Asian Journal of Comparative Law, 15 (2020), pp. 1–22
doi:10.1017/asjcl.2019.38
© National University of Singapore, 2020
First published online 6 January 2020

The Penal Code of Bhutan: Broken from the Start?

Dema LHAM*
JSW School of Law, Bhutan
dema.lham@jswlaw.bt

Stanley YEO**
Faculty of Law, National University of Singapore
stanley.yeo@nus.edu.sg

Abstract
The Penal Code of Bhutan was introduced just four years before that nation became a democratic state in 2008. After a brief outline of the origins of that Code, this article proceeds to describe the qualities of a 'good' code, as viewed by Thomas Macaulay, the principal drafter of the Indian Penal Code. Thereafter, the Penal Code of Bhutan is measured against these qualities and found to be wanting in many significant areas. This article concludes with two possible solutions to rectify this unsatisfactory situation.

This article begins by accepting that there is no doubt whatsoever that enacting a penal code for a young democratic nation like Bhutan was the right, and indeed the only, available strategy. Countries around the world have been using codes to embody their penal laws ever since codification became in vogue in the latter half of the nineteenth century. The only major competitor to codification is common law-developed criminal law, with England being the most notable example. Given the many advantages that codification has over the common law, there have been strong moves even in common law countries to codify their penal laws.[1] Since Bhutan has

* Senior Lecturer, JSW School of Law, Bhutan.

** Visiting Research Professor, Faculty of Law, National University of Singapore and Visiting Professor, JSW School of Law, Bhutan. The authors would like to thank Mark Brown, Michael Hor, and the two anonymous reviewers for their helpful comments on an earlier version of this article.

1. See eg Law Commission, *Criminal Law: A Criminal Code for England and Wales: Volume 1, Report and Draft Criminal Code Bill* (Law Com No 177, 17 Apr 1989) <https://www.gov.uk/government/publications/the-law-commission-report-on-criminal-code-for-england-and-wales-april-1989> accessed 20 Nov 2019; Law Commission, *Criminal Law: A Criminal Code for England and Wales: Volume 2, Commentary on Draft Criminal Code Bill* (Law Com No 177, 17 Apr 1989) <https://www.gov.uk/government/publications/the-law-commission-report-on-criminal-code-for-england-and-wales-april-1989> accessed 20 Nov 2019; Criminal Code Officers Committee & Australia Attorney-General's Department, *Model Criminal Code: Chapter 2, General Principles of Criminal Responsibility: Final Report* (Australian Government Publishing Service 1993).

https://doi.org/10.1017/asjcl.2019.38 Published online by Cambridge University Press

neither a common law tradition nor a strong body of judges to develop and service it, the only recourse open to the nation was to enact a penal code.

However, having a penal code is one thing; whether it is a 'good' code, in the sense that it is operating justly and effectively in service of the nation, is quite a separate matter. Before proceeding to identify the qualities that make up a good code, it will be necessary to briefly describe the background of the *Penal Code of Bhutan* (PCB) and the circumstances in which it came about.

I. THE ORIGINS OF THE PENAL CODE OF BHUTAN

The PCB is very young by the standards of the world's penal codes. Enacted in 2004 and barely 16 years old, it sought, like its predecessors, to spell out all the substantive general principles of criminal liability, in addition to an exhaustive list of offences. Prior to the enactment of the PCB, most offences were covered by the *Thrimzhung Chhenmo* [The Supreme Law Book] *1953*, the nation's first comprehensive codified law. A unique feature of this legislation was that it dealt not only with the penal law but with the entire law of the country, including personal law, private law, commercial law, procedural law, and a code of ethics. There also existed at the time penal legislation on specialized areas such as rape, narcotics, national security, and firearms. These laws stood apart from the *Thrimzhung Chhenmo*, which did not deal with these areas.

Upon the Royal Command of His Majesty the fourth King of Bhutan in 1995, the High Court was instructed to draft a penal code, consolidating all the penal legislation in existence.[2] Since Bhutan had very few legally trained personnel in the 1990s, it had to rely heavily on foreign experts to draft laws, rules, and regulations for it. In this regard, the High Court's Penal Code Drafting Committee was greatly assisted by a legal expert from the United States of America.[3] This is very likely to have been the reason why, as this article will show, the Committee drew so heavily from the US Model Penal Code ('the US Code').[4] Consequently, very little of the penal laws

2. National Assembly of Bhutan, 'Translation of the Proceedings and Resolutions of the 82nd session of the National Assembly of Bhutan 2004' (NAB 2014) <www.nab.gov.bt/assets/uploads/docs/resolution/2014/82nd_Session.pdf> accessed 20 Nov 2019. Although engaging the High Court to draft legislation was contrary to the doctrine of separation of powers, this was done as a matter of expediency, since the judges of the High Court were the most equipped to undertake this task among the few legally trained Bhutanese at the time.

3. This legal expert was Carrie H Cohen, former Assistant Attorney General of New York City. See Asia Society, 'Bhutan's Transition to Constitutional Monarchy: Challenges for Change' (Asia Society, 30 Apr 2003) <https://asiasociety.org/bhutans-transition-constitutional-monarchy-challenges-change> accessed 20 Nov 2019.

4. Unfortunately, clear and comprehensive documentation on the origins of the Penal Code of Bhutan (PCB) and related codes on criminal procedure and evidence is scarce. For an informative source derived from personal interviews and oral history, see Sonam Tshering, 'A Nation with a Legal System without a Lawyer: The King guides the Court: In Pursuit of Justice for the Happiness of His Subjects' (Paper presented at the 16th Asian Law Institute (ASLI) Conference on 'The Rule of Law and the Role of Law in Asia', National University of Singapore, 11–12 Jun 2019).

https://doi.org/10.1017/asjcl.2019.38 Published online by Cambridge University Press

contained in the *Thrimzhung Chhenmo* was preserved. Since most of the first cohort of parliamentarians lacked formal higher education,[5] the draft PCB received little debate when it was tabled in Parliament.

