 White, L. (2020). *The Importance of Accountability in Teacher Learning.* https://files.eric.ed.gov/fulltext/EJ1262922.pdf.

some teachers wait for the last bell to ring, substitution classes are left to the mercy of class captains and 3-4 teachers take leave every day. These challenges will never be solved under any circumstances until better and doable policies come to the rescue. In this system, the busy and the versatile are usually favoured and picked for opportunities ahead. For many, genuine hard work and sacrifice are never seen and rewarded. For instance, a teacher from the field shares, "Dedicated teachers at our school are rated 'good' only" in the *Annual Teachers' Moderation.* The seasoned teachers aspire for quality teaching and for this quality, time for planning is needed, and at the end of the day, teachers are responsible for inadequate student results.

Third, autonomous knowledge and learning are felt mandatory in the school. If quality subjects are taught, it requires a quality teacher to teach. Teacher training proficiencies must be reinforced. The gesture of sharing new policies, new discipline for teachers and students, use of substances, and conduct of mindfulness in the classroom are the usual agenda for professional development activities. The research activities in the schools are just in papers. Upon materializing the fact of research culture in the school, and seeing the challenges by the teacher researchers, some proactive schools started research activities and established Research Centres. However, the lack of support has rendered the school research programs futile. This monopoly of knowledge and idea creation has hindered homogenous progress. The author also believes that depth learning is more important than superficial learning so that children apply skills to any context. Understanding core concept skills by today's children rather than teaching information, limits the ability to transfer and apply knowledge to unfamiliar contexts.

Fourth, the school system is schooling the children rather than educating them. School children may fear homework more than their lives in the future. The functioning of the school system has challenged the evidence-based policy-making process, which hinders the relevancy of learners' needs and teacher professionalism. It is argued that countries around the world have started practicing evidence-based policies, to

outrun traditional opinion-based decision-making, which is desperately failing today.[10] Indeed, the higher education system faces a particular challenge, as the government aims to increase enrollment, on the other hand, with public funding under considerable pressure.

Furthermore, to develop a more internationally competitive tertiary system and labour market, there is a need for education to start skills and development. This is evident that only 3% of knowledge is used after graduation. In line with this, evidence-based policymaking becomes crucial to implement any changes. Several ambitious reforms brought in the past and reference to small research published elsewhere could be sufficient evidence to change the education system. This brings the idea of implementing based on personal research, *"One Child Seven Skills"*[11] with obligatory implementation in the schools. The changes are apparent, there are profound changes in curriculum and assessments to enable higher levels of learning. Another possible change in the school system is the creation of a new school organogram for cluster principalship, and other schools in a region which may function under one executive principal. In the field, one principal in one school is not enough to generate an effort to make a knowledge-based school. Whatever the changes, implementation of standards has frequently resulted in a much more familiar policy of test-based accountability and promotion based on their summative assessment. This disconnect between policy standards and reality is one of the reasons for the ineffectiveness of prior reforms.

The current 'Z' generation experience is much greater than the policy changes that are coming. They want to build a modern path and place at the international level. Science and technology have gained and deepened their entries and students easily use these apparatuses

10 Pellegrini, M., & Vivanet, G. (2021). Evidence-Based Policies in Education: Initiatives and Challenges in Europe. *ECNU Review of Education, 4* (1), 25–45. https://doi.org/10.1177/2096531120924670.

11 Research by the Chief Dzongkhag Education Officer, Dagana.

and tools to their positive advantage. Globalization has picked up its momentum; despite hurdles, every learner has the ambition to study and excel in modern education, study in world top universities, or participate in international-level education. The country has witnessed numerous changes that modified the lives of many, significantly in all spheres of development.

III. The Gadhen Lobdra matters

Making a system in the school where students abide by certain rules and norms about learning, can be easy as well as tough. The endeavour to make regions equal in educational opportunities and education quality is paramount and significant. However, an economics teacher confirmed that imbalance in society is a need to make the people and the society creative. Across *Gadhen Lobdra,* leaders are taking a great interest in international education. This interest stems from a belief that school leadership can significantly influence the quality of teaching and learning in their schools. Consequently, this can promote students' achievement by improving the working conditions of their teachers, and the climate and environment of their school. Numerous leadership theories have been presented in education-related literature with transformational leadership and instructional leadership being the preferred styles.

The author will examine the effects of both transformational and instructional leadership styles on improving student outcomes. This analysis will occur through three key points of focus: teaching and learning, the collaborative establishment of school goals and vision, and an awareness of and engagement with external forces affecting their school. However, many remote schools in *Gadhen* are not equipped with qualified or capable school leaders. Many schools are left without a principal and the teacher in charge must train himself through experience to learn about school leadership. Furthermore, the quality of leadership of experienced principals is also important. Principals should have at least a master's degree in education and should have adequate leadership skills since achievement in academic qualification reflects the growth mindset, discipline, grit, adaptability, and flexibility

to change. To provide transformational and instructional leadership to the teachers and students, all schools should have full-fledged qualified leaders. The problem lies in the inability to accommodate and pursue professional growth. Therefore, principals need to be the epitome of moral character, wisdom, and commitment to the vision of the school and the larger vision and mission of the nation. There needs to be a holistic selection process for educational leaders, and not just based on superficial observation such as qualification and experience, as sometimes experience will be just age with the track record of having relied simply on other team members' effort for so long. Thinking biases, fixed mindsets, and rigid beliefs are some of the greatest but invisible hurdles that must be borne silently.

It is said that "teachers who love teaching, teach students to love learning." Passionate teachers are required to take education to greater heights and the selection of teachers should also include a person's calling and earnestness to become a teacher besides competence, creativity, and resourcefulness. In the professional field, there needs to be an enabling environment to fan the flame of passion consistently. Teachers who are energetic and hard-working initially start losing their passion gradually due to factors such as the maturity of leaders and co-workers, systemic issues, and an absence of a merit-based system of engagement and promotion. Today, the *Individual Work Plans (IWP)* moderation exercise is another stressing factor for civil servants, especially teachers. The fallacy is that despite working equally hard, one of the teachers should get the needed improvement quota. This has led to far-reaching collateral effects such as fear, panic, stress, favouritism, destruction of cordial culture and low morale of staff who get this quota. Perhaps to save face, those who sense that they will get this quota, look for greener pastures to exit the profession.

Students are the cornerstone of education and future leaders and citizens of our country. They have the right to quality education and failing to furnish their privilege will in the long run affect society. In the country of *Gadhen*, special focus and care are given to the children. Children

are considered the future of our country and even the visionary Kings have pronounced, "The future of our country lies in the hands of our children." Compared to the past, schools today are furnished with better facilities including access to ICT facilities. The stipend for meals has been increased and students get adequate and nutritious meals compared to the past. Students today have a far better conducive environment to study than how it was in the past. Schools are doing their best to motivate students and raise the bar of their performance through the awarding of certificates, prizes, appreciation, and ceremonies. These approaches do not seem to succeed due to serious factors. When most students lack the seriousness to put their effort into academic subjects and show the least interest despite the best approaches, the school fails to make a good score in ALS.[12] This affects the teachers in moderation exercises. The first attempt is towards inspiring students, and then encouraging them. However, today students are distracted by technological gadgets. In as much as technology has helped them to augment learning, it has also harmed them since it lures them with online games and social media.

With more educated parents, and with the child-friendly approach that is in force and mandated, teachers' corrective measures sometimes lock horns with the parents and the law. No one likes corporal punishment and abuse, and it is right that such a negative disciplining approach should be viewed as inappropriate. However, many students are not properly disciplined at home. School becomes a place of parenting. Then, teachers are given full responsibility to manage their behaviour on one hand and facilitate learning on the other. Any mild corrective measure becomes an exaggerated offence and sometimes, teachers come into conflict with the laws. Teachers are mandated to ensure a holistic education and the overall well-being of each child. Besides these, they must plan, prepare, teach, assess, document, file up, and attend meetings, post conferences, school activities, national programs, and social programs. This kind of scenario has created more workload in the school. However, on the other hand, the lack of fear, lack of steadfastness, grit, and focus by the

12 Academic Learning Score.

students, has created a direct challenge in the face of modern education. Adequate school infrastructure, human resources, ICT resources, funds, opportunities for individual progress and growth, and mechanisms for universal teacher assessment will materialize the visions and creation of *Gadhen Lobdra.*

IV. Conclusion

The country of *Gadhen* has achieved tremendous feats under the leadership of the visionary monarchs and leaders. In the flux of rapid change and globalization, survival in the 21st century as a nation and as an individual is in no way guaranteed unless one evolves or adapts. Therefore, many welcome reformations as necessary for our country, and even education is transforming the progress of that nation. While reformation and change are being implemented, many considerations need to be considered for this process to go progressively.

ASTEROID MINING AND AERIAL MINERAL HARVESTING

*UGYEN TSHERING

Abstract: With the emergence and advancement of science and technology, countries have begun using aerial mineral harvesting. Mineral harvesting is one of the most recent developments in human space exploration. Space exploration and harvesting minerals from space stand as one of the most significant achievements of modern times. It posits a question about the ethical consumption of natural resources and the limits of human space explorations and human pursuit through science and technology. These explorations further widen the concept of space exploration, out-of-space exploration, and mineral harvesting, which serve as a vital link of purpose for exploration and consumption and provide the continuum of consumption and evolving human exploration patterns. These consumption patterns offer a space for legal analysis, and the article explores the legal paradigm in space mineral explorations.

Keywords: Asteroid, aerial mineral, harvesting

I. Introduction

Man has explored the smallest corner of the earth and the deepest oceans in pursuit of discoveries and explorations. Search for natural resources has become a part of the explorations. People's quest for a better and more comfortable life drives them to seek natural resources through extensive exploration and exploitation efforts. To this, [both] political experts and economists confine within the 'economic growth paradigm' as a strategic recourse. Economic growth is always associated with a rapid rise in the consumption of natural resources within an economy.[1] Progressively, 32 billion tons of mineral resources in 2003[2] and 61.1

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1 Nakajima, K. et al. (2018). Global distribution of material consumption: Nickel, copper, and iron. *Resources, Conservation & Recycling.* pp.369–374.

2 Wagner, M., & Wellmer. (n.d.). Global Mineral Resources, Occurrence and Distribution. *F.M. Environmental and Engineering Geology, 3.*

billion tons in 2020[3] have been estimated as consumed by the world's population of 6.389 billion and 7.821 billion, respectively. In 2003, a person, on average, consumed 5.08 tons of natural resources, and the average rate of consumption jumped up to 7.81 tons per person in 2020. The rate of natural resource consumption has manifestly increased to 46.25 percent over seventeen years.

Researchers studied a strong interlink between economic performance and natural resource volatility.[4] As we increase the exploitation of minerals and other natural resources, we gradually exploit and annihilate non-renewable resources, including the depredation of forests and vegetation covers. Scientists, political scholars, and experts identified as 'Resource Pessimists' express concerns about the impending exhaustion of finite minerals resources.[5] The opposing group to this proposition, called 'Resource Optimists,' argues that technological development would solve the problems of mineral scarcity.

As predicted by the 'Resource Optimists,' there is a light at the end of the tunnel, which serves as a hope to the predicament of depleting non-renewable resources as the resources hunt outstretches to outer space with the help of robust technological developments. Some developed countries and large companies have begun resource mining on the asteroids. Prominent space companies like SpaceX, Planetary Resources, and Deep Space Industries are launching robotic spacecraft to detect the metal and water contents in the asteroids.

When science and commerce compete to search for and mobilize resources, there are legal questions about the laws and rules regulating these explorations. These provide a legal space for the analysis of these

3 The World Count. https://www.theworldcounts.com/challenges/planet-earth/mining/environmental-impacts-of-mining.

4 Xie, M., Irfan, M., Razzaq, A., & Dagar, V. (2022). Forest and Mineral Volatility and economic performance: Evidence from frequency domain causality approach for global data. *Resource Policy, 76.*

5 Henckens, T. (2021). Scarce Mineral Resources: Extraction, Consumption and Limits of Sustainability. Resources, *Conservation and Recycling, 169.*

exploration attempts. Space laws took their roots half a century ago, but differential national policy approaches have perpetuated the existential differences and significant ambiguities in the administration of space laws.

International laws, which usually focus on preserving the ecosystem culture, should undertake a holistic view of the universe and the universality of natural ecosystems and ecology. In this field, international law societies have demanded 'better legislative supports, architectures, and legislative mechanization' to address the fast development of outer space legal sciences. It denotes the legality of space mining and the ownership of extra-terrestrial properties. However, as a strategic answer to this, only a few international laws, such as the *Outer Space Treaty of 1967,* declare outer space as a *'province of all mankind',* allowing all the states to explore space without any discrimination and limitations. The *Moon Treaty of 1979* provides outer space as the *'common heritage of all mankind',* which prescribes sustainable use of resources in space and proscribes commercial exploitation without proper regulation and management.

The article tries to deliberate on the potentialities of asteroid mining from the lens of commerce and space mining in line with the international laws on asteroid mining. The last part of this article will elucidate the loopholes of international space law and discuss potential solutions proposed by different scholars.

II. Asteroid Mining

National Aeronautics and Space Administration (NASA) defines asteroids as 'small, rocky objects that orbit the Sun.'[6] Asteroids are remnants from the formation of the solar system 4.6 billion years ago. According to NASA, the size of asteroids ranges from pebbles to a hundred miles in diameter; they are composed of different rock materials. A Japanese robotic spacecraft named Hayabusa, developed by

6 NASA. www.https://spaceplace.nasa.gov/asteroid/en.

the Japan Aerospace Exploration Agency, launched a mission on 9 May 2003 and returned on 13 June 2010 with sample material from 25143 Itokawa, an asteroid.[7] The analysis of the asteroid sample revealed two fascinating facts about asteroids to interested asteroid miners. They have discovered *achondrites* and *chondrites* rich in platinum group metals and water, respectively.[8]

Asteroids are predominantly located in the *Asteroid Belt,* between Jupiter and Mars, far beyond human explorers' reach. Martin Elvis, an astrophysicist at Harvard University, estimated that there are ten potential metal-rich asteroids and 18 water-rich asteroids in Near Earth Object within our reach.[9] Another ray of light showed asteroid mining on 6 February 2018, when SpaceX successfully launched Falcon Heavy, which weighed 1.421 million kilograms.[10] If such giant spaceships can be launched into outer space, the durability and feasibility of asteroid mining can intensify. John S. Lewis predicts that 'an asteroid of one-kilometre diameter would contain 30 million tons of nickel, 1.5 million tons of metal cobalt and 7,500 tons of platinum. Here, platinum alone would have a financial value of more than $ 150 billion.'[11] So, asteroids have undeniable potential to produce rare metals and minerals.

Large international companies like Planetary Resources and Deep Space Industries have already ventured into the treasure hunt in outer space. Planetary Resources launched ARKYD 3 on 14 April 2015 to test the components the company plans to re-send space crafts into deep space to examine resource-rich asteroids to extract water for fuel.[12]

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7 Fujita, K. et al., (2011). An Overview of JAXA's Ground Observation Activities for HAYABUSA Reentry, *Public Astronomical Society Japan, 63.*

8 Kuninaka, H. (n.d.). *Hayabusa Asteroid Sample Return Mission.* Japan Aerospace Exploration Agency.

9 Elvis, M. (2013). *How Many Ore-Bearing Asteroids.* Harvard-Smithsonian Center for Astrophysics Planetary & Space Science.

