

BUDDHIST JURISPRUDENCE

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Introduction

Buddhist philosophies are quoted and have triumphed over many other philosophies. Simultaneously, dialogues between the Buddhist spiritual leaders, scholars, and the scientists have unlocked the unknown areas of Buddhist scientific knowledge. It is the convergence of great wisdom and intelligence that liberated humanity from the drudgery of ignorance and alleviated poverty.

Teachings of Lord Buddha are the synthesis of schools of thoughts, ages and philosophies. His teaching encapsulated the past, present and will encapsulate the future as well. Indeed, he was the man of all ages with perennial wisdom. His teachings did not ossify and did not get itself entrenched to undo the reforms that were introduced by enunciating the timeless wisdom. His teachings played an important role in shaping the spiritual, philosophical, political and social modes of life in the Buddhist world. Its influence has permeated through different historical periods and many social and political laws, cultures and traditions in the Eastern world have been dominated or influenced by the teachings of the Buddha. However, only the Greek and western thinkers such as Plato and Aristotle have been projected as the source of civilization and as the authentic ideological link between the past and the present. This is despite the fact that the Buddha pre dates Aristotle and Socrates. Therefore, this Conference on “Buddhist Jurisprudence” is a good opportunity for us to demonstrate and examine Buddha from a different angle – that of a political thinker and a forerunner to the western philosophers such as Socrates, Plato, Aristotle and others.

The literary, doctrinal, practical and cultural manifestations of Buddhism are too complex for any individual, however learned, to do full justice to the topic of the Conference. Therefore, I am presenting this paper on Buddhist Jurisprudence with a modest objective. I have made an attempt to point out the Buddhist legal principles, drawing comparisons with the western philosophies and legal principles starting from the Greek’s concept of universal law (*koinos nomos*), the partial skepticism¹ of the Sophists, and the epochs of Cynicism, Rationality, Humanism,² Renaissance, Enlightenment (the Age of Reason), Empiricism,³ Romanticism, Postmodernism, etc., so that future political scientists, particularly those in my country, can further work on this subject.

I also hope that the teachings of the Buddha and the lessons drawn from this Conference can be used as an inspiration to draw lessons and ideas for our contemporary concerns and problems. It can serve as an indigenous critique of the modern political and economic theories. It could further provide a philosophical agenda or serve as a moral guide to create new political, social and economic philosophies to address the problems faced by the world today.

¹ *ajñana-vadin, amaravikkhepika.*

² K.N. Jayatilleke writes in his book that “Buddhism resembles modern scientific humanism”. See K.N. Jayatilleke, *Dhamma Man and Law*, 2000.

³ Lord Buddha said that “my statements should be accepted only after critical examination and not out of respect for me” – *Tattvasamgraha*. It is verifiable (*ehipassika*, lit. has the characteristic “come see”).

Part I

Human Society and State

The *raison d'être* of the evolution of humanity is re-procreation, survival and progress. According to Richard Posner, “*In primitive society, people believed in self-help.*” It is the depletion of food resources for an increasing population and avarice of human being that encouraged the development of a multitude of laws. This is well depicted in the tale of *Mangpos-bkurbai rGyalpo*:⁴

*“As men lost their primeval glory distinctions of class (varna) arose, and they entered into agreements one with another, accepting the institution of private property and the family. With this theft, murder, adultery and other crime began, and so the people met together and decided to appoint one man among them to maintain order in return for a share of the produce of their fields and herds. He was called “the Great Chosen One (Mahasammatta), and he received the title of raja because he pleased the people.”*⁵

This tale of the Great Chosen One (*Mahasammatta*) contains the Buddhist theory of the emergence of the State and political leadership. The *Mahasammatta* enunciates many profound legal principles such as social contract theory⁶, principle of freedom of choice from a rational-choice model of collective action, and public choice theory similar to the principles propounded by Bentham, James Buchanan and Kenneth Arrow. Laksiri Jayasuriya noted that:

*“...In many respects Buddhist ideals of statecraft embodying principles and practices such as the rule of law, deliberative democracy, procedures of governance and the social policies of the Asokan welfare state bear a striking similarity to Enlightenment values in Europe.”*⁷

The public choice theory was further supported by public reasoning as explained by Amartya Sen when he says:

*“In the history of public reasoning in India, considerable credit must be given to the Indian Buddhist, who had great commitment to discussion as a means of social progress... The so-called ‘Buddhist councils’, which aimed at settling disputes between the different points of view... these councils were primarily concerned with resolving differences in religious principles and practices, but they evidently also addressed the demands of social and civic duties...”*⁸

The Buddha believed that a just government could be obtained by having moral rulers who cared for the welfare of the people rather than for themselves. Dhammaraja or the leader with the “ten royal virtues” (*dasarajadhamma*) was the ideal leader. According to the Pali scriptures,

⁴*Mangpos-bkurbai rGyalpo* or *Mahasammatta* which literally means the King elevated by many and whose legitimacy was based on popular consent. He was the first king of Buddhist legend. See generally, Refer *rtogs brjod dpag bsam 'khri shing* 3rd edition (1999), page 93 and Thierry Mathou, “The Politics of Bhutan: Change in Continuity”, *Journal of Bhutan Studies*, 2008, p. 235.

⁵Francis Fukuyama, *The Origins of Political Order*, 2011.

⁶The Buddhist view of kingship was governed by the notion of the social contract (*Agganna Sutta*).

⁷Laksiri Jayasuriya, “Buddhism, Politics, and Statecraft”, in *International Journal of Buddhist Thought & Culture*, September 2008, Vol.11, pp.41-74.

⁸Amartya Sen, *The Argumentative Indian*, p.14.

*“It became necessary to extend natural socialism to the political foundations of the community when oppression in the community became intolerable. People saw fit to invest a particularly capable, just leader with their trust and power. This leader or raja would govern in such a way that no one could oppress anyone else, and the community would thus enjoy contentment.”*⁹

Mahasammatta was also called Khattiya or lord of the fields.¹⁰ His last name was Raja because he charmed the others by the norm or *Dhamma*. The people obeyed and respected the *Mahasammatta* because he preserved the peace and settled the conflicts among the people by way of *Dhamma*.

Mahasammatta exhibited the judicial qualities and temperament later advocated by Socrates. Judicial qualities and temperament defines judicial success. Judicial temperament means having compassion, decisiveness, open mindedness, sensitivity, patience, freedom from bias and commitment to equal justice.¹¹ Even under Buddhism, these qualifications are always ascribed to one who rightly fills any judicial office, and are called the four *Agatis*. They are the special attributes of a good king sitting as a judge.¹² Therefore, according to Buddhism, a compassionate, just and a non-violent sovereign of the world protects the people and leads them to material prosperity and peaceful life.

What is Law?

Humans aspired for salvation and liberation through spiritual, philosophical and intellectual pursuit to unlock mysteries and expose the truth. The quest for law was one of them. It is understood from the history of natural law that the Greeks gave a conception of universal law for all mankind under which all men are equal and which is binding on all people. Two trends of thought existed among them. Firstly, the Sophists developed a skepticism in which they recognized the relativity of human ideas and rejected absolute standards. The basis of law was the self-interests of the law maker and the only reason for obedience to law was the self-interest of the subject. Secondly, according to other schools of thought, law was guided by uniform principles, which could provide stability. Socrates, Plato, Aristotle and Zeno were supporters of this view.

Over the centuries, much juristic ink has flowed in an endeavour to provide a universally acceptable definition of law. Law has been defined by both the philosophers of the Socratic and Greco Romanic period as well as by the political thinkers and philosophers such as Austin, Hart, Joseph Raz, Max Weber, Kelsen, Ronald Dworkin, Hegel, Marx and Nietzsche and Dworkin.