The origins of the PCB show it to be a recent example of the transplanting of criminal laws from another legal system, in this case the United States. The successes and failures of such transplanting in other jurisdictions have been well documented and appraised in published works.[6] This article will show that, in the case of Bhutan, the PCB was likely to fail from the outset for two significant reasons. The first is that the process of transplantation itself was defective in a material way: only parts of the US Code were introduced, with many provisions of the US Code left out, rendering the law incomprehensible and incomplete. Several examples of this occurrence will be presented below. The second reason is that there was no rigorous participation by the Bhutanese themselves in the drafting of, and deliberations over, the Penal Code. Such participation has been shown to be vital to a successful transplantation of laws, especially those concerned with social norms and morality.[7] Again, some examples will be given below of provisions borrowed from the US Code which may not sit comfortably with Bhutanese values and expectations.

The PCB was adopted on 11 August 2004, and subsequently amended in 2011 to keep abreast with rapid social and economic changes. However, since then some offences such as those relating to corruption, domestic violence, and narcotics have been introduced under specific legislation. These appear to have been drafted independently of the PCB.

The latest development was the tabling of the *Penal Code of Bhutan (Amendment) Bill 2019* in Parliament on 29 May 2019.[8] The Bill covers matters such as defining a 'recidivist', the payment of compensatory damages, and specific issues pertaining to the offences of child rape, child molestation, computer pornography, and illegal hunting or fishing. Notably, the Bill does not amend any of the general principles of criminal liability or other matters of concern that will be dealt with below. On a final note, there has been scant commentary on the PCB, both official and scholarly, from the time of its progress through Parliament and since its enactment.

5. To ameliorate this situation, all candidates standing for Parliament must now possess a university degree: see the Election Act of the Kingdom of Bhutan 2008 (Act No 425 of 2008), ss 176, 177.

6. See eg Toby Goldbach, Benjamin Brake & Peter Katzenstein, 'The Movement of US Criminal and Administrative Law: Processes of Transplanting and Translating' (2013) 20 Indiana Journal of Global Legal Studies 141; Allegra McLeod, 'Exporting US Criminal Justice' (2010) 29 Yale Law and Policy Review 83; Richard Rosen, 'Theory in Practice: Code Drafting in Eritrea' (2001) 27 North Carolina Journal of International Law and Commercial Regulation 67; M Sornarajah, 'Interpretation of the Penal Codes' (1991) 3 Malayan Law Journal cxxix.

7. See Rosen (n 6) 69.

8. National Assembly of Bhutan, 'Penal Code (Amendment) Bill of Bhutan 2019' (NAB 2019) <http://www.nab.gov.bt/assets/uploads/docs/bills/2019/Penal_Code_amendment_bill_of_Bhutan2019.pdf> accessed 20 Nov 2019.

https://doi.org/10.1017/asjcl.2019.38 Published online by Cambridge University Press

II. THE QUALITIES OF A GOOD CODE

It can be readily observed that there are good and bad examples of penal codes throughout the world. We should therefore first determine what the qualities of a good code are, and subsequently evaluate the PCB on the basis of these qualities.

The thinking and planning behind the *Indian Penal Code 1860*[9] (IPC) will be relied on for this purpose.[10] With nearly 160 years of history, the IPC is the longest surviving penal code in the world, and it has been highly useful to several other countries besides India – notably Malaysia, Sri Lanka, and Singapore. Not long after its enactment, the IPC received high praise for its clear articulation and thinking concerning criminal responsibility. For example, the eminent English jurist and codifier, James Stephen, proclaimed that:

> The Indian Penal Code is to the English criminal law what a manufactured article ready for use is to the materials out of which it is made … It is to the French Penal Code and, I may add, to the North German Code of 1871, what a finished picture is to a sketch. It is far simpler, and much better expressed, than Livingston's Code for Louisiana; and its practical success has been complete.[11]

Such lavish praise was entirely warranted given the overly complex, confusing, and cumbersome state of English criminal law at the time.[12] It was also justified because Thomas Babington Macaulay, the principal drafter of the IPC, had done an excellent job in drawing on leading ideas from early nineteenth-century English criminal law reform debates, and from existing rationalizations of criminal law.[13] He had also produced a simply-written and well-structured code.

According to Macaulay, a good code should have the qualities of precision and comprehensibility.[14] It should be comprehensive and accessible, and based on legislative rather than judicial law-making.[15] The philosophical stance and the basic principles of the Penal Code are the product of a particular time, culture, and policy context. However, although some of the IPC's concepts are problematic or have

9. Indian Penal Code 1860 (Act No 45 of 1860).
10. The ensuing discussion draws upon the analysis in Stanley Yeo, 'Revitalising the Penal Code with a General Part' [2004] Singapore Journal of Legal Studies 1.
11. Cited in George Otto Trevelyan, *The Life and Letters of Lord Macaulay* (Longmans, Green, and Co 1923) 303.
12. See Lindsay Farmer, 'Reconstructing the English Codification Debate: The Criminal Law Commissioners, 1833-45' (2000) 18 Law and History Review 397.
13. See Rupert Cross, 'The Making of English Criminal Law (5) Macaulay' [1978] Criminal Law Review 519.
14. Thomas Macaulay et al, *A Penal Code Prepared by the Indian Law Commissioners* (Pelham Richardson 1838) v.
15. See Barry Wright, 'Macaulay's Indian Penal Code: Historical Context and Originating Principles', in Wing-Cheong Chan, Barry Wright & Stanley Yeo (eds), *Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform* (Ashgate Publishing 2011) 22–25. See also Lyonpo Sonam Tobgye, 'The Blessings of Enlightened Laws – A Foundation for Peace and Happiness' (2019) XI Bhutan Law Review 4, 12: 'Statute[s] must be direct, unambiguous, concise and definite. If laws are vague the Courts will be constitutive and abrogative'.

https://doi.org/10.1017/asjcl.2019.38 Published online by Cambridge University Press

become obsolete,[16] the principles of precision, comprehensibility, and active legislative law-making remain just as appropriate in the 21st century.