10 Chang, K. (2018). *Falcon Heavy, in a Roar of Thunder, Carries SpaceX's Ambition into Orbit.* The New York Times.

11 Lewis, J. S. (1997). *Mining the Sky: Untold Riches from Asteroids, Comets and Planets.* Perseus Books Group: New York

Subsequently, they launched ARKYD-6 on 12 January 2018 to explore the presence of water in space.

Deep Space Industries are involved in experimentation to harvest solar power by using satellites, which are studying and mining asteroids using solar-generated power.[13] The scientific research regarding space mining has touched only on the technical possibility and economic viability but has hardly touched on environmental impacts. However, studies have shown that in-space water supply and platinum mining provide a bootstrapping factor: asteroid mining generates substantial environmental benefits compared to its alternatives.[14]

Hence, we can assuredly conclude that asteroid mining is possible, and we may, sooner or later, see the minerals shipping in from outer space. The next and most important question is, *should the law allow such mining? And if yes, how should such activities be managed and regulated?*

III. Existing International Legal Infrastructure

Through Resolution 1348, the United Nations General Assembly (UNGA) set up the *Committee on the Peaceful Uses of Outer Space* in 1959 to govern the exploration and use of space for all humanity's benefit: peace, security, and development.[15] The United Nations Office for Outer Space Affairs is the secretariat to the Committee, which is mainly concerned with promoting international cooperation in the peaceful use of outer space around two outer space laws, namely, *The Outer Space Treaty of 1967* and the *Moon Agreement of 1979*. Here, on contemplation and analysis of the legality of asteroid mining, the question of proprietary rights arises.

12 Planetary Resources. (2015). *Arkyd 3 Reflight (A3R) Launches from Cape Canaveral on SpaceX CRS-6.*

13 Feinman, M. (2014). Mining the Final Frontier: Keeping Earth's Asteroid Mining Venture from Becoming the Next Gold Rush. *Pittsburgh Journal of Technical Law and Policy, 14.*

14 Hiena, A.M., Saidania, M., & Tollua, H. (n.d.). *Exploring Potential Environmental Benefits of Asteroid Mining.* Industrial Engineering Laboratory.

15 Committee on the Peaceful Use of Outer Space. https://www.unoosa.org/oosa/en/ourwork/copuos/index.html.

a. The Outer Space Treaty of 1967

The Outer Space Treaty of 1967 does not mention asteroid mining. However, significantly, it has laid down the two fundamental principles regarding the exploration and use of outer space. Article I of the *Treaty* provides that outer space, including the moon and other celestial bodies, shall be *'the province of all mankind.'* However, the *Treaty* does not define the principle of *'province of all mankind',* and it has become a conundrum in the space law.

Commenting on the ambiguity of the principle, German lawyer Bueckling says that attempts to develop and establish legal rules governing a vast and highly complex subject matter like space exploration are like trying to hack down Mount Everest with a blunt kitchen knife.[16] Professor Stephen Gorove tries to define the principle of *'province of all mankind'* by distinguishing mankind and man. He states that the former refers to a collective body of people, whereas the latter represents the individual making up that body.[17] According to him, mankind refers to all the people, but no one has attempted to define 'province.' Hoffstadt believes that the word 'province' talked about a *res communis*[18], but Zhukov, on the other hand, says that the *'province of all mankind'* could not have any broader significance than a *'common heritage of all mankind.'*[19]

Another principle laid down by the *Outer Space Treaty* is *res communis,* which can be deduced by reading Articles I and II together. Article II states that outer space cannot be appropriated by the claim of sovereignty, and article I provide that exploration and outer use of space shall be carried out for the benefit and in the interest of all countries, irrespective of their degree of economic or scientific development.[20] The principle of *res communis* also simply says that it is community property,

16 Bueckling, A. (1972). The Strategy of Semantics and the Mankind Provisions of the Space Treaty. *Journal of Space Law, 7.*

17 Gorove, S. (1972) *The Concept of "Common Heritage of Mankind": A Political, Moral or Legal Innovation.* San Diego Law Revision.

18 Hoffstadt, B. M. (1994). *Moving the heavens: Lunar Mining and the "Common Heritage of Mankind" in the Moon Doctrine.*

19 Bueckling, A. (1972).

and an individual or group cannot own it. So, space can be used for 'common benefit, but such resources cannot be subject to private ownership or state sovereignty.'[21] Based upon these provisions, asteroid mining aspirants argue that asteroid mining should be allowed as it would benefit the world by satisfying the demand for depleting metals on the earth's surface.

b. The Moon Agreement

UNGA adopted the *Moon Agreement* in December 1979 through Resolution 34/68 but was not in force until June 1984 when the fifth country, Austria, ratified it.[22] Countries like the USA and Russia, potential asteroid mining countries in terms of technology and finance, have not signed the *Treaty* because the *Treaty* states that the moon and its natural resources are the *'common heritage of mankind.'*[23] Article 11 of the *Agreement* expressly prohibits appropriating the surface, subsurface of the moon, any part of the moon, and natural resources by the state or any governmental, non-governmental, and international organizations. If the *Treaty* prohibits appropriation, there is no question of the legality of asteroid mining.

The language of the provision specifically talks about the 'moon' only. Still, Article 1 of the *Treaty* states that 'the provision of the agreement relating to the moon shall also apply to other celestial bodies within the solar system other than the earth.'[24] From the reading of Article 11 and Article 1 together, the *Treaty* prohibits mining on the asteroid.

Countries like the USA argue that the *common heritage* principle should be applied to the *Moon Agreement* as per the standard set by the *Third*

20 Article I of *Outer Space Treaty 1967.*
21 Tan, D. (n.d.). Towards a New Regime for the Protection of Outer Space as the Province of All Mankind. *Yale Journal of International Law.*
22 Listener, M. (2011). The Moon Agreement: Failed International Law or Waiting in the Shadow. The Space Review.
23 Article 11 Para 1 of the *Moon Agreement.*
24 Article 1 of the *Moon Agreement.*

Convention on the Law of the Sea. On the other side, others contend that *common heritage* in space should not be taken the same as in the sea since it is mentioned in the *Moon Agreement* with explicit language. [25] The *common heritage* principle is the most argued subject in *Law of the Sea,* where industrialized countries demand lenient interpretation while developing countries call for strict interpretation.

Para 5 of Article 11 of the *Moon Agreement* provides for establishing an international regime to govern the exploitation of natural resources of the moon,[26] and the purpose of such regime includes 'an equitable sharing by all States in the benefits derived from those resources.'[27] However, NASA estimates the cost of the *Asteroid Redirect Mission* to be $2.6 billion, and the California Institute of Technology study also showed the cost of asteroid mining to be $2.6 billion.[28] No country nor a private company would invest billions of dollars to be shared equally.

c. Ambiguity in Space Law

The *Moon Agreement* is labelled a failure by critics as only six countries have ratified the *Treaty,* and most of the space-faring countries are reluctant to endorse the *Treaty* as it contained the provision of a *'common heritage of mankind'* and the *'international regime'* to share the benefits equally. The *Moon Agreement* is a soft law that remains unenforceable until the country ratifies it.

Space law is one of the newest fields of International Law, and there is no international customary principle regarding space law. Dr Gbenga Oduntan argues that commercial mining on planets and asteroids can remain ambiguous until an international regime governs such exploitation; it is binding on non-party States as customary international

25 Heim, B. E. (1990). Exploring the Last Frontiers for Mineral Resource: A Comparison of International Law Regarding the Deep Seabed, Outer Space, and Antarctica.*Vanderbilt Journal of Transnational Law, 23.*

26 Article 11 para 5 of the *Moon Agreement.*

27 Article 11 para 7 (d) of the *Moon Agreement*.

28 Glester, A. (2018). *The Asteroid Trillionaires.* Physics World.

law.[29] Non-appropriation of space and celestial bodies became customary international law as soon as the *Space Treaty* was adopted.[30] They also argue that the legal nature of space has been changed from *res nullius* to *res extra commercium,* which continues to be *res extra commercium*.[31]

The Outer Space Treaty of 1967 is the most accepted in space law, but it has also been criticized for its ambiguity and loopholes in regulating space affairs. For example, Dennis Hope, an American citizen, has been selling the land on the moon's surface since 1980 with a Copyright Registration Certificate from the US Government.[32] In its defence, the USA argues that Article II of the *Treaty* prohibits 'national appropriation by the claim of sovereignty, using use or occupation, or any other means, and there is no expressed prohibition of appropriation by private individuals.'

However, commentators argue that Article 6 of the *Outer Space Treaty* imposes individual countries with international responsibility for national outer space activities carried out by governmental agencies or non-governmental entities. *'National activities'* include governmental and non-governmental activities and require conformity with the *Outer Space Treaty,* which prohibits appropriation. Moreover, VLCT mandates the treaty to be interpreted under the ordinary meaning to be given to the terms of the treaty in their context and light of its object and purpose.[33] If not a private company, what non-governmental entity capable of spaceflight could the framers of the *Outer Space Treaty* have in mind?[34] Virgiliu describes the sale and purchase of the moon's surface as *sancta simplicitas,* and he argues that Dennis Hope merely has the

29 Oduntan, G. (2015). *Who Owns Space? US Asteroid Mining Act is Dangerous and Potentially Illegal.* NSNBC International.

30 Su, J. (2017). Legality of Unilateral Exploitation of Space Resources Under International Law. *International & Comparative Law Quarterly, 66.*

31 William, S. M. (n.d.). The Law of Outer Space and Natural Resources. *International & Comparative Law Quarterly.1.*

32 Lunar Embassy. https://lunarembassy.com/head-cheese.

33 Article 31 of the *Vienna Convention on the Law of Treaties.*

animus possidendi but not the *corpus possidendi* to claim ownership of the moon.[35]

The Outer Space Treaty does not provide anything about asteroid mining, and it might have been beyond the foresight of the framers that the world would colonize the minerals stored in asteroids after half a century. Many astrophysicists have confirmed the reservoir of depleting metal at asteroids, and they suggest colonizing the universe to save the earth. Many private companies have taken considerable steps towards asteroid mining, but the laws are still misty. On calling the need for the new international law to regulate asteroid mining, Matthew Feinman says that asteroid mining should not result in the California Gold Rush, and after it becomes like the Gold Rush, it becomes challenging to settle. [36]

IV. Proposed Solutions to the Issues

a) The Requirement of International Regulatory Body

United Nations Office for Outer Space Affairs has been working to regulate the peaceful use of outer space. However, the specific authority to oversee the commercialization of space and asteroid mining is required just as there is the International Seabed Authority to oversee seabed mining in the international territory. An institution of a Regulatory Body is found to conform with the international apparatus mentioned in Article 11 of the *Moon Agreement* to govern space resource exploitation.[37] Professor Carl Quimbay Christol believed that such a body is the best and perhaps the only way to maintain open communication channels among public and private institutions that seek to use lunar resources.[38]

When NASA's Near-Shoemaker landed on 433 Euros, Gregory Nemitz accused NASA of trespassing on his property.[39] His claims were

34 Heise, J. (2018). Space, the Final Frontier of Enterprise: Incentivizing Asteroid Mining under a Revised International Framework. *Michigan Journal of International, 40.*

35 Pop, V. (2001). The Men Who Sold the Moon: Science Fiction or Legal Nonsens. *Space Policy, 17.*

36 Feinman, M. (2014).

37 Coffey, S. (n.d.). Establishing a *Legal Framework for Property Rights to Natural Resources in Outer Space.*

38 Christol, C, Q, (1980). An International Regime for the Moon. *Colloquium on Law of Outer, 23.*

dismissed, and no legally binding law interpreter and enforcer existed. The listener has asked a very critical legal question on space proprietary issues. If a national of the nonsignatory's country of the *Moon Agreement* claims the same surface of land on the moon bought from the Lunar Embassy, how will the conflict be resolved?[40] The United States would not have territorial or national jurisdiction over the case. So, the dispute settlement process and forum are required to settle disputes between foreign parties.[41]

b) Asteroid as a Chattel

Article II of the *Outer Space Treaty* states that outer space, including the moon and other celestial bodies, is not subject to national appropriation. However, the proponents of asteroid mining argue that asteroid does not fall under the meaning of 'celestial bodies.' The *Treaty* uses the phrase like the moon and other celestial bodies which might support an *ejusdem generis* inference that the celestial bodies envisioned by the *Treaty* must be moon-like; that is to say, a celestial body must be very large and predictable orbit around a planet or star, including planets and moons, but excluding asteroids and comets.[42]

Another argument is that the moon and other planets are real property, and asteroids are chattel as they can be captured, slowed down, and relocated.[43] If international space law identifies the difference between an asteroid and celestial bodies and considers asteroids as personal property or chattel, it would unravel the confusion of space property law and boost asteroid exploitation.[44]

c) The Doctrine of Appropriation

Some scholars argue that declaring an asteroid as a chattel would

39 Feinman, M. (2014).

40 Listener, M. J. (2003). The Ownership and Exploitation of Outer Space: A Look at Foundational Law and Future Legal Challenges to Current Claims. *Regent Journal of International Law.*

41 Zullo, K. M. (2002). The Need to Clarify the Status of Property Rights in International Space Law, *The Georgetown Law Journal.*

42 Heise, J. (2018).

43 Tingkang, A. (2012). These aren't the Asteroid we are Looking for: Classifying Asteroids in Spaces as Chattels, Not Land. Seattle *Universal Law Revision.*

44 Tinkang, A. (2012).

jeopardize the use of an asteroid. If asteroids are considered chattel, an entity would claim and register ownership over multiple asteroids. It would lead to abstract claims as an entity would claim over an asteroid even before landing on it. If asteroids are declared the same as chattel in the eye of the law, the solar system could be divided up long before the resources could conceivably be mined.[45]

Ross Meyers proposes that the doctrine of appropriation should be used in the proprietary issues of asteroids.[46] He says that an asteroid is like water, and applying the doctrine of appropriation would reduce false claims about asteroids. An appropriation doctrine is best described as 'first in time, first in right.' According to this doctrine, a person who gets the right to appropriation will receive the fixed portion of the asteroid without consideration to other users. Even in a shortage of resources, the first right holder receives the fixed portion, and others get the resources in order of their acquisition date.

d) Equitable Sharing

The three solutions discussed above look forward to legalizing and regulating asteroid mining, but the questions of sustainability, environmental viability, and probable risk to the planet remain in abeyance, which would be significant factors in determining its legality. If it is sustainable, environmentally viable, and poses no risk, why should the law proscribe such a fortune? But when larger countries and companies exploit and enjoy their fortune, the world will face catastrophic consequences, equally, if any, just like the wrath of climate change. When industrial giants reap the benefits of enormous carbon-producing factories, even carbon-negative countries like Bhutan suffer from global warming. The fruits of asteroid mining should be equitably distributed, not just because of the principle of *res communis* and the provision of treaties but also because the whole world must bear adverse

45 Meyers, R. (2015). *The Doctrine of Appropriation and Asteroid Mining: Incentivizing the Private Exploration and Development of Outer Space.*
46 Meyers, R. (2015).

effects. Just like global warming, a blunder of industrialists and the negative effect of asteroid mining would know no territorial limitations.