Aristotle and Plato defined law as an “embodiment of reason”, whether in the individual or in the community.¹³ Austin defined law as a series of both explicit and implicit command from a higher authority. The law reflects the sovereign’s wishes and is based on the sovereign power. Backed

⁹ Buddhadasa, *A Dictatorial Dhammic Socialism*, p. 89.

¹⁰ F. Max Muller (ed.), *Sacred Books of the East*, Vol. X, trans., 1968, p. 88.

¹¹ The role of the American Bar Association in the judicial selection process: Hearing before the Committee on the Judiciary, United States Senate, One Hundred Fourth Congress, second session, May 21, 1996, Volume 4.

¹² *Samghadisesa XIII; Mahavagga VIII, 5,2; VIII, 6,1, 2 page 25.*

¹³ Otfried Hoffee, *Aristotle's Nicomachean Ethics*, 2010.

by sanctions and punishments, it is not the same as divine law or human inspired moral precepts.¹⁴ Hart defined law as a system of rules, a union of primary and secondary rules. Laws that impose duties or obligations on individuals are described by Hart as “primary rules of obligation”.¹⁵ For Max Weber, “law exist if it is externally guaranteed by the probability of coercion (physical or psychological) to bring about conformity or avenge violation, and is applied by a staff of people holding themselves especially ready for that purpose”.¹⁶ Law has also been defined and understood as an interpretative social practice¹⁷ that contains implicit moral principles and values. Law is related to justice, reason, human nature and ethics. It is also an instrument of social change.¹⁸ According to Alexander Bickel: “Law is the principal institution through which a society can assert its value”.¹⁹

In Buddhism, the term *Dhamma* is variously translated as doctrine, law, norm, righteousness, truth or world order.²⁰ *Pali English Dictionary* gives the meaning of *Dhamma* as law.²¹ The *Dictionary of Political Science* defines *Dhamma* or law as the proper attitude of the ruler of subjects and of subjects to their governing body.²² Lord Buddha said that law is “for correcting those who have gone wrong”²³ (*Durmangana pudgala nigrahaya*). This is a profound statement of restorative justice²⁴. In all societies, the law gives form and direction to the social world. It represents the solemn will of the state pronounced through the legislative power for the common good. *Nagarjuna*²⁵ wrote:

“As the earth is to living and non-living entities, law is to human beings.”²⁶

Therefore, law is a system of rules usually enforced through a set of institutions, which is to provide an objective set of rules for governing conduct and maintaining order in a society. Lord Buddha mentioned that:

“The Law is that which leads to welfare and salvation. It forms conduct and character distinguished by the sense of equality among all beings.”²⁷

¹⁴ John Austin, *The Province of Jurisprudence Determined*, 1995.

¹⁵ H.L.A. Hart, *The Concept of Law*, 1961.

¹⁶ Max Weber, *Law in Economy and Society*, p.31-33.

¹⁷ For example, Chanakya (350-275 BCE) who was a philosopher and founder of an independent political thought in India, laid down rules and guidelines for social, legal and political order in the society. See B.K Chaturvedi, *Chanakya*, Diamond Pocket Books, 2001.

¹⁸ Roscoe Pound, *An Introduction to the Philosophy of Law*, 1930. According to him, legal order must be flexible as well as stable. Law must be overhauled continually, and refitted continually to the change in the social life which it is to govern.

¹⁹ Alexander Mordecai Bickel, *The Least Dangerous Branch*, 1962.

²⁰ C.T. Straus, *The Buddha and His Doctrine*, 1970, p. 25.

²¹ T.W. Rhys Davids and William Stede (ed.), *Pali-English Dictionary*, 1975, p.336

²² Joseph Dunner (ed.), *Dictionary of Political Science*, 1984, p. 143.

²³ *bka' - 'gyur sutra, rapa*, p. 57.

²⁴ Restorative approaches to crime date back thousands of years:

- In Sumer, the Code of Ur-Nammu (c. 2060 BC) required restitution for violent offences.
- In Babylon, the Code of Hammurabi (c. 1700 BC) prescribed restitution for property offences.
- In Israel, the Pentateuch specified restitution for property crimes.
- In Rome, the Twelve Tables (449 BC) compelled convicted thieves to pay double the value of stolen goods.
- In Ireland, under the Brehon Laws (first recorded in the Old Irish period) compensation was the mode of justice for most crimes.
- In Germany, tribal laws promulgated by King Clovis I (496 AD) called for restitutive sanctions for both violent and non-violent offences.
- In England, the Laws of Ethelbert of Kent (c. 600 AD) included detailed restitution schedules.

²⁵ *Nagarjuna or Pelgoen Phagpa Lhuedrup* was a famous Buddhist philosopher of the second century A.D.

²⁶ Refer *Suhrida Lekha*.

²⁷ *Somadewa Nitivakyamrita*.

The wheel of the most excellent laws rolled at Sarnath when Lord Buddha began to preach to the five *bhikkhus*²⁸ that the spokes of the wheel are the rules of pure conduct: justice is uniform like their length; wisdom is the tyre; modesty and thoughtfulness are the hub in which the immovable axle of truth is fixed.²⁹ The law is for the welfare and happiness of the many- *bahujana hytaya, bahujana sukhaya*. This is a utilitarian concept.

The Buddha saw the law as an actual, present and an eternal order. He declared the law as a universal norm, as a true standard of views and values to be followed equally and justly without regard to class, social status or economic conditions. The Buddha said:

*“the gift of the law exceeds all gifts.”*³⁰

Mipham Rinpoche³¹ mentioned that:

*“Good laws are the guardian and protector of the World. Hearing that it punishes the guilty would appease the good people but frighten the bad ones.”*³²

Types of Law

Laws may broadly be divided into natural law (*jus naturale*)³³ and positive laws (*jus positivum*)³⁴, criminal and civil laws, substantive and procedural laws, public and private international laws, etc. The medieval thinkers Augustine, Aquinas and Suarez tried to work out a relation between the inherent constraints of human conduct. St. Augustine was influenced by the last school of pagan philosophers, known as the Neo-Platonists. At the end of the Roman era, the principles of natural law were accepted by the Christians.

Natural law or the law of nature has been described as a law whose content is set by nature and therefore is universal or has validity everywhere.³⁵ As classically used, natural law refers to the use of reason to analyze human nature and deduce binding rules of moral behavior. Therefore, reason and common sense are the basis of natural law. Natural law is truth and truth cannot change. It is derived from absolute truth based on divine sources - birth, old age, sickness and death cannot be altered. It denotes a system of rules and principles for the guidance of human conduct, which is independent of enacted or positive laws. According to Richard Posner,

²⁸ They are the five “Excellent Disciples” of Lord Buddha namely (1) *kun shes kaun Di nya*, (2) *rta thul*, (3) *rlangs pa*, (4) *ming chen* and (5) *bzang Ldan*.

²⁹ *Dharma Chakra Pravartan*.

³⁰ F. Max Muller (ed.), *Sacred Books of the East*, Vol. X, trans., 1968, p. 83.

³¹ Ju Mipham Rinpoche (1846-1912) was a great *Nyingma* master and writer. Blessed by *Manjushri*, he became one of the greatest scholars of his time and his collected works fill more than thirty volumes.

³² Mipham Rinpoche, *rajaniti shastra*, p.116.

³³ Natural law and social contract theories were rejected by David Hume which is contrary to empirical truth. Rousseau objected the doctrine of natural law in favour of inalienable sovereignty vested in the ‘general will’ as opposed to any individual ruler or oligarchy. Natural Law Theory is supported by Grotius, Blackstone, Locke, Pufendorf, Montesquieu, Voltaire and Rousseau. Natural law is divided into prescriptive and descriptive natural law. The origin of it can be traced to the belief in a law of nature as a system of justice common to all human beings of the Stoics.