We shall now briefly evaluate the current state of the IPC on the basis of Macaulay's criteria of a good code. The purpose of this evaluation is to highlight the need to conduct systematic major reviews of a code, however good it might have been at its inception. Macaulay was the first to acknowledge that his creation was not perfect, and that deficiencies in its interpretation and application would require fixing. In line with his insistence that the code should be the work of the parliament and not the courts, Macaulay proposed establishing a revision mechanism: whenever an appellate court reverses a lower court on a point of law not previously determined, or whenever two judges of a higher court disagree on the interpretation of a provision of the Code, the matter should be automatically referred to the parliament, which should decide the point and, if necessary, amend the Code.[17] Regrettably, this mechanism was not adopted in India and all the other jurisdictions with penal codes based on the IPC.

While most of the provisions in the IPC are sufficiently precise, there are some which are ambiguous.[18] Other gaps and inconsistencies have shown up in the course of time and, like the ambiguous provisions, have required the attention of the courts.[19]

As for comprehensibility, the IPC may have been understood by the ordinary people of Macaulay's time who were familiar with the words used. However, ever since its inception, parts of the IPC have required clarification by the courts on account of their incomprehensibility. Furthermore, while much of the IPC remains understandable in the present day, some words or concepts are likely to cause puzzlement.[20]

In relation to the need for a code to be the product of legislative engagement, the underlying premise is that:

> [S]ince the criminal law is arguably the most direct expression of the relationship between a State and its citizens, it is right as a matter of constitutional principle that the relationship should be clearly stated in a criminal code the terms of which have been deliberated upon by a democratically elected legislature.[21]

The ad hoc nature of legislative amendments to the IPC over the years, instead of the systematic legislative review contemplated by Macaulay, is a cause for concern.[22]

16. For a very recent example, see the Supreme Court of India's decision in *Navtej Singh Johar v Union of India* (Writ Petition No 76 of 2016) <https://www.refworld.org/cases,IND_SC,5b9639944.html> accessed 20 Nov 2019. In that case, Dipak Misra CJI held, at para [240] of the judgment, that the criminalization of consensual homosexuality between adults under the IPC was unconstitutional, 'irrational, indefensible and manifestly arbitrary'.
17. Alan Gledhill, *The Penal Codes of Northern Nigeria and the Sudan* (Sweet and Maxwell 1963) 19.
18. Several examples are described in detail in Yeo 'Revitalising the Penal Code with a General Part' (n 10).
19. ibid.
20. For example, the following words contained in the IPC: 'wantonly'; 'maliciously'; 'common intention'; 'unsoundness of mind'.
21. Law Commission, *Criminal Law. A Criminal Code for England and Wales: Volume 1, Report and Draft Criminal Code Bill* (n 1) 5.
22. See Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (2nd edn LexisNexis 2012) 1040–1042.

https://doi.org/10.1017/asjcl.2019.38 Published online by Cambridge University Press

Judicial activism is another concern. The fact that so many parts of the IPC have been subjected to judicial interpretation and elaboration runs counter to Macaulay's insistence that the Penal Code should be the creation of 'the Legislature, by those who make the law, and who must know more certainly than any judge can know what the law is which they mean to make'.[23]

The final and related features of a good code, in Macaulay's eyes, are that it must be comprehensive and accessible. Macaulay envisaged that all the penal laws which the legislature enacted from time to time would be framed in such a manner as to fit into the code.[24] Macaulay also proposed that each member of the population should be furnished with a copy of the code in their own native language.[25] Certainly, in today's world, a person has easier access to a copy of the IPC than ever before, thanks to the electronic age. Unfortunately, the IPC is no longer the sole repository of the law which it purports to cover, but has to be read together with a very large body of case law.[26]

To Macaulay's list of qualities of a good code, it is also necessary to add 'contemporary relevance and modernity'. Values, ways of thinking about criminal responsibility, and policies inevitably change with time and place, and it is incumbent upon legislators to keep abreast with these changes. It would be very surprising if all of the pronouncements in a code enacted for nineteenth-century British subjects in India could accurately reflect the values and views of twenty-first century Indians (or Malaysians, Sri Lankans, and Singaporeans, for that matter).[27]

In summary, a good code should have the qualities of precision and comprehensibility, be comprehensive and accessible, and embody the contemporary values of the society which it serves. Does the PCB possess these qualities? We shall now proceed to show, through some examples drawn from the PCB, that the answer is, sadly, a 'No'. The PCB is barely 16 years of age, but it is already deeply troubling to find so many ambiguous and defective provisions in the code. As we have observed from the IPC's experience, the courts have to interpret the provisions of the code as best as they can if the parliament fails to rectify them.[28]

This leads to an increase in judge-made law, causing the PCB to cease being the sole repository of the penal law, and with that, the law is rendered inaccessible to the general public. Furthermore, judicial interpretation of the PCB in the form of reported case law is not widely available, which suggests a lack of coherence even within the less-than-desirable movement away from the PCB. There is a real danger

23. Macaulay et al (n 14) (referring to the legislative quality of the illustrations appearing in the proposed Code).

24. ibid.

25. ibid viii.

26. See eg the 4,900-plus pages of commentary on the IPC by Hari Singh Gour, *Penal Law of India* (11th edn, Law Publishers 2000); and the 3,700-plus pages of *Ratanlal and Dhirajlal's Law of Crimes* (27th edn, Bharat Law House 2013).