V. Conclusion

In international space law, the property right over space resources and the legality of asteroid mining have remained in a grey area. The international treaty, which was prominently accepted by the member nations, contains many pores of ambiguity. There is no expressed regulation of asteroid mining in the *Outer Space Treaty* of 1967. The *Moon Agreement of 1967,* which seeks to supplement the shortcomings of the *Outer Space Treaty,* has not been signed by space-faring nations. There is only a tug of war among the international community, with some supporting asteroid mining while others refuting it. When some say that the non-appropriation of a celestial body is the international customary principle, others vehemently contradict the statement.

There is a dire need for new international law which allows sustainable asteroid mining. The prohibitive law, just like the *Moon Agreement,* would not be a success because the space-faring states and large space industries are already on their way to fortune. Instead, we need international regulatory law with a robust regulatory body with a dispute settlement body and procedure. An unregulated race to space resources would lead to pandemonium, and the race to space resources needs to be adequately controlled and regulated for the benefit of mankind.

REEVALUATING THE PROPOSED CONCEPT OF GROSS NATIONAL HAPPINESS AS THE GUIDING PRINCIPLES IN INTERNATIONAL COMMERCIAL ARBITRATION

*STEVE NGO

Abstract: *Gross National Happiness (GNH)* is the guiding development principle that is rooted in the concept of value. International Commercial Arbitration has successes as well as shortcomings. In this, *GNH* can be seen as the guiding and implementable principle which can act as a catalyst to improving commercial dispute resolution in Asia. The domains are compatible with promoting holistic approaches and human fulfilment including culture and custom elements that are central to human lives. The article explains the fundamentals of international commercial arbitration and the relevance of *GNH* domains as a guiding principle.

Keywords: Guiding Principle, Gross National Happiness, International Commercial Arbitration

I. Introduction

As an introduction, in *Gross National Happiness (GNH) as Guiding Principles in International Commercial Disputes Settlement,*[1] I briefly examined the shortcomings and problems that accompanied the vast success of arbitration in the resolution of international commerce[2] and posited creating guiding principles based on the Gross National Happiness

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1 Ngo, S. (2021). Gross National Happiness (GNH) as Guiding Principles in International Commercial Disputes Settlement Appraising Appropriate Dispute Resolution for China–ASEAN Commerce. *China and the World: Ancient and Modern Silk Road, 4* (1).

2 Ngo, S. (2021). Gross National Happiness (GNH) as Guiding Principles in International Commercial Disputes Settlement Appraising Appropriate Dispute Resolution for China–ASEAN Commerce.

(GNH) domains to address these issues. For this article, the guiding principles will be referred to as the *GNH* arbitration guiding principles or guiding principles interchangeably.

The catalyst for this novel idea stems from the fact that the current international arbitration practices are very demanding, turning it into a vigorous area of practice affecting the users and actors at times referred to as the arbitration 'actors' and 'service providers.'[3] The *GNH* arbitration guiding principles using the *GNH* that I suggested are not a set of 'soft laws' or protocols nor does it harbour any such ambition to become one, given also that the arbitral world is fairly exhausted by an exhaustive list of proposed frameworks including through private initiatives. In turn, I am suggesting that the guiding principles can be applied in the context of improving commercial dispute settlement in Asia where I have found that the *GNH* domains appear to be compatible with promoting holistic approaches and human fulfilment including where culture and customs elements are central in human lives[4] thus be given consideration.

In this article, I will not be providing a detailed explanation of the fundamentals of international commercial arbitration; after all, arbitration is already widely known to those who are from the practice of commercial law and international dispute resolution. Nevertheless, this article will reevaluate the relevance of using the *GNH* domains as guiding principles and attempt to suggest its application.

II. Grievances about International Commercial Arbitration- Have They Abated?

Grievances about international commercial arbitration are not myths and they are well documented, researched, and discussed.[5] There is no

3 Terms used in an article by Emmanuel Gaillard on the study of the 'sociology' of arbitration, see Gaillard, E. (2015). Sociology of international arbitration. *Arbitration International 31*(1).

4 Ngo, S. (2021). Gross National Happiness (GNH) as Guiding Principles in International Commercial Disputes Settlement Appraising Appropriate Dispute Resolution for China–ASEAN Commerce.

5 Queen Mary University of London (QMUL) annual arbitration survey reports.

evidence to suggest that the problems associated with arbitration such as high cost, complexity, or lack of speed[6] would vanish though they may be decreased through interventions or means intended to improve it; the proposed *GNH* arbitration guiding principles are conceptualised as one possible means of contributing towards improving current arbitration practice. Nevertheless, it is reasonable to ask why arbitration is in its current state. It would not be surprising when a system of dispute resolution which is widely accepted and used in tandem with the massive growth of international trade today would result in increasing complexity as practically the world is doing cross-border business more than before given the globalized state of the world economy.

The idea of arbitration in the past being a method of dispute resolution alternative to mainstream court litigation means that arbitration was an option based on the parties' explicit choice also means that when they agreed to arbitration, they did so because of what this method has to offer particularly the features of speed and cost savings. For instance, in the past arbitration was often associated with the engineering, construction or shipping sectors where the ensuing contractual disputes tend to be technical and would be advantageous to be resolved expeditiously. Previously, architects, engineers and construction experts tended to be appointed as arbitrators and parties have been represented by technical claims specialists instead of wholly by legally trained professionals. How a court judge may not understand the civil engineering terms of beams, columns and 'negative skin friction' would rather revengefully put technical people in a bind over the meaning of 'discovery' or 'leave of the court.' Technical arbitrators used to be less legalistic, consequently, the parties are likely to present their technical disputes more factually and there are fewer legal 'technicalities' involved.

Today's commercial world is legalistic for the stakes are high. The nature of trade and investment is far more complex than before involving multi-parties. At times, the arbitration agreement in the parties'

6 Ngo, S (n.d.). 2150004-17

contracts is denied by a party resulting in a 'dispute within a dispute' or the constitution of the tribunal being challenged. Indeed, the success of arbitration in part has led to it being a disappointment to its users however,[7] it would probably be unfair for arbitration to shoulder all the blame for the users and service providers are in the position, in large part because of the concept of 'party autonomy,' to decide how their arbitrations are essentially conducted. Be that as it may, on a global basis, it is reasonable to say that arbitration is the method most frequently used to settle international business disputes.[8] Hence, we have to live with arbitration instead of eliminating it, but some of its problems which might have become inherent can be mitigated or managed without necessarily having to procure its panacea.

III. Revisiting and Revising the Idea of GNH as Guiding Principles in Arbitration

Earlier, in conceptualizing the *GNH* guiding principles, I suggested the following issues prevalent in international arbitration mapped against the *GNH* domains. Indeed, it is evident that the *GNH* domains are impressive in that they are a set of values or philosophies that can be effectively applied to even within a specialist domain such as international arbitration law and practice. The *GNH* domains that I have applied in my earlier study were: psychological well-being, health, education, time use, cultural diversity and resilience, good governance, community vitality, ecological diversity and resilience; and living standards. With the benefit of the passage of time, in my revision of this article, it would appear that some of the domains may overlap thus I have now adopted

7 "To some extent, arbitration has become a victim of its own success, as the arbitral process moves beyond the simplicity of earlier days, finding acceptance as a commercially preferred path to decide significant business disputes. Expectations of procedural simplicity often breed disappointment in the context of adjudicatory reality." Park, W.W. (2017). *Arbitration and Fine Dining: Two Faces of Efficiency,* No. 17-25 Boston University School of Law, Public Law Research Paper (2017) 3.

8 Queen Mary University of London (QMUL). (2021). *International Arbitration Survey: Adapting arbitration to a changing world. International arbitration is the preferred method of resolving cross-border disputes,* Queen Mary University of London. https://arbitration.qmul.ac.uk/research/2021-international-arbitration-survey.

six *GNH* domains. They are described as follows with comments on the application of the *GNH* arbitration guiding principles:

a. **Psychological well-being** – with the increasing complexity and value of disputes referred to arbitration, proceedings can be stressful for the parties, counsel and arbitrators. The parties are under tremendous pressure whether as claimants or respondents and this could affect them psychologically. Likewise, counsel or party representatives are also under pressure as they are often expected by the parties to fulfil their expectations. As it is, mental well-being is increasingly becoming an aspect of concern for legal practitioners.[9]

   ***GNH* arbitration guiding principles**: Parties are encouraged to consider conciliation or mediation even during the arbitration process or direct negotiation with a view of amicable settlement out of arbitration. Arbitral institutions can also incorporate comprehensive rules that encourage such a conciliatory approach to disputes that have been referred to arbitration including provisions that would be sensible to the arbitrators in terms of their fees or remuneration when a settlement is achieved.

b. **Health – complex disputes and time**-consuming proceedings can also impact the health and physical well-being of the parties, their counsel[10] and perhaps even arbitrators. Complex or "full-blown" arbitrations are demanding in terms of focus and attention of all those involved.

9 Strumberger, S. (2023, April 28). Today's Lawyers and Mental Health: Mental Health Awareness Month. *Thomson Reuters Law Blog.* https://legal.thomsonreuters.com/blog/todays-lawyers-and-mental-health.

10 Sloan, K. (2023, February 14). Stress and Overwork Linked to Lawyers' Suicidal Thoughts, Study Says. *Reuters.* https://www.reuters.com/legal/litigation/stress-overwork-linked-lawyers-suicidal-thoughts-study-says-2023-02-13.

***GNH* arbitration guiding principles**: Apart from conciliation or mediation even during the arbitration whenever viable, the parties could also agree to the tribunal agree to an abbreviated or expedited arbitration, particularly for less complex cases. The arbitral tribunal could also jointly agree with the parties to adopt an inquisitorial approach during the proceedings.[11]

c. **Education** – the substantial growth of international commercial arbitration has inevitably led to it becoming an area of practice dominated by legal practitioners in developed countries where some of these geographical locations have also become current global arbitration hubs such as Singapore, London, Hong Kong, Paris, and Geneva.[12] Arbitration is a process conducted in private thus the opportunity for the neophytes and aspirants to observe or learn can be limited. There could be more opportunities to educate practitioners and aspirants in emerging or developing countries on arbitration as the use of this method of dispute resolution is becoming prominent and important. In reality, arbitration proceedings tend to be very closed door with only the parties, counsel, and tribunal present throughout.

***GNH* arbitration guiding principles:** While arbitration is private by nature meaning its proceedings are not open to the public, it is still possible to allow participation by observers subject to prior approvals of the parties. The

11 Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules) 'Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules)' <https://praguerules.com/upload/medialibrary/9dc/9dc31ba7799e26473d92961d926948c9.pdf>

12 Queen Mary University of London. (2021). International Arbitration Survey: Adapting arbitration to a changing world. < https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-Internatonal-Arbitration-Survey-2021_19_WEB.pdf> 6.

involvement of arbitral tribunal secretaries and assistants whenever viable can be encouraged.

d. **Time use** – time is of the essence but in international arbitration, postponement and delay are common due to tactics (e.g., guerilla tactic) deployed by the parties or procedural inefficiency. Any prolongation of arbitration proceedings may have undesirable effects on the parties, counsel and tribunals.

   ***GNH* arbitration guiding principles:** Time efficiency is widely discussed in terms of the disadvantages of arbitration. The arbitral tribunal can take the lead in terms of better time management, in leading the proceedings like a music conductor in a symphony orchestra however this is not always that straightforward as the tribunals may be up against a party not keen to progress quicker. The tribunal can agree on a procedure at the outset that allows the implementation of efficient time management. Arbitral institutions such as the *International Chamber of Commerce (ICC), Prague Rules,* and the *IBA Guidelines* have published notes and guidelines aiming at time efficiency in arbitration.

e. **Cultural diversity and resilience** – cultures and customs are two elements that need to be taken into consideration when it comes to dispute resolution.[13] Indeed, culture can influence how one presents his case or in voicing views or arguments including[14] in dispute settlement. A robust

13 Fisher and Ury who are well known for creating the concept of "BATNA" in negotiation said, "Pay attention to differences of belief and custom, but avoid stereotyping individuals. Different groups and places have different customs and beliefs…" Roger Fisher and William Ury (1991) Patton, Bruce (ed.). Getting to YES: Negotiating Agreement Without Giving In (Century Business, 1991) 175.

14 Tjong Very Sumito and Others v Antig Investments Pte Ltd [2009] SGCA 41, 'One must also be particularly mindful when dealing with cross border transactions, since there may even be cultural reasons for silence: in certain societies, a non-confrontational approach is prized' [61]

adversarial approach in dispute resolution may not appeal to those who are unfamiliar with such a system or worse still, language proficiency could be a barrier (international commercial arbitration these days tends to be conducted in the English language).

***GNH* arbitration guiding principles**: There are various approaches to bridging cultural gaps in international arbitration. For instance, choose proceedings that allow each of the parties to be able to present its best case forward. Counsel for parties from civil law jurisdiction is likely to prefer putting greater emphasis on written advocacy than oral advocacy[15] since the latter is predominantly English tradition and a central feature in US-style litigation. On the other hand, in proceedings where extensive interpretation and translation are expected as a party may not be able to use the English language, the arbitral tribunal needs to consider this and ensure that the party is not prejudiced or made to feel disadvantage.

f. **Ecological diversity and resilience** – post-COVID-19, many people have resumed air travel. International arbitration is synonymous with international travel as preparation, preliminary meetings or hearings require the participants located in different countries to meet in person. This can contribute to increasing carbon footprint. On the other hand, due to digital platforms, the use of paper documents these days has been substantially reduced although many are still preferring hardcopy paper thus more can be done to discourage the use of the latter.

15 For further interesting reading, see Lord David Neuberger, President of the UK Supreme Court, 'Keynote closing address to the International Council of Advocates and Barristers' (Word Bar Conference 2016, 16 April 2016) < https://www.supremecourt.uk/docs/speech-160416.pdf> accessed 3 November 2023

***GNH* arbitration guiding principles** – discourage the in-person meeting unless necessary and use virtual meetings as a substitute. This can reduce the need for travel, thus carbon footprint and costs. With the increasing use of electronic discovery or electronic-based evidence and submission, parties and arbitral tribunals can contribute to lessening the use of the hardcopy bundle which can be voluminous and can be substituted to reduce costs as well as environmental protection.

IV. Using the GNH Arbitration Guiding Principles- "GNH Arbitration Schedule"

A suggested schedule as per below can be utilized by the parties and can be customized according to their needs. As the parties in arbitration can agree on the procedures to be followed[16] such a schedule can be incorporated into the procedural order or whichever way the parties prefer. It must be reiterated that such a schedule is intended to be effortless and not to create additional bureaucracy, which otherwise will be contrary to the spirit of *GNH.* It is consensual and seeks to provide all the parties and the tribunal with a basic and common understanding of how to conduct the arbitration proceedings holistically into taking consideration the usual goals of dispute resolution via arbitration and human fulfilment. The idea is for the schedule to be circulated between the parties for their completion and finally by the arbitral tribunal for its comments and decision if required. It is entirely up to the parties as to how they would utilize the *GNH Arbitration Schedule.*

16 See the principles in UNCITRAL Model Law art 19(1) "…the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings."

Table 1: GNH Arbitration Schedule

	GNH Dimensions	Claimant	Respondent	Tribunal	Decision
1	Psychological well-being				
		Comments:	Comments:		
2	Health				
		Comments:	Comments:		
3	Education				
		Comments:	Comments:		
4	Time use				
		Comments:	Comments:		
5	Cultural diversity and resilience				
		Comments:	Comments:		
6	Ecological diversity and resilience				
		Comments:	Comments:		

In terms of application, it would be useful to demonstrate through an illustrative working document as per below.