³⁴ Lord Buddha differentiated laws as *Rang-bzhin* and *bcas pa'i khrims*. Aristotle said that positive laws must be obeyed and ‘it is not perfect and it may give rise to inequalities, but we should aim at reforming the law, not breaking it.’

³⁵ J. Finnis, *Natural Law and Natural Rights*, 1980.

“Natural law project has never recovered from what Nietzsche called the death of God (at the hands of Darwin).”³⁶

Similarly, Buddhist laws can generally be classified into two categories namely natural laws – *Rang bzhin gyi khrims* as described in the *bka'gyur*, *Tri Pitaka*, *Bodhicharyavatara* (*spyod 'jug*) and *bde smon*³⁷, and positive laws - the *bcas pa'i khrims*. The theory of impermanence and the temporariness of things form the central theme of the natural law. Differentiation of natural law or positive law is explained in *Nagersen* and *Milenda*, which are so relevant and modern.

In Buddhism, the positive laws include the six edicts of law, such as:

- *Khri stse 'Bum bzher gyi khrims* (Law of governance of Army and Executive).³⁸
- *Bum gser thog Sha-ba-can gyi khrims* (Law relating to Weights, Measures and Fair trade).³⁹
- *Rgyal-khams dper blangs kyi khrims* (Law of the State).⁴⁰
- *Mdo-lon zhu-bcad kyi khrims* (Law of Interrogation).⁴¹
- *Dbang chen bcad kyi spyi-khrims* (Law of the Great Governors).⁴²
- *Khabso nang-pa'i khrims* (Law relating to Fair Trial).⁴³

Law is further classified into five broad sections, *Nyan-thos kyi khrims* (Laws for the dhamma followers), *byangchub Sems-dpa'i khrims* (Laws for the Saints), *bde bar gshegs pa'i khrims* (Laws of Enlightenment), *dge 'dun gyi khrims* (Monastic Laws), and *Rang or Kun gyi khrims* (Secular Laws). The Vinaya provides:

“There are 18 origins or roots of law, 32 branches of law and 39 digests of law. There are 3 kinds of bribery, 4 agati, 3 kinds of giving, 4 kinds of wives, 7 kinds of slaves, 7 kinds of minor cases, 4 kinds of questioning cases, 1 kind of fair case.”⁴⁴

Moral Law

The meaning of moral law in Buddhism can be understood from what Buddha said: “Not to commit any sin, to do good, and to purify one’s mind. That is the teaching of all the awakened”⁴⁵.

In Buddhism, moral law shapes both the internal and external behaviour. It regulates the conduct and determines what a man should and should not do. Buddhism believes that the destiny of man does not come from supernatural beings but from his own actions. Man is regarded as the creator of his own destiny based on his action. Buddha said:

“By oneself the evil is done, by oneself one suffers;

³⁶ Richard A. Posner, *The Problem of Jurisprudence*, p. 14.

³⁷ Prayer(*pranidh'ana*) to be reborn in the sukhavati paradise of amitabha Buddha by *Karma chags med(r'a ga a syas)*, 17th century.

³⁸ The first law Code of King *Srongtshen Gambo*. The Code enshrines separation of powers and responsibility.

³⁹ It deals with duties of an individual regarding the matter relating to weights, measures and fair trade etc.

⁴⁰ It enshrines duties and obedience to laws.

⁴¹ It enshrines fair trial.

⁴² It enshrines adjudication by due process.

⁴³ It enshrines delivery of equal justice without discrimination.

⁴⁴ Andrew Huxley, “Buddhism And Law—The View From Mandalay” in *Journal of the International Association of Buddhist Studies*, 1995,p.67.

⁴⁵ F. Max Muller (ed.), *Sacred Books of the East*, Vol. X, trans., 1968, p. 50.

*By oneself evil is left undone, by oneself one is purified.
Purity and impurity belong to oneself, no one can purify another.*⁴⁶

A good act will yield happy results to the doer, while the bad action will give bad results. This is the principle of law of causation. The *Samyutta-Nikaya* beautifully sums up the principle: “According to the seed that sown, so is the fruit ye reap these from. Doer of good will gather good. Doer of evil, evil reaps.”⁴⁷

In Bhutan, the socio-political concepts of *tha damtshig* and *le judre* (*las rgyu 'bras*) or the karmic cause and effect are popular moral and ethical precepts. People view it as an infallible law of virtuous actions leading to happiness and happy rebirth and non-virtuous actions leading to suffering and unhappy rebirth.⁴⁸

As can be seen, law and morality are intimately related to each other. Laws are generally based on the moral principles of society. Laws, to be effective, must represent the moral ideas of the people.⁴⁹

Objective of Law

The objective of law is stability, peace and tranquility of all sentient beings. The Buddhist principle of sixteen virtuous acts of social piety (*Michos g.tsangma bcu-drug*) exhorts that the laws of the past spiritual Monarchs were enacted to secure freedom.⁵⁰ Subsequently, Lord Buddha propagated:

*“The Law is that which leads to welfare and salvation... The Law is equal, equal for all beings... Impartial is the law.”*⁵¹

Law must allow each individual to know, before taking any action, what conduct is illegal, why it is forbidden, and what will be the penalty for violation. In substance, the law must forbid only such private conduct that violates the individual rights of others. According to accepted principles of “*institia est constans et perpetua voluntas ius suum cuique tribunes*” - justice is the constant and perpetual purpose of rendering each man his due and “*iuris praecepta sunt hae: honest vivere, alterum not laedere, suum cuique tribuere*”- the precept of the law are: to live honestly, not to injure your neighbour, and to render each man his due. Law should be clear and precise, and it should leave no room for any person to exercise arbitrary power through unpredictable and subjective decisions. Lord Buddha himself mentioned that:

*“He who dispenses justice in an arbitrary manner could never be considered one who abides by the law. One who clearly ascertains both right and wrong is the one who is held as wise and just.”*⁵²

Furthermore, in *Dhammapada* it is mentioned that:

⁴⁶ F. Max Muller (ed.), *Sacred Books of the East*, 1968), p.46.

⁴⁷ Mrs. Rhys Davids, *Buddhism: A Study of Buddhist Norm*, 1928, p. 123.

⁴⁸ Karma Phuntsho, “Echoes of Ancient Ethos”, in *The Spider and the Piglet*, Karma Ura & Sonam Kinga (Eds.), 2004, p.568

⁴⁹ See L.L. Fuller, *The Morality of Law*, 1969.

⁵⁰ Freedom encompasses *bDe ba* to secure happiness, welfare, safety, tranquility, prosperity and liberty.

⁵¹ *Dharmasangiti Sutra*.

⁵² *The Dhammapada*, The teachings of the Buddha, Verse 19: *Endowed with Dharma*.

*“He is not thereby just because he hastily arbitrates cases. The wise man should investigate both right and wrong. The intelligent person who leads others not falsely but lawfully and impartially, who is a guardian of law, is called one who abides by righteousness.”*⁵³

Law should have utilitarian and functionalist purposes.⁵⁴ It must encourage virtue, and prevent vice and immorality. The legal principles must be divided under three divisions namely, the enunciation of legal values without subordinate sections, elaborate legal remedies, and punishment for violation and non-compliance. Every law must be cautionary to avoid disproportionate punishment and abuse of power.