27. See eg *Navtej Singh Johar* (n 16).

28. The ensuing discussion does not refer to decisions of the Bhutanese courts for two reasons. The first is that the authors have encountered difficulty finding relevant cases. Secondly, and perhaps more importantly, an evaluation of the judicial handling of the PCB provisions would sidetrack from the thrust of this article, which is to show that the PCB is in need of a major review.

https://doi.org/10.1017/asjcl.2019.38 Published online by Cambridge University Press

that such an outcome will have a multiplier effect in introducing potential arbitrariness into the application of the PCB in cases coming before the courts, which in turn has negative implications for the rule of law.

III. AMBIGUITIES IN THE PENAL CODE

Among the many instances of ambiguity, three of the four instances discussed in this article are contained in PCB provisions dealing with general principles of criminal liability. As such, they constitute the core or fundamental principles of penal law which every legal system bases its notions of criminal justice on. These core provisions are concerned with the definition and use of *mens rea* terms in the PCB, the elements of accomplice liability, and an aspect of the law of attempt.

A. *Choice of* Mens Rea *Terms*

Under Chapter 6, which is headed 'General Principles of Liability', the PCB declares that 'a defendant shall not be guilty of an offence unless the defendant acted purposely, knowingly, recklessly, or negligently as the laws may require with respect to each quintessential element of the offence' (Section 53). This provision is followed by detailed definitions of 'purposely' (section 54), 'knowingly' (section 55), 'recklessly' (section 56), and 'negligently' (section 57).

This arrangement was borrowed directly from the US Code, to such an extent that the PCB provisions on *mens rea* are identical to those of the US Code.[29] The drafters of the US Code had this to say about its arrangement:

> The purpose of articulating these distinctions in detail is to advance the clarity of draftsmanship in the delineation of the definitions of specific crimes, to provide a distinct framework against which these definitions may be tested, and to dispel the obscurity with which the culpability requirement is often treated when such concepts as 'general criminal intent', '*mens rea*', 'presumed intent', 'malice', 'willfulness', 'scienter' and the like have been employed. What Justice Jackson called 'the variety, disparity and confusion' of judicial definitions of 'the requisite but elusive mental element' in crime should, insofar as possible, be rationalized by a criminal code.[30]

Yet, some of the offence-creating provisions in the PCB deviate from this admirable purpose by using *mens rea* terms other than those provided for by sections 54 to 57. Take, for example, murder, conceivably the most serious offence in the PCB and, therefore, one which should be defined with utmost care. The offence-creating provision reads in part: 'A defendant shall be guilty of the offence of murder, if the defendant commits a homicide knowingly and deliberately … with premeditated

29. *Model Penal Code: Official Draft and Explanatory Notes* (The American Law Institute 1985), s 2.02 (General Requirements of Culpability).

30. ibid 230.

https://doi.org/10.1017/asjcl.2019.38 Published online by Cambridge University Press

malice' (Section 138). One is left in doubt as to what constitutes 'deliberately' and 'premeditated malice', since these terms are not defined anywhere in the PCB.

This may be contrasted with the definition of murder under the US Code, which reads in part: '[C]riminal homicide constitutes murder when (a) it is committed purposely or knowingly; or (b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life' (Section 210.2). It is noteworthy that the definition in the US Code uses only the words 'purposely', 'knowingly', and 'recklessly', which are terms that have been expressly defined in the General Requirements of Culpability portion of the US Code, thereby avoiding any ambiguity over the *mens rea* for murder.[31]

One more example will suffice. The definition of larceny in the PCB reads:

> 240. A defendant shall be guilty of the offence of larceny, if the defendant takes or moves the property of another person without the owner's consent and with the intent to deprive the owner of the property or to appropriate the same to the defendant or a third person.

It is observed that the *mens rea* term used for the offence is 'intent', which is not defined anywhere in the PCB.

This may be contrasted with the equivalent provision in the US Code, where the equivalent offence is called 'theft' and is defined as follows:

> 232.2 (1) *Movable property*. A person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with purpose to deprive him thereof. (2) *Immovable property*. A person is guilty of theft if he unlawfully transfers immobile property of another or any interest therein with purpose to benefit himself or another not entitled.

Once again, we note how this provision adheres to the arrangement under the General Principles of Culpability by selecting 'purpose[ly]', a term that is defined in the US Code,[32] as the *mens rea* for the offence of theft.

B. *The* Mens Rea *and* Actus Reus *of Accomplice Liability*

An important general principle of criminal liability pertains to 'secondary' liability, or sometimes called accomplice liability, which is the description used by the PCB. As the adjective 'secondary' suggests, this principle is concerned with specifying the requirements which must be established to convict persons who are not the principal perpetrators of the crime ('principal' liability), but have assisted or encouraged such perpetrators to commit that crime. Although the terminology may vary slightly among jurisdictions, the words 'aid, abet, counsel or procure' are often used to describe the *actus reus* elements of accomplice liability.

The primary provision on secondary liability in the PCB reads: 'A defendant is an accomplice of another person in the commission of an offence, if the defendant purposely or knowingly engages in a conduct that helps a person to commit a crime.'

31. *Model Penal Code: Official Draft and Explanatory Notes* (n 29).
32. US Code, s 2.20(a).

https://doi.org/10.1017/asjcl.2019.38 Published online by Cambridge University Press

(Section 64) The word 'helps' is clearly equivalent to aiding, but is it wide enough to also cover abetting (encouraging), counselling (soliciting), and procuring?

The law on accomplice liability in the PCB is also made ambiguous by the existence of the following three provisions:

> 125. A defendant shall be guilty of the offence of aiding and abetting a crime, if the defendant engages in a conduct designed to accommodate or help another person in the commission of a crime.
> 126. A defendant shall be guilty of the offence of solicitation to commit a crime, if the defendant purposely or knowingly solicits, requests, commands or causes another person to commit a crime.
> 150. A defendant shall be guilty of the offence of complicity in suicide, if the defendant aids, abets, counsels or procures the suicide of another person.