Table 2: Illustration of the GNH Arbitration Schedule

Claimant: Everest Peak Private Limited (Bhutan)
Respondent: Singa Star Limited (Singapore)

Arbitration Case No: 008/2023 (International Arbitration Centre)
Arbitral Tribunal: (1) Professor T. Sample (2) Dr O. Example (3) Mdm Z. Template (Presiding)

	GNH Dimensions	Claimant	Respondent	Tribunal	Decision
1	Psychological well-being	The claimant's settlement offers stand until the end of the first day of the oral hearing	None	Agreed	As per the parties' choice
		Comments:	***Comments:*** Respondent's counteroffer is similarly valid until the end first day of the oral hearing		
2	Health	Suggests that the tribunal adopt an inquisitorial approach. Cross-examination of witnesses to be less hostile, 'non-court style'	None	Parties need to decide for themselves the tone to be used, Tribunal is unable to insist on the parties. However, the tribunal can adopt a fact-finding approach equally across the board.	As per the Tribunal's comments taking into consideration the parties' consensus.
		Comments: None	***Comments:*** No objection. For an inquisitorial approach, the tribunal must be balanced and fair to all parties		
3	Education	Respondent's team during discussions and oral hearing would include two legal trainees who are postgrad students from JSW Law School.	None	No objections	The tribunal agrees that details of the attendees are to be provided and a confidentiality agreement signed.
		Comments: None	***Comments*** Please provide details and a CV. Please sign a confidentiality agreement		

4	Time use	Minimal time extension request, postponement. In the event of an inevitable request, unless necessary, the other party may not necessarily need a similar time extension for the sake of doing so.	None	None	The tribunal agrees and follows the agreed timeline/schedule
		Comments: None	***Comments:*** Agree in principle, on best best-effort basis unless a time extension is necessary.		
5	Cultural diversity and resilience	Some of the factual witnesses are not very fluent in English and are technical people who are not familiar with legal proceedings. Would request a 'friendlier' approach, especially for the first-timer in arbitration proceedings.		None	As per the parties' agreed procedure. The tribunal will ask questions (inquisitorial) so the inexperienced witness should not feel intimidated.
		Comments:	***Comments:*** No objections. On best best-effort basis, will try its best.		
6	Ecological diversity and resilience	Electronic submissions only unless hardcopy is necessary. During the hearing, only digital bundles (PDF format)	Zoom hearing only – cost and time-saving	*The tribunal will have no objections to both requests. It is suggested that parties ensure internet connection is reliable in advance.*	As agreed by the parties and tribunal.
		Comments: Agreed	***Comments:*** Agreed		

As enumerated earlier, the proposed *GNH Arbitration Schedule* which incorporates the *GNH* arbitration guiding principles is not intended to become another burdensome document to add to a litany of guidelines, protocols, or rules already aplenty in the practice of international arbitration. In the simplest form, it can act as a checklist with the basic understanding between the parties and arbitral tribunals at the outset. The schedule may not be mandatory and does not bind the parties leading to increasing the bureaucracy of international commercial arbitration as it is.

V. Conclusion

When I was first exposed to arbitration a while ago, the terms 'inquisitorial' and 'non-adversarial' were recited rather frequently, ascribing them to arbitration. Today, such a description is rare and quite likely not uttered by arbitral professionals for the fear of misportraying arbitration, potentially leading to misrepresentation. At the same time, it is hardly the purpose of arbitration as a platform for the parties to 'make peace.' Indeed, until recently, some people have perceived arbitration as a dispute resolution method based on a 'win-win situation,' quite likely a confusion between arbitration and mediation. Arbitration has grown into a giant today and along the way, inevitably, it has created some problems for itself. Indeed, as rightfully said by Singapore Chief Justice Sundaresh Menon:[17]

> *Arbitration emerged as a response to the shortcomings of the traditional domestic litigation system. For many decades, it was seen as litigation's poor cousin. But today, it has come to be seen as a critical foundation of transnational trade and commerce by providing the primary framework for the resolution of cross-border commercial disputes.*

17 Menon, S. (2013). Some cautionary notes for an age of opportunity, a keynote address by the Chief Justice of Singapore, Volume 79 Arbitration: *The International Journal of Arbitration, Mediation and Dispute Management, 4,* p. 405.

Menon CJ also cautioned in what he considered as the 'three biggest mistakes' that the arbitral community could make, namely, underestimating the disenchantment of arbitral users 'consumers,' overestimating the value of arbitral providers and professionals to the users and ignoring the power of ingenuity.[18] As for the latter, rightfully so, innovations both technological and otherwise can result in finding not only solutions to the problems in arbitration but perhaps also an alternative to arbitration. As it is, we are also seeing how mediation has been incorporated into the arbitral process in the form of 'mediation-arbitration (med-arb)' processes.

There are already various guidelines, protocols or notes out there on helping to make arbitration functions better. This proposed *GNH* arbitration guiding principle is an example of a simple framework that perhaps brings us closer to the idea of making arbitration make sense, to also to give meaning and purpose into the conduct of arbitration these days as a central method of commercial dispute resolution. In a tumultuous world today, we pursue happiness in our lives and professional pursuits, yet it can be elusive. After all, the 13th century philosopher and theologian Saint Thomas Aquinas said 'Happiness, itself, since it is a perfection of the soul, is an inherent good of the soul.' [19]

18 Menon, S. (2013). *Some cautionary notes for an age of opportunity, a keynote address by the Chief Justice of Singapore.*

19 Summa Theologiae: Things in Which Man's Happiness Consists (Prima Secundae Partis, question 2, article 7)' (Newadvent.org2017) <https://www.newadvent.org/summa/2002.htm#article4.

LEGAL ENGINEERING AND APPRAISAL OF LEGAL DEVELOPMENT IN RAPE LAWS

*KINZANG CHEDUP

Abstract: Rape laws form a significant component of the *Bhutan Penal Code.* It repositions the 'treatment of sex' and provides a new theory of knitting and theory development and the emphasis on the dynamics of sex. It also provides how the legal paradigm of the law of the sex is viewed and provides a psychoanalysis of sex. The article provides an analysis of the offence and law of rape in the Bhutanese jurisprudence. The article undertakes the critical approach in the field of legal engineering in the development of laws on sex in Bhutan.

***Keywords*:** Rape laws, dynamics of sex, rape

I. Introduction

The "anatomy of rape" is a complex etiology that is still evolving with new theory knitting and theory development associated with violence, power, and social control.[1] Some theorists opine that "rape" is not about sex but a deeply entrenched psychoanalytic issue, thus, professing the enigma about the nature of rape. If we call it a sex crime, some philosophers argue that sex is associated with anger, devastation, and fear. While on the other hand, the normative belief about sex is associated with terms like pleasure, ecstasy, warmth, love, sharing, and emotion.[2] Aside from all these theories, it is defined by tangibles that can be investigated and the universally accepted connotation of rape as non-consensual sexual contact.[3] One of the confounding concepts of rape is normative as well as the misleading definition of rape in the penal

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1 McPhail, B.A. (2015). Feminist Framework Plus: Knitting Feminist Theories of Rape Etiology Into a Comprehensive Model, Sage Publications, p. 1.

2 Barlette & Jones. (n.d.). *Introduction to Rape and Sexual Assault, Jones& Barlette Learning LLC.*

3 Savino, J.O., & Turvey, E. B. (n.d.). *Defining Rape and Sexual Assault,* Rape Investigation Handbook, p.2.

laws- guided by legal, clinical, political and moralistic definitions. These different terminologies are a result of "how" rape is conceptualized in each society that is furthered by goals, biases, and assumptions. This [allows] for a divergent understanding of rape. While most penal laws capture the legal definition of rape, each state defines the offence of rape and sexual assault differently.[4]

Many penal codes define rape in an unemotional, functional language for a successful criminal prosecution. In some countries, legal statutes have distinguished between different rapes, thus positing a degree of the offence that provides a situation for justice based on the language of the law and common sense. On the other hand, the clinical definition of rape is viewed from the pathology of the offender-the lack of consent. In this sense, the anatomy of rape is also looked through a political definition, and it reflects "rape exists any time sexual intercourse occurs when it has not been initiated by the woman, out of her genuine affection and desire."[5] It is further accentuated by moral definition[s] of the offence that views the offender. Here, rape is amorphously described as an atrocious act of cowardice and has nothing to do with virile qualities.[6]

By understanding the legal, clinical, political, and moral views on rape, it can be studied that offence of rape and how each legal system defines it depends on the conceived notions and investigative biases including the various contortions, desires, and emotions that [causes] rape. It is mixed with the offender and victim myths, and in such cases, sexual assault flourishes in the grey areas. It is agreed and logically principled in leading rape scholarship that women possess the right to sexual determination and sexual autonomy. A woman has the choice to engage in sex, where, with whom and at what time.[7] Although the conceptions of what rape is: even if viewed from the perspective of feminine purity

4 Savino, J.O., & Turvey, E. B. (n.d.).
5 Savino, J.O., & Turvey, E. B. (n.d.).
6 Savino, J.O., & Turvey, E. B. (n.d.).
7 Rubenfeld, J. (n.d.). The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy. *The Yale Law Journal.*

premise, denigration of feminine virtue. It must be accepted, both socially and legally, that rape is a serious criminal offence.

Different courts across different international jurisdictions have categorized the degree of the offence of rape as the total contempt for the personal integrity and autonomy of the female victim and for the latter's privilege of choosing those with whom intimate relationships are to be established. It is discussed as the "ultimate violation of self."[8] The *Common Law* parlance of rape was that rape was sex without consent. On the various aspects of what constitutes consent, "[a] person's consent is fully voluntary only when he is a competent and unimpaired adult who has not been threatened, misled, or lied to about relevant facts . . . "[9]

If we analyze the legal scholarship surrounding the offence of rape, rape has been a very "contextualized offence" with different legal reasonings afforded by various legal scholars. [T]he idea of consent has also been debated and is still evolving. While rape as "non-consensual sex" is just the surface of the iceberg, different legal determinants encapsulate a turbulent- with very objective as well as subjective legal theories surrounding it. [T]his precisely captures if the victim is a criminal defendant and the idea of "if basic" facts are enough to prove the offence. This results in a variety of sex-crime terminologies and elements of crime from state to state, carrying with it the anomalies. There is an increasing recognition that penetration without consent or any additional force beyond penetration is rape.[10]

II. The Complexity of Sex Crime Laws- the Status of Women

The role of women and the position of women in society is, sometimes, a fundamentally important factor in determining the complexity of sex law crimes. In Bhutan, the relationship between women and men is considered a normal directive of social coexistence. While

8 Coker v. Georgia, 433 U.S. 584, 597 [1977].

9 Feinberg, J. (1984). *The Moral Limits of Criminal Law; Harm to Others,* p.116.

10 Tracy, E.C. et al., (2012). *Rape and Sexual Assault in the Legal System.* Paper presented to the National Research Council of the National Academies.

"feminist[s]" in Bhutan, perceptibly few, view the status of women about the archaically believed social norms and practices, relationships are guided mainly by culture. With the evolving scenario of law, the concept of "female chastity and the female virtue" has [almost] become an ancient and modern tradition altogether. Modern approaches to living, relationships and social coexistence have naturally led to the evolution of such practices, even if there were any. As customary and more advanced social and relationship mores penetrate, the question[s] in heterosexual relationships are more influenced by personal choices and interpersonal predilections.

Women in Bhutan enjoy social prestige and equal respect, and there is no or negligible "preconception bias" [that] identifies a woman through the lenses of gender and sex. While there is no "standard of what constitutes a perfect society," nor there is a perfect society in [any] part of the globe, rape as an offence can happen in any part of the world, and Bhutan can be no exception. The forces behind rape can be emotionally directed, socially constructed or various other indulgent factors may stir it. In such circumstances, the criminology of rape is a specialized legal, clinical, moral, and social domain that best dictates and considers what rape and sex offences are. It must be studied as a special subject in line with various sex crime[s] and the laws.

One of the theoretical underpinnings and an inconclusive observation[s] across the world is the deduction that sex crimes happen in places where there are no women's rights. These notions proliferate the idea that sex crimes are an institutionally motivated offence, and these theories can contradict and upset the tradition[s] of different places and the place of women. It generalizes the hypothesis that sex crimes are manifestations of inequality and disempowerment of women. In almost all cases of rape and sexual offences, it is an interpersonal affair; and understandably, sex involves the most revered state of private domains. As feminist ideologies rage, many will consider the offence of rape as a depiction of social mores and the manifestation of an unruly society with no strong *rule of law*. In such contexts, it is paramount to understand the

dichotomies of sexual offences and the complexities of sex law crimes- that curbs as well as ring the social uproar.

In almost all countries across the world, except in Islamic countries, sexual offences are legally determined, and laws delimit sexual contact, exposure, and sexual penetration to sexual violence. These sets of laws reflect the social and the doctrinally legal beliefs on sex, rape, and sexual offences- thus providing a wide range of "rape jurisprudence."[11] All nations have captured the "common" contextual rape jurisprudence with a heightened emphasis on bodily integrity, physical safety, and respect for women. Let's analyze the historical perspective of sex, rape and sexual dominion in Bhutanese legal and social background. It can be surmised that, as shown by researchers in other countries, sex has been an affair between two knowing individuals. Unless to the new views of this modern century, the environment of sexual affairs in Bhutan was a mediation between the prowess of a man that assuaged the sexual inclination of the women and sexual mores were open and sexual innuendos were part of social culture and not a taboo. "Sex was the balance of the mind and wit." In rural parts of the country, before the codification of the *Penal Code,* sexual abuse, rape and abuse of children were unheard. Today, the trajectories of the society [seem] disoriented and misguided.

It is very relevant to consider the "how rape laws" and "jurisprudence on rape" have evolved in other countries. While conceptually, we may have a different legal standing on what constitutes an offence of rape; both in law as well as concepts, we agree and abide by the universal legal doctrines that describe rape. Historically, rape laws were absurdly surrounded by economic interests; no unmarried women could be raped, except if they were virgins, and the American jurisprudence of rape rested on carnal knowledge, use of force, and the notion of "against her will."[12] In America, unlike in other sexual offences, rape was

11Tracy, E.C. et al., (2012). p. 4.
12 Tracy, E.C. et al., (2012).

generally looked at from the perspective of women's character, and rape occurred due to the victim's perceived influence upon and response to the perpetrator's action.[13] These social thinking and moralistic view[s] can influence how laws on rape[s] are drafted, interpreted and applied. The psychology of morals has a significant impact on how decisions are made.