Laws should as far as possible be just and enduring for its normative, procedural and institutional values including institutional responsibility and accountability. No law lasts forever. This is in consonance with the Buddhist philosophy of impermanence. However, the laws must endure through fluctuating fortunes. Mipham Rinpoche cautioned that *“If the laws are amended repeatedly, respect and obedience will diminish”*.⁵⁵

Justice

Justice is a social virtue and an inherent human necessity. Justice is sublime and transcendental. Plato praised justice as one of the four virtues necessary to support the perfect state,⁵⁶ the other virtues being wisdom, courage, and temperance.

According to Rawls, *“justice is the first virtue of social institutions.”* Hence, justice promotes virtues and vitiates vices. With passage of time and changing situations, justice acquired multi-dimensions and categorizations such as Commutative justice, Corrective justice,⁵⁷ Compensatory justice, Social justice,⁵⁸ Distributive justice,⁵⁹ Institutive justice, Economic justice,⁶⁰ Political justice,⁶¹ Global justice⁶² etc. Buddha’s emphasis on the individual’s right to take what is due to him is closer to Aristotle’s corrective justice. Under Buddhist principles, justice encompasses the principles of equality, distributive and corrective notions. The laws of *rGyalpo Melong-g.dong* of 1914 B.C. from *Tripitika*, incorporates the concepts of retributive, deterrent and reformatory Justice.

⁵³ *Spoken in the Jetavana Grove, Dhammañña Vagga, The Just Or Righteous* (Text and Translation by Ven. Nārada), Chapter 19, verse 256.

⁵⁴ Normative ethics is rational inquiry into or theory of the standards of right and wrong, good and bad in respect of character and conduct, which ought to be accepted by a class of individuals. Hugo Grotius argued that law arises from both a social impulse. Hayek - “only the existence of common rules makes the peaceful existence of individuals in society possible... the “rationalist” or “constructivist” understanding of the origins of law.”

⁵⁵ Mipham Rinpoche, *rajaniti shastra*, page 22.

⁵⁶ V. Venkata Rao, *Ancient Political Thought*, 1966, p. 44.

⁵⁷ Corrective Justice promotes equality in exchange of goods in accordance with the amount and quality of labour contained therein.

⁵⁸ Social justice aims at abolition of all kinds of inequalities, which may result from the inequalities of wealth, opportunity, status, race, religion, caste, title, etc.

⁵⁹ Distributive justice stresses the role of the state.

⁶⁰ Economic justice at distribution of material resources is for the common good and to prevent concealment of wealth. It also includes equal pay for equal work, right against exploitation, etc.

⁶¹ Political justice is absence of any unreasonable or arbitrary distinction among the people in political matters. It includes single electorate and adult franchise. Every citizen is entitled to contest in elections and participate in voting irrespective of their status.

⁶² Refer, Thomas Pogge, *What is Global Justice?—Politics as Usual: What Lies Behind the Pro-Poor Rhetoric*.

In Buddhism, justice should not be based on the four wrong causes of behavior or prejudice:

- (1) “prejudice caused by love or desire;
- (2) “prejudice caused by hatred or animosity;
- (3) “prejudice caused by delusion or stupidity; and
- (4) “prejudice caused by fear.”⁶³

According to Buddhism, justice is the soul of the ruler’s function. *Mahā-Pāduma-Jataka* says that the king’s duties in the court, when he decides case, are to be performed with care and deliberation. The Buddha said to the King of Kosala, “*My lord king, to judge a cause with justice and impartiality is the right thing*”.

The important quality of the person whose work is concerned with the punishment of a man who has done wrong is that he must consider and examine the case from many documents, situations and pleas, and then decide justly and rightly. The Buddha speaks of how to prepare the decision:

*“You first have the advice of a being all-wise like me; it is no wonder if you should judge your case fairly and justly avoiding the four ways of wickedness.”*⁶⁴

When a case arises, each party has to be heard carefully, and the arguments considered and evaluated before judgment - *Iyadhuyasikiya-vinayana*(consensus) is given. Partiality, ill-will or fear should not be allowed to influence one’s judgment. In the *Mahavastu*, it is stated that:

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

It is said that a judge fails to uphold justice, if he deprives a rightful owner of his property, or pronounce an innocent man guilty because he had a long-standing grudge against him, or because he was irritated over another matter without applying legal principles (*Yukti Ayukti*) to the facts of the case. The judge is exhorted to come to a decision only after carefully considering all relevant facts. A judge who fails to follow these rules is likely to lose prestige and suffer loss of status among his colleagues as well as the confidence of the people.

Social Justice

Social justice in terms of the fair distribution of resources, the impartial rule of law and political freedom in Buddhism is *dri-ma medpar grags pa'i mdo* (*Vimalakirti Nirveda Sutra*) – when one’s mind is purified, society will also be purified. Lord Buddha said, “*A correct economic policy should be based on voluntary participation.*” Nobody should gain the surplus value which leads to the concentration of wealth in a few hands, leading to social injustice.

Lord Buddha mentions that:

⁶³T.W. Rhys Davids (ed.), *Dialogues of the Buddha* Vol. IV, trans., 1957), page 228.

⁶⁴ E.B. Cowell (ed.), N. 67, page 1.

“It takes great courage to stand up for and protect what is right... Do not violate the rights and commitments of others.”

Buddhism is based on social reforms and freedom for all. Lord Buddha taught eight freedoms and ten advantages. However, he said, *“Let no one forget his own duty for the sake of another’s, however great; let a man, after he has discerned his own duty, be always attentive to his duty.”*⁶⁵ Thomas William Rhys Davids said that;

*“The Buddha’s doctrine of love and goodwill between man and man is here set forth in a domestic and social ethics with more comprehensive detail than elsewhere. And truly we may say even now of this Vinaya or code of discipline, so fundamental are the human interests involved, so sane and wide is the wisdom that envisages them, that the utterances are as fresh and practically as binding to-day and here as they were then at Rajagaha. Happy would have been the village or the clan on the banks of the Ganges where the people were full of the kindly spirit of fellow-feeling, the noble spirit of justice which breathes through these naïve and simple sayings.”*⁶⁶

In Light of Asia, Lord Buddha said;

*“Be thou content to know not, knowing thus
Thy way of right and duty.”*⁶⁷

Buddhist teachings acknowledge that good legislation be translated into a healthy social order. A king or ruler of the state should ensure a system of impartial justice.

Part II Procedural Law

Judicial Process

The Buddhist transcendental wisdom is relevant to law, justice, democracy, freedom and rights. *Prajna-Paramita* intones transcendental wisdom of the right to freedom of speech, thought and conscience. To protect them, Lord Buddha had established processes similar to the modern day due process of law, fair trial and rule of law. Lord Buddha exhorted that:

*“...upholding the Law - Deliberate well and lean not to either side ...
Not dispense justice in an arbitrary manner clearly ascertain both right and wrong.
Wise men ... Hear both sides first, then judgment true declare;
... a well-weighed verdict⁶⁸ gives,
Of righteous judge the fame for ever lives.”*

⁶⁵ Refer Sacred Books of the East, Vol. 10: The Dhammapada and Sutta Nipata, by Max Müller and Max Fausböll, [1881], at sacred-texts.com
⁶⁶(<http://www.tipitaka.net/tipitaka/study/pageload.php?book=004&page=01>) The Layman’s Code of Discipline, Sigalovada Sutta.

⁶⁷Sir Edwin Arnold, *The Light of Asia or the Great Renunciation Being the Life and Teaching of Gautama, the Prince of India and Founder of Buddhism*, (2009) page 153.

⁶⁸ Doctrine of *Ratio-decidendi*.