As noted earlier, the terms 'aiding', 'abetting', and 'soliciting' (counselling) contained in sections 125 and 126 are conventionally used for secondary liability in many legal systems. Indeed, section 150 utilizes these very terms to describe the *actus reus* of the offence of complicity in suicide.

Consequently, it is unclear what the precise relationship is between these provisions and section 64, the primary provision on accomplice liability. Assuming that such a relationship can be clarified,[33] questions arise about the *actus reus* and *mens rea* of these provisions. With respect to the *actus reus*, is it permissible to read into section 64 the words 'aiding', 'abetting', and 'soliciting' found in sections 125, 126, and 150? As for the *mens rea*, sections 64 and 126 express it as 'purposely or knowingly', whereas section 125 uses the term 'designed'. Presumably, a difference was intended between 'designed' and 'purposely', but it is unclear what this difference is. It could also be asked why the form of *mens rea* in section 125 differs from that in sections 64 and 126. Furthermore, it is noteworthy that section 150 is silent on the *mens rea* for the offence of complicity in suicide. Given that it is a specific form of complicity, one could assume that the *mens rea* would be as provided by section 64, the primary section on accomplice liability, in which case, the *mens rea* of section 150 would be 'purposely' or 'knowingly'. However, countering this position is section 58, which states that when the offence-creating provision is silent on the *mens rea* element for the offence, that 'element is established if a defendant acts purposely, knowingly or *recklessly* with respect thereto'.[34] This raises the question of whether the Bhutanese Parliament meant for the scope of the section 150 offence to be extended in this way.

These are all difficult and perplexing questions which have been created by the PCB, and which the courts have to somehow resolve. The following comment by

33. A possible interpretation is to regard s 64 as dealing with cases where the principal perpetrator committed the crime, helped by the accomplice. The provision states that the accomplice will be guilty of the same crime as the principal perpetrator, but will receive a reduced penalty. On the other hand, ss 125 and 126 are concerned with cases where the principal perpetrator did not commit the crime. They hold the secondary offender guilty of the offence of aiding or abetting a crime, or solicitation to commit a crime (as the case may be) in spite of the principal offence not being committed. As such, they are forms of inchoate crimes, as attested to by the provisions coming under Ch 10, alongside attempt and conspiracy. This interpretation, albeit correct, does little to resolve the many problems of imprecision and ambiguity described in the main text.

34. Emphasis added.

https://doi.org/10.1017/asjcl.2019.38 Published online by Cambridge University Press

Lyonpo Sonam Tobgye, a former Chief Justice of Bhutan, is apposite: 'Therefore laws should be drafted in a manner that it is harmonious with other laws to eliminate contradictions and disparities. Ambiguity and disparity breed controversies.'[35]

A comparison with the US Code shows that the PCB provisions on accomplice liability share only some minor similarities with that Code. The important point to make here is that the provisions of the US Code are far superior in spelling out clearly, precisely, and comprehensively the *actus reus* and *mens rea* for accomplice liability.[36]

C. *Factually Impossible Attempts*

In most legal systems, a defendant who commits what would otherwise be a crime, but for the fact that the result they sought to achieve was factually impossible, will nonetheless be found guilty of attempting to commit that crime. The US Code expresses this position in the following way:

> 5.01(1). A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:
> (a) purposely engages in conduct that would constitute the crime if the attendant circumstances were as he believes them to be.

Take for example the case of *X*, who puts his hand in *Y*'s handbag for the purpose of stealing her wallet, which *X* believes is in the handbag. *Y*'s handbag is empty. *X* is nonetheless guilty of attempted theft. As the drafters of the US Code explain, '[[t]he factual] impossibility defense is rejected, liability being focused upon the circumstances as the actor believes them to be rather than as they actually exist.'[37]

The equivalent provision in the PCB reads:

> 120. A defendant shall be guilty of the offence of an attempt to commit a crime, if the defendant:
> (a) Acts with the culpability required for commission of a crime; and
> (b) Engages in a conduct or an omission, which constitutes the commission of crime.

It is observed that this provision borrows parts of its US counterpart but leaves out the significant words which make it clear that the US provision is concerned with rejecting the impossibility defence, namely, 'if the attendant circumstances were as [the defendant] believes them to be'. Without these words, section 120 of the PCB is ambiguous as to whether it likewise rejects the defence of factual impossibility in the law of attempt.

D. *The Meaning of 'Sexual Intercourse' in the Law on Rape*

The conventional definition of 'sexual intercourse' in the law on rape is gendered, comprising the penile penetration of a female person's genitalia. In recent years,

35. Lyonpo Sonam Tobye, 'The Blessings of Enlightened Laws – A Foundation for Peace and Happiness' (n 15) 13–14.

36. In particular, a detailed definition of 'accomplice' is provided for under s 2.06(3), and the *mens rea* of an accomplice is clearly described in s 2.06(4).

37. *Model Penal Code and Commentaries (Official Draft and Revised Comments): Part I, General Provisions, §§ 3.01 to 5.07* (The American Law Institute 1985) 297.

https://doi.org/10.1017/asjcl.2019.38 Published online by Cambridge University Press

many legal systems have greatly expanded the definition of 'sexual intercourse' to include digital penetration of the anus and cunnilingus, thereby removing the gendered nature of rape law.[38]

The PCB provision for rape is section 177, which, in its 2004 version, stated simply that a 'defendant shall be guilty of the offence of rape, if the defendant has sexual intercourse with another person'. Presumably with the aim of removing the gendered nature of the offence, these words were amended in 2011 to read: 'A defendant shall be guilty of the offence of rape, if the defendant commits any act of sexual intercourse whatever its nature against any other person'. While its objective may have been laudable, the amendment has thrown the meaning of 'sexual intercourse' into doubt. For instance, do the words 'whatever its nature' cover cases where a defendant had used an object such as a bottle to penetrate the anus or mouth of his or her victim? These words are thrown into further doubt by the existence of section 213 of the PCB, which reads: 'A defendant shall be guilty of the offence of unnatural sex, if the defendant engages in sodomy or any other sexual conduct that is against the order of nature'. It is by no means clear what forms of sexual conduct would fall outside the scope of section 213 and within the rape provision under section 177 instead. This ambiguous state of the law could have serious punitive implications for a defendant, since rape is a felony in the fourth degree, whilst the offence of unnatural sex is only a petty misdemeanour.[39]