In Bhutan, the *Thrimzhung Chhenmo of 1959* outlawed rape under section Kha-6. Before the enactment of the Rape Act of 1996, it was observed by the *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Committee*[14] that "gang rape" required to demonstrate a "good moral character." The *Rape Act,1996* was superseded by the *Penal Code of Bhutan* in 2004. In this background, the rape law in Bhutan is approached from the perspective of a [mixed] civil-criminal law. In the civil law component, the perpetrator [had] to pay GAO (compensation) to the spouse. This is still carried out even in the *Penal Code,* thus allowing the international community to further analyze the *Bhutan Penal Code*. They suggest [that] it is prejudicial to women, from the angle of *sexual objectification*.[15] However, this has never been an intentional legal thought in Bhutan; it is the simple act of incorporating the customary law in Bhutan, which is one of the jurisprudential sources of law.[16] Whatever the historical perspectives, *criminal sexuality* and *interpersonal violence* epithets in Bhutan have been minimal. Today, sexual offences are described by different terminologies like forcible sex, rape, sexual assaults, *military sexual trauma* (MST), sexual abuse, and *sexual violence.* The article is expected to investigate the legal domains of rape law in Bhutan and provide an idea of how rape is becoming an increasing social menace.

Definition of Rape

13 Tracy, E.C. et al., (2012).

14 CEDAW. (2003). *Updated Summary of the Report of Kingdom of Bhutan,* Department of Planning, Ministry of Finance, Royal Government of Bhutan.

15 Sexual Objectification of Women (SOW) premise the use of women as a sexual commodity.

16 Customary legal practices are accepted source of law. The observations made by the *CEDAW* Committee is made from the perspectives of equality and human dignity and rights dimensions.

The *Penal Code provides that a defendant shall be guilty of the offence of rape if the defendant commits any act of sexual intercourse, whatever its nature, against any person.*[17] This definition applies to the general concept of rape, which is supported by various sub-clauses under section 177. If we examine these provisions strictly, [it] can be deduced:

a) There should be an act of sexual intercourse;
b) The nature of sexual intercourse can be of any form non-exhaustively;
c) The offence should be "directed against a person;"
d) Consent is subjective;
e) The use of force or coercion is irrelevant;
f) The mental element is not considered, and
g) Involuntary sexual act [under the influence of drugs and substances] is not tolerated.

i) The Act of Rape

In the analysis of the definition of rape in various jurisdictions, different states have used other words to describe rape and transmitted the use of words like *sexual intercourse, sexual assault, sexual penetration and carnal knowledge.*[18] As such, it is essential to deconstruct the common element of rape as envisaged in the national legislation since it is the legal and its interpretational basis that becomes the genesis of sexual Justice for both prosecution and conviction. One of the determining factors and the primary basis of the definition of the offence of rape is the *"commit any act of sexual intercourse" "whatever nature" "against a person."*

Therefore, as understood in other jurisdiction[s], it will involve *"any act of sexual intercourse,"* which may also include vaginal, anal, or oral intercourse and this [may] not mean that "there shall be only vaginal-penile penetration." Irrespective of the act, *sexual intercourse* should not involve "the intercourse of two sexual organs and the intercourse of the male sexual organ to any other part of the body can also be interpreted

17 *The Penal Code (Amendment) Act of Bhutan, 2011, s.* 177.
18 European Institute of Gender Equality. (2016). *Analysis of national definitions of Rape.*

as sexual intercourse." The ordinary meaning of *sexual intercourse,* in this background, [may] challenge this proposition.

In this, let us examine the legal definition of *sexual intercourse,* which the *sexual intercourse*[19] - is defined as "vaginal intercourse or any insertion, however slight, of a hand, finger or object into the vagina, vulva, or labia, excluding such insertion for medical treatment or examination." This provides the realistic idea of how *sexual intercourse* [may] not require the "union of two sexual organs" to be defined as *sexual intercourse.* This may include [any one part of the *sexual organ* interacting with any other part of the body.] This will not require vaginal penetration to have *sexual intercourse.* This is further substantiated by the word *"any act…"* Now, if we examine the various acts of *sexual intercourse,* and for that matter, this is a very generic sexual morphology, and can include "indefinite acts of *sexual intercourse,"* "which may include the most modern ways of sexual gratifications…"

Another aspect of rape in the *Bhutan Penal Code* is the word *"against."* The phonology of the word *"against"* can be understood as directed to a person, or it can also be deciphered as "use of sexual force or coercion" to a person of the opposite sex. However, the concept of "against any person" has a gender-neutral connotation and will include a man forcing his sexual desires against a person of the same sex or a woman to a man. So, by this understanding, the idea of rape does not require the copulation between two persons of opposite gender. It does not require penile-vaginal intercourse: which is a common dimension of rape. Breaking the general definition of rape into further smaller legal bits and pieces requires the attention of consent and the use of force and sexual coercion as a means of *sexual intercourse.*

ii) The Issue of Consent

One of the determining factors about the offence of rape is "if there was a consent." Doctrinally, the issue of consent and what constitutes

19 Govt. of the V.I. vs. Vicars, 2009 U.S. App. Lexis 17633 (3d Cir. V.I. Aug. 7, 2009).

and does not constitute consent are mainly based on different legal reasoning premised on case laws and logical deductions. "Staying silent and non-reactionary" during the act of *sexual intercourse* or "simply saying yes…" cannot be construed as "giving consent" within the legal paradigm. Sexual theorist says that consent should be expressed. Now, it has become imperative that consent should be "written and signed…" since the lines of legal defences between "consenting or non-consenting" are extremely thin, and the act of sex is a highly private affair, without privity. In modern times, the issue of consent is going to become a highly debatable legal subject if it is not corroborated with other physical evidence, if any, in the interest of Justice. There are many falsities that "surround how women and rape laws are interpreted and how rape can be a falsified claim of the victim, and the courts are taking a very seminal role in dissecting these developments truthfully."[20]

It is imperative to examine the issues between the lines and use judicial wit and prudence to identify the falsities if there are any. If we are blind to this purportedly thin line, it [may] lead to a gross miscarriage of justice and get disoriented and deflected from the truths of modern sexual relational fallacies. This is not intended to denigrate the victims of rape and sexual offences- but is purposely used as a statement for enhancing truth and accord a middle-pathed approach to judicial determination. The absence of clear guidelines as to how consent to sexual activity is to be determined also mire these lines.[21] This must be consistent with the principle of clarity of the law. The rape definition in the *Penal Code* also presumes that "consent is lacking" in all cases of rape where reference is made to the use of force or the threat of use of force, threat, or obtaining consent through fear.

20 In a case was reported in *Kuensel,* a woman was punished for falsifying rape.

21 Judicial prudence and careful judicial examination – not positing a vulnerable situation for the victim[s] of rape is essential in a few of the cases to determine the veracity of the claims. Today, it has become imperative to scrutinize the claims of women as the victim of rape to ensure that a balanced approach is afforded as well as to objectively observe the nature of rape to advance sexual Justice. Presently, men also have become easy victim[s] in the hands of "well-spoken women" who can beguile *consensual sex* as rape to defame or incriminate him through *mala fide.*

The Penal Code (Amendment) Act of 2011 has amended the general definition of what rape is. However, it has not altered the sub-clauses, thus maintaining the general conditions of rape unchanged. Under section 177 version of rape in the original 2004 penal manuscript, the legislator[s] have failed to define rape in the context of Bhutan criminal jurisprudence; and they have conditioned the rape as the fulfilment of the pre-conditions (a) to (d). This legal definition has only provided under which the offence of rape can happen and retains the challengeable provisions-thus attracting an array of criticism[s]. *The Penal Code (Amendment) Act 2021* has not added extensively.

The domain of consent is an array of different legal experiences and hypotheses. It is synthesized on the political definition of rape; in some cases, the definition of *rape will appear as rape exists any time sexual intercourse occurs when it has not been initiated by the woman, out of her genuine affection and desire.*[22] These legal principles will ultimately influence how rape is viewed, defined, and legally assumed. Therefore, unless the *Penal Code* prudently elaborate[s] on the various conditions, as well as an explicit definition without giving scope for multi-faced interpretations of rape, it will open a different ideological, legal theory which will not only stir the legal minds and the phases of arguments of the people but may also persuasively influence the judicial constructions on rape offences in the country. It can be recalled that "when you cut a tree down, it is imperative to see the size of the tree and the weapons employed so that the damage is minimum and justified.[23]

Pre-conceived theories and investigative bias, as different authors put it, also affect how "consent is viewed." *A priori investigative bias* is a phenomenon that occurs when investigators, detectives, crime-scene

22 Savino, J.O., & Turvey, E. B. (n.d.). *Defining Rape and Sexual Assault.* Rape Investigation Handbook, p. 8.

23 This woodcutter or the lumberjack analogy is used to examine the economic and social costs and legal safety purposes. Although the lumberjack [may] cut the tree professionally, the falling tree may either maim the cutter or kill or injure innocent bystanders. The tree will fall in the direction of the wind.

personnel, or others somehow involved with an investigation develop theories uninformed by the facts. These theories, which are most often based on subjective life experience, cultural bias, and prejudice, can influence whether or not investigators recognize and collect certain kinds of physical evidence at the scene.[24] However, standard legal theories and case studies on the issue of consent are both informative and definitively abiding. This provides the legal and rational basis for reasoning, analysis and acceptance. Factually, although this [may] be remotely associated with consent, research has shown that most rape happens within close victim-perpetrator relationships.[25] This is not to forward the *Rape Myths Acceptance (RMA).*

In the United States, police officers, Judges, juries, and other third parties are much less likely to perceive an incident as a "real rape" if it does not involve physical injury; if the offender and victim were intimately involved before the rape; and if the victim was willingly alone with the perpetrator. This also cracks the psychology of the investigator[s] and Judges, and an intrusive as well as "ill-thought" Judge or a defence counsel [may ask], "You are so close, you already knew each other, there is a possibility, you have given the consent…" Whether a Judge or the prosecutor, for that matter, believes the opposite and the woman agrees that she did not consent to the sex but later enjoyed it… this invites an outburst of both laughter and tears. These are just unrealistic hypotheses, but human interactions are so multidimensional; there cannot be a square hole for the square peg; the aspect of reality differs completely from one to the other. The contour[s] between denial and agreement through consent can also be thinly veiled; thus, the victim denies it since she has to choose between two stories.[26]

Legal theorists and sexual crime experts say that a rape law that respects the sexual autonomy of the victim will reject the force requirement,

24 Savino, J.O., & Turvey, E. B. (n.d.).

25 Savino, J.O., & Turvey, E. B. (n.d.).

26 Michelle, A.S., & Brown, J. (2012). *Rape and Victim-Blaming: A Critical Examination of the Tendency to Blame Victims and Exonerate Perpetrators in Cases of Rape.* United States of America.

defining rape solely in terms of consent. In such instances, there are questions if rape by deception is a rape since there is a consent. This will depend on the synthesis of arguments. Different positions of legal arguments further reinforce the arguments. One of the most argumentative antitheses to consent in the law rape is the rape by deception. In this particular case, the victim agrees to sex and says "yes." Now, this provides the argument that sex by consent is not rape; and the victim has consented: this predicates in [many jurisdictions] that consent by fraud is no consent at all. However, another legal juxtaposition offers that sex achieved through "the common misrepresentations of dating and courtship" is "merely humiliating" rather than "disgusting as well as humiliating."[27] Law also propositions that consent must be informed.[28] Consent is, therefore:

> *…clear, unambiguous, and voluntary agreement . . . to engage in specific sexual activity. Consent cannot be inferred from the absence of a "no"; a clear "yes," verbal or otherwise, is necessary…Talking with sexual partners about desires and limits may seem awkward, but it serves as the basis for positive sexual experiences shaped by mutual willingness and respect.*

It also states that consent cannot be obtained from someone asleep, and consent to some sexual acts does not imply consent to others, nor does past consent to a given act indicate ongoing or future consent.[29] If ambiguity exists between what has been consented to and what has not, it must take the positive and affirmative consent to a specific act.

One of the most crucial parts of consent can arise from the marital rape. At the same time, research shows that the offence of marital rape has been

27 Rubenfeld, J. (n.d.). The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy.
28 Rubenfeld, J. (n.d.). The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy, p. 1385.
29 Rubenfeld, J. (n.d.). The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy.

a typical individualistic boundary between the husband and the wife. In the traditional legal concepts, marital rape is justified as marriage is the sacralized and moralized sexual licence. The concept of "wifely duty" and the legal and conventional and unwritten "spousal rape"[30] further stirs a legal and feministic controversy. The mutual matrimonial consent and contract given to the husband, which she cannot retract philosophy, disturbs the normalization of both legal, social and judgmental reasons in marital rape. This can easily complicate "what is consent and not consent:" imposing a very legalistic social culture. It will also brew a good soup for divorce.

Whatever the social or family drama the marital rape may entail to play, it is a significant legal question for the legal experts. What is consent in [this] case, and what are the circumstances that make it? These imported legal doctrines practised in very individualistic societies disturb the nation's legal and social stupor. It also invites unnecessary legal issues to the nation. It may be futuristic, but when is the future, like the consent? Unless the definition had been revised by the amendment of 2011, rape law in Bhutan was both non-definitive and anomalous. All other definitions of rape derived its legal description and classification from section 177. We do not have to explore the issue of who can give consent; since it is determined by different forms of rape in the *Penal Code.*

iii) The Mental Element

The physical element constituting the offence of rape is categorically captured in the *Penal Code.* It establishes that the use of force, administration of drugs, intoxicants or other substances, and rendering the other "person unconscious" are a few physical acts which are done in concomitant to the offence of rape or to fulfil the purposes of rape. It also includes the act of sexual intercourse, irrespective of the nature of the act. One of the primary geneses of the offence is that it ruptures from the sexually deviant behaviour of the assailant. The early psychological

30 Yllo, K. (1996). *Marital Rape,* The Battered Women Justice Project, Minneapolis. United States of America.

theory of rape states that "rape was conceptualized primarily as an act of sex rather than an act of violence."[31] The view of rape as sexually motivated has given relevancy to the victim's past sexual behaviour. The earlier typology of rape determined the type of offenders based on their intent:

a) Anger rapists;
b) Power rapists; and
c) Sadist rapists.

A well-validated taxonomy of rapists termed the *Massachusetts Treatment Center Rapist Typology (MTC: R3)* identified four primary motivations for rape: opportunity, pervasive anger, sexual gratification, and vindictiveness.[32] In Bhutan, it [seems] that we are still guided by the traditional view of rape as a fulfilment of the sexual needs of the perpetrator. Some of the factors that enable them to offend are cognitive distortions, deficient victim empathy, or deviant sexual preferences. Current psychological research focuses less on the motivations of rapists and more on common risk factors and pathways to sexual offending. Therefore, the offence of rape has very divergent motivations- which are not driven by sexual desires or fantasies but by other factors, including aggressive impulse, hostile masculinity, and sexually aggressive behaviour.[33] While the *Penal Code* does not stress or require the mental element in the offence of rape, the theories of why rape happens, including research, have to be undertaken to estimate the "aggravating and mitigating circumstances of the crime."