There are two prevalent legal systems in the world. They are the adversarial system (Accusatorial or the Common law system) and the inquisitorial system (Continental or the Civil law system). The principle of adversarial system is well enshrined in the *Bardo Thos-grol* (*Book of the Dead - Garuda Purana in Sanskrit*). The trial performance begins with the production of the accused (a dead person by name of *dMyal-bum*) before the King of Purgatory, whereby the principle of *habeas corpus* is upheld. The principle of fair and public trial is demonstrated by the fact that the accused is heard in the presence of all the *g.shin-rje lasmkhan*.⁶⁹ The proceeding is presided over by the Lord of Purgatory. The accused is represented by his defence counsel⁷⁰ *dlha dkarpo* and the prosecutor represented by '*Dre Nagpo* invoking the right to legal counsel.

In this particular proceeding, the accused is alleged of the commission of various offences (sins) such as offence against person, property, cultural heritage, wildlife and environment, fraud, defamation etc. The Lord of Purgatory grants the accused the opportunity to plead innocence or guilt. We see the modern day fundamental right of "innocence until proven guilty" being invoked. Consequently, the accused here pleads guilty invoking the doctrine of necessity and extenuating circumstances. The defence counsel submits that the accused is ignorant. He pleads that although he was made aware of that commission of sins was bad, he was never aware of the consequences of such action after death. He has therefore committed the sins in dullness of mind and not having the knowledge of consequences. He pleads that the punishment may be mitigated under the mitigating circumstances of necessity and compassion. However, the prosecutor (*Dre Nagpo*) in contrast invokes the doctrine of *actus reus* and *mens rea* and submits that the accused is guilty of mass destruction of wildlife and the environment. He submits that the accused has used slanderous words, injured and killed many innocent animals, assaulted the poor and innocent, condemned the saints and their religion, burnt down the shrines and temples, polluted the ocean and injured marine life. Moreover, he has tormented his parents and demolished many stupas and monasteries.

The presentation of facts and evidence by the *g.shin-rje lasmkhan* guarantees the right of the accused not to be condemned unheard or without proof beyond reasonable doubt. The King of Purgatory after having heard the submissions of the parties and based on the facts and issues submitted before him by the parties, render the judgment. Therefore, it has all the elements of fair trial incorporating the principle of natural justice, the right of *habeas corpus*, right to be represented by a legal counsel, the right to an uninterrupted hearing, the right to be informed of charges, right to defence, production of evidence and witness⁷¹, and the delivery of a reasoned decision (*ratio decidendi*).

In a dispute between two parties, the primary purpose of the trial or judicial process is not to punish but to uncover the mental state of the parties. The role of the judge is to supervise the process of calming and harmonizing the mental state of the disputants. Rebecca Redwood notes that "The goal of a legal proceeding was to calm the minds and relieve the anger of the disputants and then – through catharsis, expiation, restitution, and appeasement – to rebalance the natural order."⁷² Since the source of animosity between the parties needs to be addressed to

⁶⁹The *g.shin-rje lasmkhan* includes representatives from the animal kingdom such as Ox, Boar, Tiger, Lion, Raven, Monkey, Bear, Dog, Sheep, Rat, Owl etc.

⁷⁰ Legal Council - *trnastaraka-vinayana*.

⁷¹ Witness - (*smrti-vinayana*)

⁷² Rebecca Redwood French, *The Golden Yoke: The Legal Cosmology of Buddhist Tibet*, 1995, p.74.

resolve the conflict, the root cause is considered more important than the dispute. As part of the judicial process, internal settlement between the parties is widely encouraged. For example, Alternate Dispute Resolution (ADR) is widely encouraged and considered as part of the judicial process in Bhutan. The Civil and Criminal Procedure Code of Bhutan requires the judges in Bhutan to spell out and inform the parties, during the preliminary hearing of the case, their rights to negotiated settlement (to settle the case out of court).

Fair Trial

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

- Right to equality before the law;
- Right to be heard by a competent, independent and impartial tribunal;
- Right to a public hearing;
- Right to be heard within a reasonable time;
- Right to counsel;
- Right to interpretation;
- Right to be notified of charges in a timely manner;
- Right to adequate time and means for the preparation of a defense;
- Right of the accused to defend himself or herself, or the right to a counsel chosen by the accused and the right to communicate privately with the counsel;
- Right not to incriminate oneself;
- Right to appeal at first instance to a higher court⁷³; and
- The prohibition of double jeopardy.

These rights were also enunciated by Lord Buddha, when he said:

- (1) “Be charged with the particular offence and which is supported with evidence and witnesses;
- (2) “Be in the presence of a representative; and
- (3) “Be ordered to remember whether he has or has not committed, brought upon himself a new offence (namely, of obstinacy or prevarication)”.

Further, the fair trial method is clearly depicted in the Seven Practices of Reconciliation (*saptadhikarana-samtha*):⁷⁴

- (1) The first practice is *samukha-vinaya*, or face to face sitting. According to this practice, the dispute must be stated before the entire convocation of *bhikkhus*, with both sides of the conflict present. This is to avoid private conversation about the conflict which

⁷³ Appeal - *pratijnakaraka-vinayana*)

⁷⁴Seven Practices of Reconciliation (*saptadhikarana-samtha*) was formulated after four days of discussion by the *bhikkhus*. It is to be used in settling disputes within the *sangha*.

inevitably influences people against one side or the other, creating further discord and tension.

- (2) The second practice is *smṛti-vinaya*, or remembrance. In the convocation, both parties involved try to remember from the beginning everything that led up to the conflict. Details should be presented with as much clarity as possible. Witnesses and evidence should be provided, if available. The community listens quietly and patiently to both sides in order to obtain adequate information to examine the dispute.
- (3) The third practice is *amudha-vinaya*, or Non-stubbornness. The monks in question are expected to resolve the conflict. The community expects both parties to demonstrate their willingness to reach reconciliation, *tatsvabhaisya-vinayan*. Stubbornness is to be considered negative and counterproductive. In case a party claims he violated a precept because of ignorance or an unsettled state of mind, without actually intending to violate it, the community should take that into account in order to find a solution that is agreeable to both sides.
- (4) The fourth practice is *tatsvabhaisya-vinaya*, or voluntary confession. Each party is encouraged to admit his own transgressions and shortcomings without having to be prodded by the other party or community. The community should allow each party ample time to confess his failings, no matter how minor they may seem. Admitting one's own fault begins a process of reconciliation and encourages the other party to do likewise. This leads to the possibility of full reconciliation.
- (5) The fifth practice is *pratīṅnakaraka-vinaya*, or accepting the verdict. When the verdict is reached, *janapaticaturthin-karmavacana*, it will be read aloud three times. If no one in the community voices disagreement with it, it is considered final. Neither party in dispute has the right to challenge the verdict. They have agreed to place their trust in the community's decision and carry out whatever verdict the community reaches.
- (6) The sixth practice is *yadbhuyasikiya-vinaya*, or Decision by Consensus. After hearing both sides and being assured of the wholehearted efforts by both sides to reach a settlement, the community reaches a verdict by consensus.
- (7) The seventh practice is *ṛṇastaraka-vinaya*, or Covering Mud with Straw. During the convocation, a venerable elder monk is appointed to represent each side in the conflict. They are high monks who are deeply respected and listened to by others in the sangha. They sit and listen intently, saying little. But when they do speak, their words carry special weight. Their words have the capacity to soothe and heal wounds, to call forth reconciliation and forgiveness, just as straw covers mud, enabling someone to cross it without dirtying his clothes.