IV. GAPS IN THE PENAL CODE

In Part III, we examined some provisions in the PCB which are ambiguous, resulting in imprecision and incomprehensibility in the law, which have been described as being antithetical to a good code, and likely to produce 'controversies'.[40] In this Part, we will provide some examples of provisions which are deficient because they create gaps in the law. These gaps greatly diminish the element of comprehensiveness, which Macaulay required of a good code.

A. *Discordance between Assault and Battery*

Most legal systems provide for assault and battery as the standard forms of non-fatal offences against the person. The conventional distinction between these two offences is that assault involves a threat to apply force or inflict bodily harm, whilst battery involves the actual application of force or infliction of bodily harm. From this it may be observed that a close concordance (or symmetry) exists between assault and battery, in that the elements of both offences are identical except for the distinction above. This concordance serves to ensure that an assault is transformed into a

38. For example, Sexual Offences Act 2003 (England and Wales), s 1; Crimes Act 1900 (New South Wales), s 61HA; Criminal Code (Queensland), s 349.

39. A felony is punishable with between three to five years' imprisonment, whereas a petty misdemeanour attracts between one month to one year of imprisonment.

40. See main text accompanying note 35.

https://doi.org/10.1017/asjcl.2019.38 Published online by Cambridge University Press

battery as soon as the defendant goes beyond threatening the victim by injuring or using force on the victim.

While the term 'assault' is standard nomenclature, this is less so for 'battery', which is frequently subsumed under the definition of 'assault', as has been done in the US Code.[41] The PCB goes against this trend by having separate provisions for the offences of assault and battery. The provisions read:

> 156. A defendant shall be guilty of the offence of assault, if the defendant purposely, knowingly, recklessly, or negligently causes apprehension of bodily injury to another person.
> 158. A defendant shall be guilty of the offence of battery, if the defendant purposely uses physical force of an adverse nature on another person.

No objection is raised over the use of the term 'battery' by the PCB. However, there are two forms of discordance between sections 156 and 158, which are of grave concern. First, section 156 provides that the *mens rea* for assault can be established on proof that the defendant had 'purposely, knowingly, recklessly or negligently' caused apprehension of bodily injury. In contrast, under section 158, the *mens rea* for battery is confined to 'purposely' using physical force. It is difficult to decipher the reason for making the *mens rea* for assault so much more expansive than that for battery. It is submitted that, to achieve the necessary concordance between the two offences, the definition of battery under section 158 should have provided for the very same types of *mens rea* as for assault under section 156. Such a gap in the definition of battery is bound to create controversy in the law.

Secondly, it is observed that the *actus reus* for assault is the 'causing of apprehension of bodily injury to another person', whereas for battery it is the using of 'physical force of an adverse nature on another person'. To achieve concordance, the projected harm for both offences should be identical. In the definitions of assault and battery of some legal systems, the harm is expressed in terms of 'bodily injury';[42] whereas in others, it is described as the 'use of force'.[43] Which description is chosen is immaterial so long as the same is used for both offences. Unfortunately, the PCB fails in this regard by choosing 'bodily injury' for its definition of assault, and 'use of force' for its definition of battery.

All told, the lack of concordance in the *mens rea* and *actus reus* of assault and battery under the PCB leaves much to be desired. This state of affairs creates confusion and problems of application. Take, for example, a case where a defendant had performed a combination of acts, some of which constitute an assault and others a battery. A court handling such a case would be hard-pressed to distinguish (1) whether the defendant's mental state satisfied the requirements for assault or that for battery; and (2) whether there had been 'bodily injury' for assault or 'use of force' for battery.

41. US Code, s 211.1. Occasionally, assaults are classified as psychic and physical, with the former constituting a common assault and the latter a battery.
42. See eg US Code, s 211.1 (the offence of 'assault').
43. See eg IPC, ss 350–352 (the offences of 'criminal force' and assault').

https://doi.org/10.1017/asjcl.2019.38 Published online by Cambridge University Press

B. *Justification: Prevention of Greater Harm or Crime*

The PCB largely adopts the US Code's formulations on justificatory defences. The first of these is the 'prevention of greater harm or crime', which, in the PCB, reads:

> 89. Subject to the provisions of this chapter, a defendant shall have the defence of justification, when the defendant in good faith engages in a conduct that the defendant reasonably believed was necessary to prevent a harm or crime to oneself or to another person and the harm or crime sought to be prevented by the conduct is greater than that sought to be prevented by the law defining the offence charged.

The equivalent provision in the US Code is section 3.02(1), which is largely identical, except for the requirement of the defendant's belief. Under the US Code, such a belief need only be honest, whereas the PCB requires the belief to be both honest and reasonable.[44]

To identify the gap in the PCB, it is necessary to compare a further provision with its equivalent in the US Code. Section 89 of the PCB is followed immediately by the following provision:

> 90. When a defendant is reckless or negligent in encompassing the situation requiring a choice of whether to engage in a conduct that will result in a lesser harm or crime or in appraising the necessity for such conduct, the justifications afforded by this Penal Code are unavailable as a defence.