The *Penal Code* may not be able to explicitly dictate that law enforcement agencies identify the causes of the crime of rape, but it is important to understand the primary basis of the actions of the assailants and the perpetrator[s] so that curbing the offences will need to examine the

31 McPhail, B.A. (2015). *Feminist Framework Plus: Knitting Feminist Theories of Rape Etiology Into a Comprehensive Model, p. 2.*
32 McPhail, B.A. (2015).
33 McPhail, B.A. (2015).

delinquent sexual mentalities, more than the act that brings in conflict with the law. The mental element of rape has been excluded from the *Penal Code,* and even if it requires corroborating the mental element, as it has to be established in other crimes, this can be seen as an exception to basic elementary constituents of crime. It does not require a guilty mind, and this violates the basic principle of *culpability* material element, which is constituted thoroughly "purposely," "knowingly" or "recklessly." Although the sections of the *Penal Code* provide the "liability basis" of all crimes in general, this provides an arduous task of mental reasoning, deduction, analysis and exploration of the "state of mind" of each offender. Moreso, determining "knowingly" and "purposely" has to be considered on precise facts that may not directly point to the offender's psychological state. The core psychoanalysis, for that matter, can be based on deductive reasoning.

This is more prominently reflected under section 181 for statutory rape, which says that "…either with or without knowledge." This posits that the mental element is insubstantial in the offence of rape. In English law, the accused must know that the woman did not consent and is reckless whether she agrees. This is referred to as *"Cunningham recklessness" and "Caldwell or Lawrence recklessness."*[34] It states that the simple question of no- consent can theorize the mental element, stating that if no consent or consent is obtained against her will, it indicates the vicious nature of the sexually aroused mental element. *In re Upaha v. State,* the *Court of Appeal* stated what the prosecutrix must prove to establish the offence of rape as follows:

…

d) That the accused had mens rea, that is, intention to have sexual intercourse with the prosecutrix without her consent... or that the accused acted recklessly, or not…

Using this as a guide, the deductions studied expiate the mens rea within the legal subculture of *"acting without consent…accused acted recklessly or not…"*

34 Oji, S. et al. (2019). *Mental Element of Rape.* Rivers State University of Science and Technology, Department of Public Law and Jurisprudence. Faculty of Law, Usman Danfudio University, Sokoto.

In this context, judicial interpretation of intention has to be gathered from the non-consensual act of the accused. The second limb of the *mens rea,* i.e., "being aware that there is the possibility that she does not consent," seems to refer to situations where there are no threats of physical bodily harm, but for some other reason, there is no consent.[35]

Statutory Rape

The provisions for the offence of rape have been both explicit as well as implicit, thus providing a legal culture based on a common consensus that echoes the aspirations of the people. Statutory rape provides the delimitation for the rape, and this can be backed up by both scientific as well as social studies, that a person below twelve years of age may not be physically as well as emotionally ready to engage in sex. This also includes incompetent persons. Although there were instances of the *Royal Courts of Justice* invoking the sections on statutory rape: since a person has raped a child, many people [have] and are legally uninformed on the issue of an incompetent person.

There is no definition of what legal incompetence agrees: physical or mental or both? Moreso, the determinants of an incompetent person are not calibrated in the *Penal Code* or other laws. For that matter, this may *sui generis* add to the complexity of judicial determination: this has to be assisted and validated by medical or other forensic mental health experts. While we may be able to identify through the traditional views on "personal incompetence," this may leave the bracket of other or evolving or unseen incompetent person[s].

There are legal definitions of *incompetence to stand trial (IST),* which has to be validated by a qualified psychologist or psychiatrist.[36] It has to be attested by a mental health expert.[37] The approach must be scientific, not a common-parlance view of an incompetent person. Legal

35 Oji, S. et al. (2019), p. 324.
36 Disability Rights California. (2019). *Forensic Mental Health- Legal Issues (IST).* California Protection and Advocacy System.
37 *Guardianship Forms* for incapacitated person in the United States of America.

decisions must be scientific, scientifically proved, reasoned and attested to validate the judicial concurrence on the issue. Psychologically, unless scientific, it may also start the *Dunning Kruger Effect.*[38] This may also put emotional imbalance in the victim[s], so the scientific approach is both relevant, appropriate and more professional. Understanding the *science of incompetence* is crucial. It has to be moved towards a functional approach, which says:

> *A person is incompetent when they lack sufficient capacity to manage their affairs OR to make or communicate important decisions concerning their person, family, or property.*

Bhutanese laws provide little or no guidance on who is an incompetent: is it physical or mental? This may also hinder marriage between two individuals if one of them is either dump, deaf or physically incapacitated. The spouse of the incompetent person may be challenged in a court of law and prosecuted, as is happening for marriages under eighteen. It is the ordinary men's justifications that Bhutanese laws enter into controversies while the intention of the laws is clear: the *Legislature* does not recognize the results of the interpretations. The effects of the laws come into view through interpretation and application, not by legislation. Whatever the methods of interpretation, it cannot deviate from the apparent intent of the law and avoid the original meaning the letters of the law offer. The laws' intentions must be tested: they cannot merely depend on what the law wants to say; their sayings must be worded accordingly.

Moreover, while statutory rape includes children below twelve years of age, "incompetent person" is a "blanket application" and does not consider age – as one of the factors in deciding whether a person is

38 *Dunning-Kruger* Effect is a cognitive bias whereby people with limited knowledge or competence in a given intellectual or social domain greatly overestimate their knowledge or competence in that domain relative to objective criteria or the performance of their peers or people in general.

incompetent. We can sense the noble intention of the Legislature to protect the incompetent persons from sexual predation- inconsiderate of their state of being; and promote the well-being of the incompetent person. This legal protection will run against personal sexual autonomy and completely restrict the choice of sexual partners and sexual choices. More importantly, it has been defined with relevant "non-obstante clause[s]" that classifies and respects the choice of the incompetent person. It completely restricts their sexual choices; this may not be relevant to all the sections of incompetent persons, but it will undermine the sexuality and sexual autonomy of the husband as well as the wife if an incompetent person is married thereto.

For that matter, unless legal doctrinal beliefs and suppositions differ, a "blind man" is incompetent in the sense he has visual impairments. Although this may not affect his decision-making skills in the ordinary course of his life, he still has a comparative disadvantage over another man without visual impairments- their ability to conclude their decisions based on external factors – supported by their cognitions of their eyes. However, today's idea about the incompetent person can lead to discrimination and objective decision-making. Recently, in India, a person without proper limbs, for that matter, was happily driving an auto rickshaw-styled automotive vehicle- thus, it [may] relatively confuse the idea of "who is an incompetent person." Traditionalist view of incompetence: It can mostly be deducted from their physical inabilities and low mental cognitive abilities. The advanced scientific analysis of soft mental and verbal cognitive skills requires the analysis of the brain.

The incompetency law in North Carolina requires a multidisciplinary evaluation containing the current medical, psychological, and social work.[39] In some cases, incapacity is not an all-or-nothing matter. An individual may have sufficient capacity to make certain types of decisions but cannot make other types of decisions or have the capacity to manage some of their affairs but lack sufficient capacity to handle more complex

39 Pollitt, S. H. (2007). Incompetency and the Law in North Carolina. Carolina Legal Assistance, United States of America.

matters. Competency is a changing status. People can recover from mental illness or substance abuse, and skills can be acquired, lessening the need to consider an incompetent person.

When a person is adjudicated as incompetent, he or she loses the right to self-determination. However, this does not eliminate the right to make decisions within their comprehension and judgment or to participate in all decisions affecting them. One of the most important aspects is the right to marry or the right to contract, which may include contracting for making sexual choices.[40] *It was held that a prior adjudication of incompetency is not conclusive on the issue of later capacity to marry and does not bar a party from entering a contract to marry. The prior adjudication does not even shift the burden of proof in an annulment action.*[41]

Competence means the person must understand the powers they are granting to the agent and the implications of having someone else make decisions for them. Sometimes, a person's capacity fluctuates depending on the time of day, medication, and surroundings. It can be valid if the person has a period of mental alertness and can understand what they are doing [lucid period]. Considering all [these] medical and legal aspects of "incompetence,"- the issue of an incompetent person has to be dealt with very carefully in the larger interest of Justice.

The rape provisions in the *Penal Code* exhaustively cover various offences of rape; section 183 of the *Penal Code,* which states that a defendant shall be… if "the defendant commits any act of sexual intercourse against a child between the ages of twelve to eighteen years. However, consensual sex between children of sixteen years and above shall not be deemed to be rape." This section of the law has been very intriguing and has resulted in the loss of liberties of many people. The *Marriage Act*

40 Pollitt, S. H. (2007). Incompetency and the Law in North Carolina. p. 12.
41 *First National Bank vs. Townsend and Geitner,* 312 S.E.2d 236, review den. 315 S.E. 2d 702 (1984).

of 1980 states that the age of marriage is eighteen years, and underage marriage or *"Chung Ngyen"* or the concept of traditional "non-ripened age" concept has been proscribed in the *Marriage Act.* This is the civil part of the issue. The criminal jurisprudence has blanketed the legal idea of sex as non-consensual if the women are below the age of eighteen years engage in sex [not within that legal bracket]. It is important to respect sexual autonomy as well as respect the holistic approach of self-determination for sexual choices, especially for women or girls below the age of eighteen. The central legal concept here is to afford comparative legal protection on the basis of age of consent.

Culturally, social research shows that young people's sexual choices are influenced by individual needs to call on shared meanings and expectations to produce sexual scripts. Analytically, these scripts are defined at three distinct and interacting levels: cultural scenarios, interpersonal scripts, and intra-psychic scripts. More specifically, this means that young people's sexual encounters and sexual interactions are influenced by social norms on different levels: on a *societal level* through culturally and socially constructed norms, on an *interpersonal level* through social norms in other peer groups, and *intrapsychic level* through norms constructed through personal experiences and the internalization of norms created and expressed on the societal and interpersonal level.[42]

Legal experts opine that the *minimum age of consent* and age of marriage serve different purposes and must be understood from that starting point. In the case of marriage, the minimum age of consent advocated for is 18 years without exceptions, as per international standards. This aims to guard against minors being given out in marriage without their consent and to prevent the disruption of their schooling. In terms of sexual activity, the age of consent is set to protect adolescents against adults who may prey on them, but it also recognizes that with their

42 Elmerstig, E., & Plantin, L. (2020). Complexities of sexual consent: young people's reasoning in the Swedish context.

evolving capacity, adolescents should be able to consent to sexual activity, especially as they approach eighteen years of age.

In this context, if the law respects the sexual choices or the sexual health of children under the age of eighteen years, then it says that *"consensual sex" between children of sixteen years and above shall not be deemed rape.* This indicates the different sexual functionality and "considers the age of consent" to sixteen years in law and provides a specific different functionality of sex, thus standardizing two sexual instances: if two children who are sixteen years and above engage in sex, consensually, it is valid in the eyes of the law.

If we are looking at the physiology of women's bodies or at least respect the physical integrity of an underage woman, then allowing sex between two children who are sixteen years and above nullifies the "basic intent of the law." The law has delineated and rigorously capped the sexual choices of children, thus permitting and not permitting sexual choices. Let us look at the logic of why sex between two individuals who are in the age bracket of sixteen years and above is legal and not rape. Therefore, although the concept of rape has been defined in section 177 of the *Penal Code,* the idea of "terming the sex act" as rape even if the children in the bracket of sixteen years and above with a man above eighteen years of age provides us with two distinctive legal analogies:

a) Human sexuality is different

Categorically different [physiological different] and insensibly, without formal research differentiates sexual physiology. If a woman is not ready, be it sexually or emotionally, until she attains the age of eighteen years, she cannot physically or emotionally be ready or consent to have sex with a boy who is sixteen years and above. Sexual physiologically, this is incorrect. If the law is intended to protect the sexual integrity of a woman and protect his emotional or other aspects of sexual health, does engaging in a sexual act with a boy of seven years contradict such morals? Sexual research says that the age of consent is to protect minors against sexual exploitation from older partners.[43]

b) The importation of Romeo and Juliet liaisons

The broad and expansive involvement of definitions by the justice system in the lives of similarly aged teenagers engaging in relatively normal sexual behaviour, so-called *"Romeo and Juliet"* liaisons. Although the public supports this in other countries, age-of-consent laws can become controversial when applied to like-aged teenagers who are prosecuted for what many believe to be normative sexual behaviour.[44] This is a United States invention, to be precise. In the United States, statutory rape laws are primarily based on the age of the minor, but there is no national standard defining the age of consent.[45] This has also become true for Bhutan. There is no legal idea of the age of consent in Bhutan; it is presumed from the child's age under the *Child Care and Protection Act, 2011,* and can it afford the defence?

This reflects the age of consent from sixteen to seventeen years in New Mexico and Wyoming in the United States. In the United States, although this may be contrasting with the social differences, the age of first sexual encounter was between 14 and 17 years of age. The median age was 15.6 years.[46] This indicates that girls are ready and [can withstand the sexual encounters and enter into copulation.][47] *The Romeo and Juliet* liaison is still in the development stage. Statutory rape laws criminalize sexual activity with persons who are not yet old enough to give consent for sex legally. The age discrepancy consideration today takes into consideration the difference in age between the alleged victim and the alleged perpetrator when determining the punishment for statutory rape.[48]

These statistics are not all that surprising when you consider how much

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43 Bud, M.K., & Bierie, M.D. (2016). Romeo, Juliet and Statutory Rape: *Sexual Abuse: A Journal of Research and Treatment,* Sage Publications.

44 Bud, M.K., & Bierie, M.D. (2016).

45 The problem of legal principle importation also imports the legal paradoxes of other countries.

46Virginia Health Department. (2012). *Age of First Sexual Intercourse.* STD Surveillance Network (SSuN), Virginia.

47 Analysis shows that women can enter into sexual relationships as early as 15 years of age; and in this, since human anatomy is not different [purportedly], it can be deduced that the age of first sex can be as early as 15 years of age or below.

sexual content teenagers are being exposed to. These teenagers are more vulnerable to such content than adults because the exposure occurs during a period in which sexual attitudes and behaviours are being developed.[49] The American concept of statutory rape has been captured in Bhutan. Therefore, as children who are minors and above twelve years of age get half the sentence, this law [can] incriminate children equally. Michelle Oberman argues that statutory rape laws provide ample evidence of the entrenchment of the hazy spectrum that separates consensual sex from rape.[50] It also states that a victim—which usually involves an individual being hurt or injured—may not always apply in statutory rape cases; a minor in a sexual relationship— regardless of how honest and consensual such a relationship may be—is considered a victim.

IV. Effectiveness of the Law

Section 183 continues to be upheld because it is determined that these laws are necessary to protect its youth, which is considered a compelling state interest. It is important to note, however, that these laws have not been known to be effective in preventing consenting teenagers from having sex with one another. The ineffectiveness of these laws in deterring teenagers from having sex puts the future of many high school students in doubt, as many of them will be required to register as sex offenders for the rest of their lives. The consequences of carrying such a label can be absolutely devastating.[51] Consequently, the effect of the laws can put many young adults, keeping aside the adult sex offenders, into the peril of their lives.

In Bhutan, the expunging of the criminal record details of underage offenders [is] legally expunged; still, it is unclear if it is coordinated by different law enforcement and Justice Sector institutions- thus, the indelible mark is still existent. It impacts the family's lasting impact on

48 This age differences have resulted in gender discrimination.

49 Tover, J. (2013). For Never Was a Story of More Woe Than This of Juliet and Her Romeo" - An Analysis of the Unexpected Consequences of Florida's Statutory Rape Law and Its Flawed "Romeo and Juliet Exception. *Nova Law Review, 38* (1).