Stare decisis is a legal principle by which judges are obliged to respect the precedent established by prior decisions. The words originate from the phrasing of the principle in the Latin maxim *Stare decisis et non quieta movere* (to stand by decisions and not disturb the undisturbed). Similarly, in Buddhism it is mentioned as:

“When a legal question, O Bhikkhus, has been thus settled, if a disputant re-open the question, such re-opening is a Pakittiya. If one who has conveyed his consent complain of the decision, such complaint is a Pakittiya.”⁷⁵

In Buddhism, the *Tagganiya-Kamma* has many legal guarantees as that of in the Covenant of Civil and Political Rights, such as:

- (a) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
- (b) To be tried without undue delay;
- (c) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it. In Buddhism, Legal Council is known as *trnastaraka-vinayana*;
- (d) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. Witness is *smrti-vinayana* in Buddhism; and
- (e) To be cross-examined - (*sammukha -vinayana*).

Part III Criminal Jurisprudence

Crime and Criminal Justice

Criminal justice is the system of practices and institutions to maintain social control, deter and mitigate crime either through religious belief, imposing penalties on perpetrators of crime, or through rehabilitation efforts.

Criminal justice has two essential pre-conditions of criminal liability that is guilty mind (*mens rea*) and commission of an act. In the commission of crime the four stages has to be completed (1) Intention to commit crime; (2) Preparation to commit crime; (3) Attempt to commit crime; and (4) Commission of crime.

Buddha has rightly noted that “*All wrongdoing arises because of mind...*” Any act of an individual by itself does not constitute a guilt or crime, unless it is accompanied by a guilty mind. “*Actus non facit reum, nisi mens sit rea*”. In Buddhism, it is *sbyor dngos-rjes gsum*:

- (a) (*Parikalpa*)/*bsam sbyor* - Mind (premeditated act).
- (b) (*Prayatna*) - Implementation.
- (c) (*Parinispanna*)- Commission of crime.

⁷⁵ Refer Vinaya Text, Vol. 20 part III, p.54

The criminal law generally prohibits undesirable acts. Thus, proof of a crime requires proof of some act. Scholars label this as the requirement of *actus rea* and *mens rea*. Buddhists also believe that one need to see past the crime to the reason or intention behind the action to find a solution. This is done by encouraging a person to detach from the attractions of material possessions that human beings crave for, thereby helping in the avoidance of crime. Crime is committed due to delusion and ignorance and Buddhism encourages one to realize this and use it to achieve enlightenment.

Lord Buddha based criminal jurisprudence on the ten negative actions. They are (i) three physical acts which includes taking life, taking what is not given, and sexual misconduct; (ii) four verbal acts which includes lying, sowing discord, harsh words and worthless chatter; and (iii) three mental acts includes covetousness, wishing harm on others and wrong views. It can also be classified as:

Truni Kayasucaritam - Three good actions of body:

- (a) *Pranatighatad viratih* - Not destroying life.
- (b) *Adattadanad viratih* - Not taking what has not been given.
- (c) *Kamamithyacarad viratih* - Refraining from improper sexual practices.

Catva Vaksucaritam - Four good actions of speech:

- (a) *Mrsavadat prativiratih* - Not telling falsehoods.
- (b) *Parusyat prativiratih* - Not using abusive language.
- (c) *Paisunyat prativiratih* - Not slandering others.
- (d) *Sambhinnapralapat prativiratih* - Not indulging in irrelevant talk.

Trini Manahsucaritam - Three good actions of mind:

- (a) *Abhidhyayah prativiratih* - Not being covetous.
- (b) *Vyapadat prativiratih* - Not being malicious.
- (c) *Mithyadrsteh prativiratih* - Not holding destructive beliefs.

Andrew Huxley notes that the 18 heads of *Vyavahara* litigation which he calls the “list of lists” can be found in the *Patimokkha*, the bi-monthly public recital of the 227 rules of monastic discipline. At the end of the recital the monk states:

*“Venerable sirs, I have recited the introduction, 4 cases of defeat, 13 cases entailing a meeting of the sangha, 2 indeterminate cases, 30 cases entailing expulsion, 92 cases entailing expiation, 4 cases that must be confessed, 75 rules of conduct, 7 ways of settling litigation.”*⁷⁶

⁷⁶ Andrew Huxley, “Buddhism and Law—The View From Mandalay”, *Journal of the International Association of Buddhist Studies*, 1995, p.67.

Similarly, under modern criminology the classification of crimes includes offences against the person,⁷⁷ sexual offences,⁷⁸ offences against property,⁷⁹ commercial crime,⁸⁰ defamation and related offences, offences against State and public order,⁸¹ offences against cultural and national heritage property,⁸² offences against judicial authority,⁸³ prostitution and related offences,⁸⁴ offences against the public welfare,⁸⁵ offences against public morality,⁸⁶ offences related to public and civic duties,⁸⁷ offences related to public order and tranquility,⁸⁸ offences against privacy,⁸⁹ offences related to weapons,⁹⁰ offences related to protected species and other harmful substances,⁹¹ corporate or other business association's liability, etc. Most of these offences are encapsulated in the Buddhist laws as stated:

"I prescribe, O Bhikkhus, ten precepts for the novices, and the exercise of the novices in these (ten precepts), viz. abstinence from destroying life; abstinence from stealing; abstinence from impurity; abstinence from lying; abstinence from arrack and strong drink and intoxicating liquors, which cause indifference (to religion); abstinence from eating at forbidden times; abstinence from dancing, singing, music, and seeing spectacles; abstinence from garlands, scents, unguents, ornaments, and finery; abstinence from (the use of) high or broad beds; abstinence from accepting gold or silver...."

The criminal law states that an act must be voluntary or an omission must be voluntary. The general requirements of culpability comprises of purposely, knowingly, recklessly, negligently, culpability, causal relationship between conduct and result, and accomplice liability. Buddhist laws have attitude and additional point with affirmative defenses to liability⁹² and justification in general.⁹³

⁷⁷ Homicide, murder, voluntary manslaughter, involuntary manslaughter, negligent homicide, illegal abortion, complicity in suicide, illegal selling or buying of human organs, trafficking a person, assault, battery, reckless endangerment, kidnapping, abduction, criminal elopement, escape from lawful custody, felonious restraint, infringement of movement, etc.

⁷⁸ Rape, rape of a child, rape above twelve years of age, rape of a pregnant woman, gang rape, custodial rape, marital rape, child molestation, sexual harassment, incest, indecent exposure, bestiality, unnatural sex, abandonment of an infant or a child, child abuse, endangerment of a child, pedophilia, trafficking of a child, endangerment of a mentally disabled or an incompetent person.

⁷⁹ Arson, burglary, trespass, larceny, larceny by deception, robbery, armed robbery, extortion, illegal transfer of immovable property, larceny of property lost, mislaid, or delivered by mistake, possession of stolen property, theft of services, unauthorized use of property, breach of trust, criminal misappropriation of property, reckless endangerment of property, unlawful posting of advertisements, etc.

⁸⁰ Money laundering, smuggling, receiving of smuggled goods or substances, tax evasion, breach of contract, embezzlement, bribery, official misconduct, forgery, tampering with public records, execution of a document by deception, counterfeiting, deceptive practice, fraud involving a security interest, etc.

⁸¹ Treason, terrorism, sedition, espionage, hijacking, abettor of mutiny, impersonation, etc.

⁸² Damage to cultural or national heritage property and national monuments, and damage to religious objects.

⁸³ Unauthorized hearing, contempt of court, perjury, cantankerous litigation, etc.

⁸⁴ Prostitution, promotion of prostitution, patronizing a prostitute, trafficking a person for prostitution, lewd and lascivious conduct.

⁸⁵ Public intoxication, use of health hazard substances and illegal sale.

⁸⁶ Gambling, malicious mischief, usury, tampering with a consumer product, black-marketing, antitrust, endangerment of a public water source, environment pollution, criminal nuisance, etc.