This provision is taken directly from the following provision in the US Code:

> 3.02(2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this Section is unavailable *in a prosecution for any offence for which recklessness or negligence, as the case may be, suffices to establish culpability.*[45]

A gap in the PCB was created when it failed to adopt the concluding italicized words of the US provision. The effect of those words is to permit a defendant to raise a defence of justification in answer to a charge where culpability comprises acting 'purposely', but to deny that defence if the charge was based on recklessness or negligence. As the drafters of the US provision explained:

> This treatment of the matter thus precludes conviction of a purposeful offense when the actor's culpability inheres in recklessness or negligence, while sanctioning conviction for a crime for which that level of culpability is otherwise sufficient to convict.[46]

A simple hypothetical scenario will illustrate the workings of the US provision, and the failure of the Bhutanese provision to accommodate the situation. X, the chief supervisor at a hydro-electric dam, is negligent in permitting water pressure to

44. Note that the requirement of 'reasonable belief' under s 89 of the PCB creates an inconsistency in that the other justificatory defence of 'use of force' under s 95 only requires an honest belief. In contrast, the equivalent provision in the US Code, namely s 3.04(1), follows s 3.02(1) in only stipulating that the belief be honest.

45. Emphasis added.

46. *Model Penal Code and Commentaries* (n 37) 14.

https://doi.org/10.1017/asjcl.2019.38 Published online by Cambridge University Press

build up to an extremely dangerous level behind the dam. X notices cracks appearing in the dam wall and realizes that the only way of avoiding a complete collapse of the dam is to immediately release an immense amount of water from the reservoir behind the dam. X has a choice of directing the water into one of two valleys below the dam, the first containing 20 inhabitants, and the second containing 1,000 inhabitants. X decides to direct the water into the first valley, causing some people to drown. Under the US Code, X will be able to rely successfully on the 'prevention of greater harm' defence in answer to a charge of 'purposeful' murder under section 210.2(a) of that Code. However, he would be denied that defence against a charge of negligent homicide under section 210.4 of the Code. Justice is thereby served by not convicting X of murder or manslaughter. Consistent with the operation of a justificatory defence, X is thereby encouraged to take the course of action that he did, which saved many more lives than if he had done nothing and allowed the dam to burst. However, he would still be convicted and punished for having been negligent in creating the perilous situation giving rise to a choice of harms. By contrast, under the PCB, X will be denied the defence of 'prevention of greater harm' altogether, and convicted of murder or manslaughter. This result is highly unsatisfactory as it conveys the message to someone in the position of X that he would nonetheless be punished for homicide despite the fact that his action in discharging the water into the sparsely inhabited valley would save many more lives.

C. *Use of Force upon a Person*

A second form of justification recognized by the PCB is the use of force towards or upon another person to protect oneself or a third person. This is conventionally called the plea of self-defence or private defence. The relevant provision states:

> 95. A defendant shall have the defence of justification, when the defendant uses force upon or towards another person to protect the defendant or a third person if:
> (a) The defendant uses the same or a lesser degree of force to protect oneself or the third person;
> (b) The defendant believes that the force is necessary for the protection of oneself or the third person; and
> (c) The force used is no greater than that which is necessary.

Once again, this provision is drawn from the US Code, namely, section 3.04. Like the preceding discussion on the 'prevention of greater harm' defence, a gap in the PCB has occurred because a portion of the US provision which it borrowed has been left out. The faulty Bhutanese provision reads:

> 113. Wherein a defendant is justified under this Penal Code in using force upon a person but the defendant recklessly or negligently injures or creates a risk of injury to a third person, the justifications afforded by this Penal Code are unavailable.

This may be compared with the equivalent provision in the US Code, which reads:

> 3.08(3) When the actor is justified under Sections 3.03 to 3.08 in using force upon or toward the person of another but he recklessly or negligently injures or creates a risk

https://doi.org/10.1017/asjcl.2019.38 Published online by Cambridge University Press

> of injury to innocent persons, the justification afforded by those Sections is unavailable *in a prosecution for such recklessness or negligence towards innocent persons*.[47]

The concluding italicized words are missing from the Bhutanese provision. Without them, the Bhutanese law denies the 'use of force' defence *whenever* the circumstances were such that the defendant had been reckless or negligent in injuring or creating a risk of injury to a third (innocent) person. Take, for example, X who is attacked by Y wielding a sword in a crowded market. X grabs a pole lying nearby and swings it at Y in self-defence. In doing so, his pole injures a market stall holder who is standing nearby. Under the US Code, X will be able to plead the 'use of force' defence against a charge of injuring Y, his attacker. However, he could be denied that defence in relation to a charge of recklessly or negligently injuring the stall holder if it was determined that his swinging of the pole was reckless or negligent in the circumstances. In contrast, under the PCB, X will be denied the defence altogether with respect to anyone he might have injured while defending himself, including his attacker. This is surely a highly unsatisfactory position as it denies the right to defend oneself or another against an unlawful attack whenever the defensive action creates a risk of injury to innocent persons who happen to be in the vicinity.[48]

D. *Non-Self-Induced Intoxication*

A third example of a gap in the PCB is to be found in the law of intoxication. The principal provision reads:

> 78. Intoxication shall not constitute a defence unless it:
> (a) Negates an element of the offence; or
> (b) Is administered to the defendant without the defendant's knowledge or against the defendant's will.