50 Tover, J. (2013).

51 Tover, J. (2013).

the offender, thus vitiating his future. Most importantly, the statutory rape laws have blurred the lines of a relationship and have exterminated families, bringing in more lone mothers and fatherless children. This does not require substantiation from the social-psychic perspectives: the damages to society are never studied, nor has any credible interest been shown to consider the larger interest of society. It [has] seemingly done more harm than the protection it supposedly tried to boast about. Till now, across the country… people had been prosecuted on the offence of rape, which few seemingly had been encountered due to ignorance or had been consensual.

It has increased the number of people using vindictiveness as a tool for social coercion and capitalising on the girl child to destroy a family or a son of others. It has destabilized many families. If the law is not very coherent and does not secure the interest of Justice, i.e., "the laws need not have to interfere" in the private lives of people, when the question of sex had been consented to and "when both the parties" has agreed to engage in it; when woman willing that [she is of age] of conscience; and physically able to withstand the sexual force. The law of consent and the age of "conscience and reason" have to be bifurcated, and it can be firmly stated that "no law' can define a person's decision–making ability.

The age of consent, be it legally, socially, logically, or medically, is the assumption, based on universal belief, that, by a certain age, a person can conclude and reason. It does not consider that each individual is entirely different; as "there are the different shapes of faces for each individual, there are physical and mental capacity differences." The law cannot overrule the common physiology of human beings- and the human physique differentials are associated with each person. If the "act of sex" has no element of coercion or other forces that defines rape, both parties' consent, and the parties have come of age, the laws should not interfere. The extensive application of the laws in such matters defies the concept of natural Justice, which relies on the fact of *audi alteram partem,* which, in this sense, may mean both parties have accepted and decided on their free will to engage in sex. There are many other issues that the

law has to look after, and it is the typical protrusion of the ill effects of a borrowed law, untested in the social mores of Bhutan. This derogates the concept of sex altogether- rape, sex, without consent. If there is consent, the terminology of the "offence as rape" is both mistaken, ill-informed, prejudicial and legislatively wrong and inconsistent. It violates the basic principle of "rape," a simple act of sex without consent.

In one way, this section shows the "ill-intention to punish people" and interfere in their private lives. This is a constitutional guarantee that *a person shall not be subjected to arbitrary or unlawful interference with his or her privacy.*[52] One of the foremost arguments as legal professionals would be that "the actions as per the *Penal Code* are lawful and non-arbitrary." Legally, it is very *professional sounding,* so it is non-debatable; the law has won, but not the Justice. Here, the law has violated the common conscience of *Justice,* supported by human reason. The *norm of reasonability* is not conjecturing the mere facts of the law, and for that reason[s], the law is the expression of human reason and conscience with the best aim to help society traverse the path of good behaviourism and morality. We can say that neither moral nor judgmental human reason is complemented here: it stands singularly defiant when considering the ground realities of Bhutanese society. A guest would not know the norms of the host unless he or she is taught well: instinctively.

It simply violates the principles of an enlightened law. The concept of *enlightened law* is not a religious law, for that matter, or is the normative expression of an idealistic society. Enlightened law needs to be responsive, cater to the aspirations of society, and be affected with a noble purpose. In this case, the purpose of the laws [may] be noble, yet if the novelty is lost in its interpretation, it is as if we are smiling when we are angry.[53] In some parts of the *Penal Code*, there are expressive provision[s] which may be irrelevant. When required, some provisions fall short of definitions and conclusive legal requirements to be considered an offence. Rape is

52 *The Constitution of the Kingdom of Bhutan 2008,* Art. 7 (19).

a very specialized legal, medical, psychic and social subject. First, the *Legislature* has to be very clear on the offence of rape: clear with specific details, for example, the physical anatomy of a woman, mental habits, sexual aggression of men, social perspectives, the progressive role of law, the regressive social outcomes of the law, amongst many things. A law does not become a legal document by merely enacting it as a provision: the echo of the provisions has to be tested, researched and analyzed. Each section of the law, for that matter, is a research subject requiring the fusion of knowledge, analysis and re-analysis.

A legal subject is an engineering of its own. Some may say that making a law is not rocket science but an experimentation of science, technology, and space engineering. Drafting laws is an engineering of its own, a spaceship-building engineering that requires precision detail as well as perfection. There are two instances of "building a rocket:" "the actual builders, who in simple algorithm weighs the weight, the propulsion, and the buoyancy of the rocket. If any of these proportions are miscalculated, either it will explode itself at the *launchpad* or lose its trajectory, thus losing the energy, skills, and money and disastrously concluding an ineffective space engineering.

Similarly, the failure of a legal trajectory is more expensive and dangerous than a spacecraft failure. While the spacecraft is mostly unmanned these days, it does not cost the human element. It would incur a huge amount, and this can be recoverable: human liberty is not recoverable and the amount of time spent in rehabilitative or in the cells of detention, cannot be recovered and is very huge loss in the lifecycle of a person. It will destroy and disconnect the normal lifecycle of a person: thus, breaking the chain of happiness, security and well-being. These dimensions are an important part of pre-legal drafting analysis and for that matter, the legislators have to be acutely conscious of the liberties of a person.

53 As part of human psychology: the characteristic of an angry person is different and has varying expressions. For some, they smile when they are angry.

V. Causes of Rape

Rape is a serious sexual offence. Every person, be it young or old, considers rape as a very unsettling social and legal development. It evokes sadness, and frustration, and questions the mental or the physical capacity of a person, who may have caused the rape. We just morally abhor it, and we, with few words of prayers, leave it to the Justice Institutions. The different media houses report about the issue, it generates a short-lived social clamour, and "curse the demonic beast…," and as my late mother would say, "Time ashen[s] the memory…"

We look at how these happened and not why it had happened. It was in 1997, to be precise, not a very brightening evening, it was partly cloudy. It reminds me of a man, who still might be living, who insisted on touching and groping student girls that were in front of us, walking for their homes. Mostly they travelled in groups- to ensure that they had a friend to converse with while travelling. This incident, clearly, to some extent, enables us to define and narrow the "psychology of the offender." Although the incident of rape or groping did not happen, we might have, had the role to play there - the third-party presence. He was typically unmarried: guessing he may have not got in hand with [any] girl, partly he was not exactly smart, but blackish, hardened by physical labour and errands of little money generations of the time.

The girls, by now [may] be in the civil service or fairly aged now. They were in class eight at that time. The man did not know any of the girls in person. The man, shared with us, how he liked the fairness of their face and "how erogenous and suggestive they looked in their dresses [uniforms] and expressed, how he would ravish and force himself if he had the slightest opportunity to mingle with them." This was, of course, a self-bearing imagination. He did not touch the girls and they were much more fast-paced than us, probably, the evening was closing so fast, or they were acutely aware of the sensitivities; and they generally, kept "little distance from men," as they travelled. At that time, there were no known ideas of *sexual harassment* nor were women acutely sensitive and by that parlance, the society [seemed], at least a little relaxed. In this

case, I could after two and half decades analyze why *"sexual perversion"* or that *"sex predation mentality"* exists in people. This can be deduced from the following reasons:

a) Mental perversion and illogical sex idiosyncrasies;
b) Power imbalance [physical force] between men and women- "making thinking I can force her down;" and,
c) Situational based.

As per the *Statistical Records* maintained by the RBP since 2017, it shows that offence of rape has steadily climbed. However, it is sad to report that rape of a child above twelve years of age has been critically high with each year, the offence reported with alarming categorical numbers, in compared other offence. Sexual offences are representatively very ignominious: since the number of "rape of a child above twelve years of age" is comparatively higher all "throughout the years" from 2017-2020. Child molestation is apparently a very serious issue too. While sexual offences like bestiality is also appearing; and this can indicate a wronging society.

The apparent of rape[s] in Bhutan is understudied.[54] The verbal accounts reflected in the media papers indicates that "it is the responsibility of the individual to avoid going out during odd hours or in secluded places. Most heart wrenching of the issue in 2021 was the "rape and murder" of a young girl on 18 September 2019. This incident still awaits Justice. In such instances, it is of paramount important to take up relevant studies on the cause of the offence of rape, so that it serves a basis for strict action and strategies. As per the media reports, and the opinions shared there to by relevant authorities, the causes of rape, for the time being, unascertained on standard research shows:[55]

a) Dwindling parental responsibility of child care and child discipline;
b) Ineffective Awareness Programs;
c) Relational or residential;

54 The *Royal Bhutan Police* was expected to study the underlying causes of rape in Bhutan.

d) Wrongfully trusting the neighbours [increasing sexual predation in close-knit communities]
e) Wrongful exposure to the Internet and unhealthy Internet content;
f) Lack of coordination in support services;
g) Lack of community support- everyone wants to stay out of such issues;
h) Lack of gender sensitization and strict implementation of the laws;
i) Economic dependency [mothers could not report their daughters raped by stepfathers due to economic dependency];
j) Institutional integrity and name [schools not reporting];
k) Lack of awareness among the people, high level of acceptance, and limited response services;
l) Lack of multi-sectoral approach on the issue and promotion of child safe environment; and
m) Disrespect for and lack of value for an individual.

In these contexts, it is important to relay the information of the causes of rape[s] and child molestations in other countries and relate the human psychology of the offence since the "mental element" of the offence, with the different societies, will remain, almost similar; with little differences. While the issue of violence is pre-mediated, child molestation and rape of a child below as well as above twelve years of age shows a degree of *"sexual perversion."* The causes of offences of rape can be divided into the following theoretical and practical domains:

a) Philosophical perspectives;
b) Human Perspectives;
c) Cognitive and psychological perspectives;
d) Rule of Law perspectives;
e) Social domain or change perspectives/ Personality Traits; and
f) Place (Location).

From a philosophical perspective, which few may like to consider,

55 Opinions shared by people in *Kuensel,* and *Bhutan Times.* There is no standardized study undertaken to analyze the causes of rape in Bhutan. *The Parliament of Bhutan* has undertaken the revisions and amendments of the *Penal Code,* thus upgrading the sentences for the offences of rape but we are yet to see the deterring effects of the criminal law on the matter of sexual offences.

we need to consider the philosophical understanding of "dependent arising"[56] and the negotiation between the diagnosis and the causes. As per the philosophical undertones, offences are caused by, which is partially true, corruptions of the time, as people, call it the "degenerated time."[57] One of the elements of "time corruptions" is the generation of perverted views and the emergence of a degraded society. In Bhutan, the social mores or the weighty concepts of *Tha Damtsig, Le Judre, Drig Lam Namzha* and the philosophical inclinations. I normally, listens, indirectly to how children and youth of today, converses, on what issues, and with what linguistic tones. While many children [only discusses], what has happened a month before, or few days back, and their talks are punctuated by tones of masculinity and violence orientations. [Most] talks about how a friend of him or he himself, has hit another person, or at most times, talks about a sycophant behaviourism.[58] They does not normally talk about upscaling their personal or education standards.

The ideal of *Drig Lam Namzha* is soon becoming only an institutional requirement. Le Judre, the karmic causes and conditions are soon going to become confined to the esoteric practices. While *Tha Damtsig* is associated with kindness, reverence, respect, gratitude; and moreover, it puts a sense of obligation, personal integrity, moral rectitude; and is mostly nuanced with good moralism.[59] The values of Bhutanese society is slowly giving way to modern culture. The difference between a "man and woman" is very blurred; and more so, children are becoming victims of the offence. The idiosyncrasy and the ethics of Bhutanese population is waning away. As in the *Mawong Lungten, Clarifying Light: A Prophecy of the Future, Lord Buddha* has said:

Further, Guru Rinpoche prophesized:[60]

56 *Dependent arising* is a phenomenon- which does not exist by itself. The offence has a cause principle.

57 *Degenerate time* refers to dark age or *snings mahi dus.*

58 Youths appear to dress very shabbily, be in the national dress or casual clothing: we can make out their deep voices most discussing on "very unethical state of youth behaviour, like how he or his friend has hit a person over the table, or how his parents were furious since he had done…"

59 Phuntsho, K. (2004). *Echoes of Ancient Ethos: Reflections of Some Popular Bhutanese Social Themes.* The Centre for Bhutan Studies, Thimphu.

When minds are occupied with negative thoughts, people feed on broken pledges and misdeeds, they engage in unwholesome actions, when people commit wicked deeds.
All sentient beings will come to lack self-control, like paper blown about in the wind or like a great lake that surges and overflows.

At that time people will kill as their way of life; as trade they will deal in falsehood; wearing costumes to bolster their confidence, they will murder for prizes and revel in sexual perversity.

These are not impractical theories of existence; they direct us with the predictions that "pure ethics"[61] would wane down thus generating a tumultuous time.

a) The Psychology of Rape [Cognitive and Psychological Perspectives]

As per experts, it is said that rape [can be] made into three clinical classifications of *aggressive, sexual and sex-aggressive diffusion.* The aggressive offender uses sex as show of aggression. It is an expression of their anger to humiliate and defile the victim, who is always a stranger. They tend to have history of difficult heterosexual relationship. While some psychologists say that *sexual conflict between men and women involving a co-evolutionary arms race.* The psychological differences between men and women, such as the male desire for sexual variety and the female preference for long-term commitment, that enhance mating success. Conflicts naturally arise because what is good for women is not always good for men, and vice versa.

Moreover, the Intensive Studies covering over 37 different cultures show that men prefer youth and physical attractiveness in women.[62] It was

60 *Advice from the Lotus Born,* A Collection of *Guru Padmasambhava's Advice* to *Dakini* Yeshey Tsogyal and Other Close Disciples, Rangjung Yeshe Publication, Hong Kong.

61 The concept of *"pure ethics"* is the ability to maintain good conduct and a pure mental landscape.

studied that "that mating was the center of the psychological universe" and that men and women had different sexual psychologies.[63] The theories of specific intent shows that rape can constitute a torture in a colloquial sense.[64] Feminist theorists inspired by Brownmiller often interpret rape as a method by which men maintain this power and dominance over women. Moreover, feminist theorists have argued explicitly that rape is not about sexual gratification and often seem more focused on making ideological, rather than scientific, statements about human psychology and behaviour.[65]

Evolutionary psychology is a powerful heuristic tool that can be used to generate new testable hypotheses across all domains of psychology. Evolutionary psychology rests on several key premises. The research provides the premise states that natural selection is the only known process capable of producing complex functional systems such as the human brain. It analyzes the specific powers of brain that generates the theory of psychology and behaviour.[66] These tools help to capture the basic human behaviour that is generated towards sex. While *parenting investment theory* says that woman is always selective of their sex partners, and for men, whose sex does not invest in offspring, will compete for sexual access: this in the sense, foretells that men will be very open and competitive for open sex.[67] Psychologically, women are more prone to invest in offspring (non-causal sex) than men, who will invest more in mating effort. This also fights *genetic determinism,* the idea that behaviour is unalterable, programmed, or otherwise unchangeable.

This is incorrect and experts maintain that rape is not evolved by evolutionary mechanisms. It considers rape as the product of specialized

62 Klien, M. J. (2021). *Men Behaving Badly: David Buss on the Ancient Origins of Sexual Harassment.* California.

63 Klien, M. J. (2021).

64 Teo, P.Z. (n.d.). *Rape as Torture: The Psychology and Motivations of Perpetrators.* Retrieved from Teo-Rape-as-Torture-DOJ-Perpetrator-Psychology.pdf.