⁸⁷ Entrapment, torture, illegal arrest, hindering prosecution, obstruction of lawful authority, obstruction of public service, reporting of false information, failure to assist lawful authority, failure to report a crime, tampering with a dead body, abandonment of a person in danger, malpractice, crime against public election, illegal immigration, drawing of an illegal document, etc.

⁸⁸ Breach of public order and tranquillity, unlawful assembly, disruption of a lawful meeting or gathering, failure to disperse, rioting, promotion of civil unrest, disorderly conduct, harassment, obstruction of thoroughfare, etc.

⁸⁹ Eavesdropping and unauthorized opening of mail or parcel.

⁹⁰ Illegal manufacturing of a firearm, ammunition, explosive, or other lethal weapons, illegal possession of a firearm, ammunition, explosive, or other lethal weapons, false alarm, brandishing weapons, etc.

⁹¹ Risking the protected species, illegal hunting or fishing, genetic interference, illegal cultivation, production or manufacturing, illegal transaction of controlled substances, possession of a controlled substance, adulteration of drugs, illegal sale and use of harmful chemical substance, etc.

⁹² Ignorance or mistake, intoxication, duress, compulsion, or coercion, consent of the victim, conditions for valid consent, entrapment defence, or defence of alibi, etc.

⁹³ Prevention of greater harm or crime, execution of public duty, error in the execution of a superior's order, officially induced error, use of force, when use of force is not a defence, use of deadly force, use of confinement as protective force, use of force to protect property, use of force to a

For example, the penal laws of Bhutan have been permeated with the spiritual mentality, with the Buddhist principles of karmic cause and effect, and with the moral precepts and standards of the Buddha. The Penal Code of Bhutan of 2004 has its objective as “*For perpetuation of good and chaste actions*”. Therefore, Bhutan provides an example of a judicial system organized according to the Buddhist jurisprudence, one which emphasizes reformation of character and restoration of social harmony.

Taking life (Homicide)

The Buddhist precept of “abstinence from taking life” includes the virtue of non-violence and supports the fundamental human right of preservation of life. Taking life is categorized as follows:

- (a) A warrior killing an enemy in battle is an example of killing out of hatred.
- (b) Killing a wild animal to eat its flesh or wear its skin is killing out of desire.
- (c) Killing without knowing the consequences of right and wrong-or, like certain *tirthikas*, in the belief that it is a virtuous thing to do-is killing out of ignorance.
- (d) Patricide and matricide.

In Buddhism, every individual has a duty to preserve himself and others from danger to life. To refrain from killing all beings is to support the fundamental right of living beings to live safely. Killing animals for the purpose of food and sacrifice is also prohibited. The right of both man and animal to exist is considered equal. The *Dhammapada* says:

*“Let him not kill, nor cause to be killed any living being,
nor let him approve of others killing, after having refrained
from hurting all creatures, both those that are strong and those
that tremble in the world”⁹⁴*

The act of taking life is complete when it includes all four elements of a negative action. For instance, when a person sees an actual stag, or musk-deer, or whatever it might be, and identifies the animal beyond any doubt. It is his knowing that it is a living creature and is the basis for the act. Next, the wish to kill it arises: the idea of killing it is the intention to carry out the act. Then, when he shoots the animal in a vital point with a gun, bow and arrow or any other weapon, it is the physical action of killing is the execution of the act. Thereupon, when the animal’s vital functions cease and the conjunction of its body and mind is sundered. It is the final completion of the act of taking of life.

Taking another example of the slaughtering of a sheep raised for meat by its owner. When the master of the house tells his servant or a butcher to slaughter a sheep, the basis is that he knows that there is a sentient creature involved. The intention, the idea of killing it, is present as soon as he decides to have this or that sheep slaughtered. The execution of the actual act of killing takes

wrongful obstructer, use of force by a private person assisting an arrest, use of force to prevent escape from custody, use of force to prevent suicide or the commission of a crime, use of force for care, discipline, or safety of another, reckless or negligent use of otherwise justifiable force, etc.

⁹⁴ F. Max Muller (ed.), *Sacred Books of the East*, Vol. X, trans., 1968, p. 65.

place when the slaughterer seizes his noose and suddenly catches the sheep that he is going to kill, throws it on its back, lashes its legs together with leather thongs and binds a rope around its muzzle until it suffocates. In the violent agony of death, the animal ceases to breathe and its staring eyes turn bluish and cloud over, streaming tears. Its body is dragged off to the house and the final phase, the ending of its life, reaches completion. In no time at all the animal is being skinned with a knife, its flesh still quivering because the “all-pervading energy” has not yet had time to leave the body; it is as if the animal were still alive. Immediately it is roasted over a fire or cooked on the stove, and then eaten. When you think about it, such animals are practically eaten alive, and we humans are no different from beasts of prey.

Also, when you intended to kill an animal today or that you said you would, but did not actually do so. There would already be the basis, the knowledge that there is a sentient being, and the intention, the idea of killing it. Two of the elements of the negative action would therefore have been fulfilled, and the harm would be heavier than if you had in fact completed the act of killing, the stain of a negative act, like a reflection appearing in a mirror, would nevertheless remain.

Enjoining the offence of taking life away or homicide, Lord Buddha said:

“Whosoever Bhikkhu shall knowingly deprive or life a human being, or shall seek out an assassin against a human being, or shall utter the praises of death, or incite another to self-destruction, saying, ‘Ho/ my friend/ what good do you get from this sinful, wretched life ? death is better to thee than life’-if, so thinking, and with such an aim, he, by various argument, utter the praises of death or incite another to self-destruction-he, too, is fallen into defeat, he is no longer in communion.”

Taking what is not given

Buddha said that to seize other’s property directly or indirectly creates social injustice. If one followed the teaching of abstinence from stealing, it would lead to assurance of the right to property.

Taking what is not given is of three kinds; taking by force, taking by stealth and taking by trickery.

- (a) *Taking by force:* Also called as taking by overpowering, this means the forceful seizure of possessions or property by a powerful individual having no legal right to them. It also includes by force of numbers, as by an army.
- (b) *Taking by stealth:* This means to take possession of things secretly, like a burglar, without being seen by the owner.
- (c) *Taking by trickery:* This is to take others’ goods, in a business deal for example, by lying to the other party, using false weights and measures or other such subterfuges.

Taking what is not given also has to include the four elements that have already been explained above for the negative action to be complete. However, any participation, down to merely offering hunters or thieves some food for their expedition, is enough to bring you an equal share of the effect of evil action of their killing or stealing. Lord Buddha explained that:

“The Bhikkhu who in that manner takes the thing not given, he, too, has fallen into defeat, he is no longer in communion.”

Sexual misconduct

The gravest sexual misconduct is that of leading other people to break their vows. Sexual misconduct includes acts associated with particular persons, masturbation, sexual relations with a person who is married, or committed to someone else; or with a person who is free, but in broad daylight, during observation of a one-day vow, during illness, distress, pregnancy, bereavement, menstruation, or recovery from child-birth; in a place where the physical representations of the Three Jewels are present; with one’s parents, other prohibited family members, or with a prepubescent child; in the mouth or anus, and so on.

Compoundable and non-compoundable offence

Crimes can be of compoundable and non-compoundable offence. Similarly, the Buddhist laws have classified under compassion and forgiveness. Lord Buddha said:

“There are five things which make a grant of acquittal to those who are conscious of innocence to be according to law. The Bhikkhu must be innocent and without offence, other must have censured him, he must ask the Samgha for acquittal as being conscious of innocence, the Samgha must grant it, the Samgha must be duly held and duly constituted. These, O Bhikkhus, are the five things which make a grant of the acquittal of those who are conscious of innocence to be according to law.”