65 McKibbin, W.F. et al. (2007). *Evolutionary Psychological Perspectives on Rape.* Florida Atlantic University, Oxford University Press.

66 McKibbin, W.F. et al. (2007), p.3.

psychological adaptation. Rape adaptations involve mechanisms that cause men to evaluate the sexual attractiveness of rape victims differently than for consensual partners. One of the psychological factors that perpetuates rape is the "disadvantaged male," which is characterized by men who are motivated to rape if they have no other means of securing copulation. This is called *mate deprivation.* Another group of perpetrators are called by a *specialized rapist.* Men in this group may possess a psychology that produces differences in sexual arousal in response to depictions of rapes versus depictions of consensual matings. Because rape carries high potential costs for the rapist, particularly if caught in the act, rapists with a psychology that allowed for quicker arousal and ejaculation during rape might have been more successful than men who did not possess such a psychology.[68] They also evaluate the *"attractiveness of the victims."*

While another group is called as the *"opportunist rapist."* These men generally seek out receptive women, but might switch to *sexual coercion* and rape if women are not receptive, or if the benefits of coercive sex outweigh the costs, such as a low or absent risk of detection and injury or retaliation by the victim, the victim's family, or society. All offenders of rape are predicted to be attuned to a potential victim's vulnerability.[69] The fourth one is the *"high mating –effort rapist."* Offenders of this type may be characterized as being aggressive, dominant, and having high self-esteem. These men often are the perpetrators of date or acquaintance rape. These behaviours also proved by research that these men have a history of uncommitted sexual relationships. The research also pointed out the possibility of "date rape" since the man has initiated the date, a woman has agreed, spent money on her, and provided transportation. This theory was proved as far back as 1987 by Muehlenhard & Linton.

There is another group called a *"partner rapist."* The writers argue that rape in these cases happens when the "partner is suspected to be

67 McKibbin, W.F. et al. (2007).
68 Palmer & Thornhill. (2000).
69 Palmer & Thornhill. (2000).

unfaithful." This can be the ground of marital rape. The psychological mechanisms that lead men to experience greater interest in copulation, and to believe their partner is interested in copulation with them, also may be part of the suite of mechanisms that lead men to sexually coerce or rape their partners.[70] Like any psychological mechanism, rape mechanisms require functioning genetic and environmental components. Rape is only predicted to occur under specific environmental circumstances that activate men's evolved psychology. Writers argue that *"men also have controlling behaviour,"* and they can control their behaviour.

b) Role of Personality Traits (Social Domains)

Some writers agree that *"male sexual victimization"* or childhood experiences known as *Child Sexual Abuse (CSA)* has a role to play.[71] Bronfenbrenner originally developed this model to describe human development. He proposed a broader approach to human development that included not only the immediate setting that surrounds the developing person but also the larger social contexts in which development takes place.[72] It is stated that man who perpetrates offences are hyper-masculine and requires high power and dominance. They are impulsive, aggressive, and manipulative. Moreover, sexual assault perpetrators lack social conscience, and are more immature and irresponsible when compared to non-perpetrators. They lack sexual empathy. Researchers have termed this as the *"Big Five Personality Traits of Neuroticism."*[73] This can be best explained through the *Ecological Model,* which states this level takes into account personal history that influences or shapes behavior. It includes developmental experiences, attitudes, and aspects of personality that influence the individual's reaction to *microsystem* and *exosystem stressors*.[74] Examples of individual factors that could influence the propensity to sexually aggress include certain personality

70 McKibbin, W.F. et al. (2007). *Evolutionary Psychological Perspectives on Rape.*

71 Hammond et al. (2016). Perceptions of male rape and sexual assault in a male sample from the United Kingdom: Barriers to reporting and the impacts of victimization. *Journal of Investigative Psychology and Offender Profiling.*

72 Voller, K.E. (2004). *Role of the Big Five Personality Traits in the Sexual Assault perpetration by College Males.* Saint Cloud State University, Minnesota, United States of America.

traits, attitudes and beliefs about sexual violence, witnessing violence, sexual assault history, and past sexual experiences.

c) Location

The authors on the risk of *sexual assault* or *rape* identify the sexual variables that aggravates a sexual offence risk. Location of the assault, alcohol use by both the victim and the perpetrator and misperception of *sexual cues* is stated as another factor. Researchers like Goodchild and Zellman say that sexual assaults take places like Parties, and the inability of women to identify the "ulterior motives" of men. If a man has misperceived a woman's friendliness as sexual, he may feel as though he has been led on, which might make him feel justified in forcing sex. Researchers in 2005 found that over half of young men surveyed thought that forced sex was justifiable if the woman leads the man on, says yes and then changes her mind, or if he gets "so excited" that he cannot stop.[75]

d) Misperceptions of Women's Sexual Preferences- Overfriendliness

This is a personal hypothesis that some women always befriend men, though not sexually. This *heterogeneous relationship* from the outside, exists as if "the woman is all agreeing- in the sense, the expressions, her dispositions as well as provides the man with the sense to identify the positive inclinations, as if to engage in sexual relationship." Although they had been the best friends, sexually, it [may] be intolerable for that woman and it is simply a blanket refusal. These misconceptions, perpetuated through various signs and indications fuel an unfounded sense of hope in her male counterpart. This can also be one of the reasons for rape. *Overfriendliness* is found in research as one reason for rape.[76]

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73 Voller, K.E. (2004). *Role of the Big Five Personality Traits in the Sexual Assault perpetration by College Males.*

74 Voller, K.E. (2004). *Microsystem stressors* are those stressors which are experienced at the individual levels, including family, marital conflict and use of alcohol. The exosystem stressors refer to specific social structures in which the individual can be found in work, school, neighbourhoods, and other institutions of society.

75 Voller, K.E. (2004). *Role of the Big Five Personality Traits in the Sexual Assault perpetration by College Males.*

e) Law and Protection

In countries like El Salvador, which is not a very safe place for women and girls, the legal provisions do not serve the protective role. Research shows that people want the role of the law in enforcing social norms about appropriate sexual behaviour rather than prosecuting cases of abuse.[77] In Bhutan, the effectiveness of the laws is tested through adjudication of the matter before the *Royal Courts of Justice, the Royal Bhutan Police and the Office of the Attorney General.* Aside from the tasks of prosecution, there are not many issues or initiatives undertaken by different agencies working for women and children to come up with strategies to counter the offences of rape. The law alone as a *factor of deterrence* [may] not be completely effective. Stakeholder engagements have to be initiated.

VI. Initiatives against the offence of Rape

Rape is an ignoble offence in the country. Analyzing the different statistics on rape, especially the rising incidences of *rape of a child above twelve years of age* is a concern. Research has to be initiated on why rape is *tending to become a prevalent offence* in the country. Generally, children after the age of twelve years enter puberty, and it is at this time that their sexual as well as physical appearances completely change, thus exhibiting a hormonal change in the body. It is at this time of their prime years, that men tend to target their sexuality, due to the outgrowth of their body parts, including the breast, and other physical growths. Men [in general perception] tend to comparably like that, and the mythical notion of *"virginity"* and *"tautness"* are both appealing to men as well as to the younger.

This invigorates the irrational impulses of men. Moreover, the relationship status of a child to [his] or [her] stepfather is complex and region-based. Particularly in western *Dzongkhags* of Haa, Paro, and Punakha, the

76 Voller, K.E. (2004).

77 Apland, K. (2014). *A multi-country study on legal barriers to young people's access to sexual and reproductive health services,* International Planned Parenthood Federation.

relationship between a stepdaughter to the stepfather is both perplexing as well as irrational. Stepfathers are allowed to have sexual relations with their stepchildren. It is heard that similar practices are followed in the *Lotsham* communities. This has set a risible *relationship status* and has led to incest-like relationships. This can be typically termed as *incest* if it is viewed from the eastern relationship culture. Bhutan has different relational statuses and practices. *The Marriage Act of Bhutan, 1980* states that close-kin relationship[s] can enter into a valid marriage, if the local customs recognize the relationship. It does not prohibit the cohabitation of the *Serga Mathang* system of the east. In such instances, it is paramount that we take adequate as well as effective remedial measures against the offences of rape, most prominently rape of young girls and children. The remedies can be:

a) Enhance Effective Investigative and Justice Services

The rape and murder of a child at Paro has wreaked national sensations and reckoned human cruelty at the highest. We agree that investigating such a case, which seems to have no clues about the perpetrator is challenging. It requires systematic approaches and coordinated methods to secure the perpetrator and administer justice. The *Royal Bhutan Police* could not trace the suspect or any person, who may be associated with it thus, fatally retarding the Justice services to the victim and their families. This may lead to loss of trust and confidence and gives false hope to the perpetrator that the law enforcement [are] not able to apprehend him. These incidences may encourage the perpetrator to commit more sexual offences or other crimes.

b) Training on Investigation in Sex Crimes and Creation of Pool of Expert Investigators

A sex crime is an incalculably serious offence. The decisions and justice are tendered down to how the matter is investigated and adjudicated. While the offences are, at the maximum, investigated, prosecuted and adjudged, the *Royal Bhutan Police* as the nodal agency for investigation should initiate specialized training on the *Investigation of Sexual Crimes* including crime detection, forensic analysis, scientific evidence gathering and collaboration.

This training should be initiated with a specialized agency in collaboration with India or another forensic and scientific-based investigation expert nation, so that we cannot only investigate minor offences but be able to identify, scrutinize and apprehend the perpetrators in offences like in Paro and Dechen Choeling, Thimphu. Creating a pool of scientific investigators [for such] crimes like the **SEAL** operators in the United States is both necessary and timely. The establishment of the *Forensic Laboratory* at Serbithang, Thimphu for the *Royal Bhutan Police* under the *Justice Sector Programme* is expected to enhance the investigation in the country.

c) Challenging the social norms through competitive Social Awareness

Social norms are the most entrenched and habituated customs in any particular society. Social norms are the ways of people's lives and they punctuate their living standards, and ways of living as well as how they view and affect relationships. Social norms are hereditary and inter-generational. It is a social habitus, as well as a community. The different agencies should initiate intelligent methods to change social perspectives, norms and sexual relations. This initiative cannot be done at once, it has to be repeated over time, over many decades, with an analysis of how human habits can be transformed.

Moreover, as the father of the twelve-year-old pregnant daughter from Samdrup Jongkhar opined that *"he trusted his neighbour and kept her with him…"* In such cases, the rural communities have to be educated and be acutely sensitive about the evolving relationship paradigms and instruct them to keep a keen eye on their young children. Sometimes, the perpetrator is within the four walls of their own houses. It is shared by people [not to name] that men tend to lure young girls by showing them sexually explicit videos and pornographic content to children, which are easily online, to indirectly entice the child towards arousal.[78] The norms have to be challenged and relationships have to be defined and looked at from different social dimensions.

d) Reporting Mechanisms: Collaboration Building and Outreach

As noted above, statutory rape cases are underreported. We need to encourage people to report the cases immediately, and this requires changing attitudes about the seriousness of these cases. Reporting would serve two goals: first, it would help identify young teens in need of services to deal with the damage done by the relationship with the adult, and second, it begins the process through which justice professionals can assess whether criminal prosecution is appropriate.

Unless statutory rape cases come to light, teens may be left alone to cope with problems, and adults may operate with impunity. How do we do that? We need to design our own mechanisms. For example, working closely with the media, improving teacher-student trust and relationship, removing the social stigma, starting a reporting desk in the schools, BHUs, community centers, and any other forms and methods that can help our children report the cases either through anonymity or in-person. We need to conduct further research and analysis that fits our context the most.

e) Legal Dissemination: Empowering Our Children

Are we educating our children enough? Do our children know their basic legal rights and duties? Certainly, we are failing to empower them! Other than the School Law Clubs established by the Bhutan National Legal Institute (BNLI) in the schools, there are hardly any legal empowerment programs. School children do not learn more than the prescribed syllabus. Therefore, Judges in the respective Dzongkhags need to be mandated to talk with the school administration and carry out the responsibility to educate our children on their legal rights and duties. Without proper mandate, any dissemination program in the school will be 'an attempted failure' because there is a genuine concern from the school administration to complete the syllabus on time.

78 These are a few incidences shared by the people in the east.

Similarly, judges can talk with the local government leaders about the legal advocacy programs in the community. Through dissemination plans and programs, we can empower our children on sexual exploitation, teenage pregnancy, and other rights and duties that concern their daily lives. In general, legal dissemination would help understand one's rights and duties while respecting the other's rights.

f) The Judicial Approach

The *Royal Courts of Justice* are at the crossroads of legal anomaly, letter of the law and justice [in the real sense]. While the hands of the *Royal Courts of Justice* are tied and the Courts in Bhutan do not take proactive judicial approaches, they interpret the letters of the law to secure justice and the *rule of law.* The courts mechanically apply the letter of the law and do not question the nature and the spirit of the laws, especially the rape of a "child above twelve years of age," when both the parties had been consenting, the girl possessing the physical ability and the consent to engage in sexual intercourse. The law has curtailed the sexual rights of people, destroyed families, created fatherless children, incarcerated innocent people, effected the vengeance-based reporting of the offence, and destroyed people.

The Legislature has not made any initiatives to amend the law and is visible that injustices are perpetuated before the eyes of the nation. The *Romeo* and *Juliet* liaison of the United States has destroyed many families in Bhutan; we are yet to consume the full scale of the law and see how many coming generations, and willing couples will be incarcerated and imprisoned. The *Romeo* and *Juliet Clause* has never encouraged the growth of affection and is a **BIG** legal anomaly Bhutan has copied in from the West. It simply shows the lack of proper research and practical-based legislative analysis in Bhutan. This is what happens when laws are simply copied without logic.

As stated above, the *Judiciary* need to provide a strict interpretation of the penal legislation. The rule of penal construction is designed in such a way that 'benefit of doubt should be given to the accused' and it

has to be proven beyond reasonable doubt for any criminal conviction. Keeping this general principle in mind, we also need to think that, unlike civil disputes where only two parties are interested in the case, criminal law attracts interest from the general masses. We should ensure entire society wins from our interpretation.

The recent issue of a 12-year-old child giving birth is devastating and nightmarish. Our approach towards such cases should be to ensure that society is safe and our children enjoy most of their right to education, growth and development, and survival. Sometimes the Judiciary should take risks to be proactive in the interest of Justice and common conscience. When the law results in injustice, then who has the final authority to arbiter Justice? So, the question of Justice here is "Is justice what the law says" or "Has justice other qualities which no law can say?"

VII. Conclusion

The offence of rape, *sexual harassment,* battery and child molestation, when we look at the statistics of the *Royal Bhutan Police* does not indicate, in comparison to the total population we have in the country, a sound society. Offences against a child above twelve years, amongst all others, had been quite alarming as well as frightening. Things can happen in India; it is simply a very huge country. Bhutan is a small country and comparatively, the offences reported indicate that "we are going through terminally *social course changing sexual behaviour.*

In this light, the offences of rape, child molestation and others, are increasing every year- and we can predict, the incidences may not fall looking at rapid urbanizations, changing human behaviour and unchallenged sexual predation practices: community-based lore. We must design a strategy and obtain a national consensus to fulfil the constitutional rights of our children to secure health and safety. The interventions have to be longer-termed, motivated and initiated with institutional zest and ownership. It has to change the perspectives of society and the people.