Five objectives or theories⁹⁵ which are widely accepted for enforcement of the criminal law by punishments are retribution,⁹⁶ deterrence,⁹⁷ incapacitation,⁹⁸ rehabilitation⁹⁹ and restoration¹⁰⁰. Buddhist laws of punishment are not only reformatory but humane as well. K. N. Jayatilleke wrote in his book, *Dharma Man and Law* that:

“In contrast, Buddhism holds that although sanctions have a place in law, the law itself is based on consent resulting from understanding, friendliness and mutual interest. The role of sanctions is secondary. Buddhism speaks of virtuous behavior arising out of respect for the dictates of our conscience (attadhipateyya), respects for public opinion (lokadhipateyya) and respect for righteousness or Dhamma (dhammadhipateyya) in the Buddhist sense of the term. ... While Buddhism thus promotes a frame of mind in which there would be respect for just laws out of love and understanding, it is not unmindful of the fact that there is a class of people, who refrain from crime mainly out of the fear of punishment in this life. The Buddha refers in one place to a class of people who “out of fear of punishment in this life do not plunder the goods of others”. Although the goal of

⁹⁵ “Huxley compares the Buddhist theory of immediate experience with the operational philosophy that scientists now apply in the natural sciences” by Churu Sheel” by Singh in his *Theory of Literature*.

⁹⁶ The criminal law will put criminals at some unpleasant disadvantage to “balance the scales.” A related theory includes the idea of “righting the balance.” Bernard Shaw “If you punish a man retributively, you must injure him. If you are to reform him, you must improve him and men are not improved by injuries.”

⁹⁷ By imposing a penalty on those who commit offenses, other individuals are discouraged from committing those offenses.

⁹⁸ Prison sentences, death penalty or banishment.

⁹⁹ Its goal is to prevent further offense by convincing the offender that their conduct was wrong.

¹⁰⁰ The objective is to repair, through state authority to repay the amount returning the victim to his or her original position before the injury.

Buddhism is a state in which there is freedom from fear (abhaya), it recognizes the importance of cultivating a sense of moral shame (hiri) and moral dread (ottappa) in the initial stages of one's moral development... This implies, inter alia, that penal laws must be based on a primarily reformatory and only secondarily deterrent theory of punishment."

It can be seen that the objective of Buddhist criminal jurisprudence is to bring safety to their people and fulfill their duties with Dharma by following the five crimson principles:¹⁰¹

"First, he must examine the truthfulness of the facts presented.

"Second, he must ascertain that they fall within his jurisdiction ...:

"Third, he must judge justly...

"Fourth, he should pronounce his verdict with kindness ...

"Fifth, he should condemn the crime but not the criminal..."

Medical jurisprudence

Buddhism places great value in relieving suffering. The law of karma states that our actions have consequences. Ignoring the suffering of the sick is likely to lead to negative consequences for our own spiritual development and for the well-being of others. Trying to find cures and helping the sufferers is likely to lead to positive consequences. For example, donating sperm, an egg or an embryo to an infertile couple could be regarded as an act of generosity (*dana*), compassion and kindness. Donating organs is also considered as skillful because Buddhists believe that there is nothing intrinsically wrong with taking or giving organs for transplantation because they do not believe that the body is required after death.

Lord Buddha prescribed medical jurisprudence as under:

"Whatsoever kinds of medicine are meet for the use of sick Bhikkhus, -that is to say, ghee, butter, oil, honey, and molasses,-when such are received they must be used within a period of seven days during which they may be stored up. Whosoever goes beyond that limit shall be dealt with according to law... End of the first Bhanavara on the law of medicines."

"Surgery at the prohibited area-Thullakkya offence- Now at that time the Khabbaggiya Bhikkhus, since a surgical operation had been forbidden by the Blessed One, used a clyster... They told this thing to the Blessed One. 'Is it true, as they say, O Bhikkhus, that the Khabbaggiya Bhikkhus used a clyster?' 'It is true, Lord ... He rebuked them, and having delivered a religious discourse, said to the Bhikkhus : No surgical operation is to be performed within a distance of two inches round the anus, and a clyster is not to be used. Whosoever does so, is guilty of a thullakkaya offence'"¹⁰²

Theory of Punishment

The concept of punishment has been theorized by moral philosophers, social theorists and criminologists. In the philosophical debate about punishment, the utilitarian and retributive

¹⁰¹ The Teachings of Buddha by Society of the Promotion of Buddhism.

¹⁰² Vinaya Texts, Vol. 20, Part III.

theories dominate the debate. Theories that set the goal of punishments as the prevention of future crime (deterrence) are usually referred to as utilitarian because they are derived from the utilitarian philosophy. Usually, three types of justification are given for punishment: (a) the harm of punishment is outweighed by some greater good (it deters others); (b) punishment does not really harm offenders (because it reforms them); and (c) and harming offender is good in itself (because retribution annuls the crime).¹⁰³ To utilitarian philosophers like Bentham, punishment can be justified only if the harm that it prevents is greater than the harm inflicted on the offender. Among the retributivists, Kant argued that the aim of penalties must be to inflict *desert* in order to maintain the cosmic order. By this he meant that inflicting what was deserved rendered all other considerations irrelevant.¹⁰⁴

Like the above theory and approach, the Buddhist approach to punishment cannot be separated from its understanding of human psychology, of the relationship between the individual and society and of its vision of human possibility of what a good life is or can be. The system of punishments used within the Sangha shows the above principles in practice. The emphasis was always on creating a situation that would help a *bhikkhu* to remember and reflect upon the offense, in order to overcome the mental tendencies that produced it. The *Pali* word for punishment, *danda*, also means “restraint”: “What was necessary was to establish restraint because the volitional activity of the offender, undesirable in nature, has resulted in the commission of this serious offense”.¹⁰⁵

Buddhists also believe that crime will create negative karma as it is based on ‘bad roots’ of greed, hatred and ignorance. The reason human beings suffer is because of ignorance, and so long as humans are ignorant, they will continue to commit crime and immoral acts. Therefore, Buddhists use wisdom and compassion when punishing criminals. Therefore, the Buddhist perspectives on crime and punishment support the contemporary movement toward restorative justice.

Conclusion

Lord Buddha enunciated recognition of all the sentient being as the core value, equality and freedom as the supporting values, while democracy and rule of law as the structural values.¹⁰⁶ Throughout the annals of history, our world has been enriched by the feats of ordinary men and women achieving the extraordinary. They have done the most to shape and influence society over the years. Each of these individuals has gone beyond expectations to achieve the seemingly impossible.

The teachings of the Buddha permeated through different historical periods and shaped the spiritual, philosophical, political and social modes of life of many cultures and societies. Therefore, to speak and write about Buddha and his teachings in retrospect is to race through virtually the entire history of our civilizations. However, my attempt has been to raise awareness of the magnitude of work done by so many scholars on Buddhism and Laws. Many people learned, wrote and compared the concept of Buddhism to that of western philosophies. However,

¹⁰³ Stephen D. Soble, *Theories of Punishment*, 2001.

¹⁰⁴ Nigel Walker, *Why Punish?*, 1991.

¹⁰⁵ Nandasena Ratnapala, *Crime and Punishment in the Buddhist Tradition*, 1993.

¹⁰⁶ Professor Venter's developed a hierarchical system of values, which were enumerated in section 1 of the South African Constitution.

more works has to be done. Scholars and thinkers before us have inspired the rest of us to go beyond our own expectations, and through karmic action, we are here, where the enlightened one and saviour had walked in flesh and blood to save the tormented soul and the anguished mind. In honouring him most reverently, let us invoke his blessings to follow the path of Dhamma, the eternal and universal laws of liberation and emancipation to benefit all the sentient beings.

Thank you and Trashi Delek