Once again, this provision is borrowed directly from the US Code, namely, section 2.08. The degree of intoxication required for cases coming under section 78(a) is clear enough – the intoxication must be of such a level as to render absent the *mens rea* or the *actus reus* element of the offence. Thus, for an offence where the element of *mens rea* includes 'knowingly', the defendant must have been so intoxicated as to not have possessed such knowledge when they committed the crime. Or it might be that the intoxication was so severe as to render the defendant's conduct involuntary, which is an essential *actus reus* element of a crime.[49]

But what about the degree of intoxication required for cases coming under section 78(b)? These cases constitute non-self-induced intoxication, where a third person causes the defendant to be intoxicated. The law in most legal systems takes a more lenient stance towards such defendants, since they had not voluntarily consumed the drink or drugs themselves. Hence, the US Code provides:

---

47. Emphasis added.
48. For a similar analysis in relation to the PCB's provisions on the defence of property, see Stanley Yeo, 'Use of Force to Protect Property' (2019) XII Bhutan Law Review (48).
49. PCB, ss 49–50; US Code, s 2.01.

https://doi.org/10.1017/asjcl.2019.38 Published online by Cambridge University Press

> 2.08(4). Intoxication that … is not self-induced … is an affirmative defence if by reason of such intoxication the actor at the time of his conduct lacks substantial capacity either to appreciate its criminality [wrongfulness] or to conform his conduct to the requirements of law.[50]

Accordingly, under the US Code, a defendant might be proved to possess the *mens rea* and *actus reus* of the crime for which they were charged, and still successfully plead the defence of intoxication if one of the two conditions specified in section 2.08(4) is met.

Since the PCB lacks a provision such as section 2.08(4) of the US Code, it is uncertain what degree of intoxication is required for cases of non-self-induced intoxication. Conceivably, the PCB does not mean to absolve from criminal liability a person who was subjected to non-self-induced intoxication, no matter how slight the degree of intoxication. This is an unsatisfactory state of affairs, requiring clarification by the Bhutanese Parliament.

V. VALUES AND STANDARDS OF THE PENAL CODE

At the beginning of this article, it was noted how the PCB was drafted largely with the assistance of a foreign expert, with little detailed scrutiny by the Bhutanese Parliament and certainly none from the wider community.[51] This may have been inevitable, and most certainly understandable, given the speed with which Bhutan moved from an absolute monarchy to a democratic constitutional monarchy. Nonetheless, the result is that many of the norms and values embodied in the PCB may not accurately reflect those of the Bhutanese people. To quote former Chief Justice Lyonpo Sonam Tobgye again:

> Laws must be in accord with moral and ethical values, cardinal and spiritual values. … [O]ur laws must be Bhutanese in essence. During the drafting of laws, it is imperative to consider the accepted Bhutanese values, traditions and culture for more or better compliance in spirit than mere legal compliance.[52]

A few examples of discordance between the PCB and Bhutanese values, traditions, and culture will be given here, which, while speculative, certainly deserve serious debate by the Bhutanese Parliament. Rather curiously, the philosophy of Gross National Happiness (GNH), which Bhutan is renowned for, has not played any noticeable role in national debates about criminal responsibility. GNH was instituted as a governmental goal in the *Constitution of the Kingdom of Bhutan 2008*, enacted four years after the PCB.

50. The conditions of substantial capacity are the same as those for the defence of mental disease or defect under s 4.01 of the US Code. The PCB has an identical provision under s 118.

51. See n 3 and accompanying main text.

52. Lyonpo Sonam Tobye, 'The Blessings of Enlightened Laws – A Foundation for Peace and Happiness' (n 15) 13–14.

https://doi.org/10.1017/asjcl.2019.38 Published online by Cambridge University Press

A. *Degree of Criminal Negligence*

There are several crimes in the PCB for which culpability comprises the element of 'negligence'.[53] The PCB defines 'negligently' as follows:

> 57. A defendant acts negligently with respect to a material element of an offence, when the defendant should have been aware that there was a substantial and unjustifiable risk that the material element exists or would result from the defendant's conduct. The risk must be of the nature and degree that the defendant's failure to perceive it, considering the nature and purpose of the conduct and the circumstances known to the defendant, constitutes a deviation from the standard of care of a reasonable person in the defendant's situation.

This definition has been borrowed almost entirely from the US Code, except for one significant difference. Under the US Code, the defendant's failure to perceive the risk must have constituted not merely a 'deviation' as stipulated by the PCB, but a gross deviation from the standard of care expected of a reasonable person in the defendant's situation.[54] Most countries take the same position as the US Code in requiring a higher degree of negligence for criminal liability, in order to differentiate it from civil (tortious) liability for negligence.[55] As it stands, under Bhutanese law, any successful civil suit against a defendant who had negligently caused the death of a person is likely to result in the conviction of the defendant for the felony of negligent homicide under section 144 of the PCB.[56] Take, for example, a surgeon whose negligence at the operating table causes the death of his patient. While the surgeon certainly deserves to pay damages to the patient's family, it is questionable whether he should also be convicted and punished (rather severely, it may be added) if the degree of negligence was only that of the civil standard rather than gross negligence.

B. *The* Mens Rea *of Rape*

The crime of rape is specified in section 177 of the PCB. To be found guilty of rape, the defendant must have engaged in sexual intercourse with the victim without her consent, knowing that she did not consent or being reckless as to whether she had consented.[57] Where a defendant had an honest mistaken belief that the victim was consenting, this belief negates the *mens rea* for rape, with the result that the defendant is acquitted. This is the effect of section 75 of the PCB, which states that 'mistake of fact shall be a defence, if … the mistake negates the purpose, knowledge

53. For example, negligent homicide (s 144); negligent assault (s 156); and negligent burning or exploding (s 233).

54. US Code, s 2.02(2)(d).

55. Some examples of this are Australia, Canada, England, and India.

56. The offence is categorized as a felony in the fourth degree, which, under the PCB, attracts a penalty of between 3 years and 5 years' imprisonment.

57. Since s 177 is silent on the *mens rea* for rape, s 58 operates to stipulate that it is established if the defendant acts purposely, knowingly, or recklessly with respect to the material elements of the offence. Consequently, the prosecution must prove that the defendant had purposely engaged in sexual intercourse knowing that the victim did not consent, or was reckless as to whether she consented or not to such intercourse.

https://doi.org/10.1017/asjcl.2019.38 Published online by Cambridge University Press

[or] recklessness … required to establish a material element of the offence'. As with many other areas of the PCB, this position has been taken from the US Code.[58]

This was the dominant approach to culpability for rape in the common law world around the time when the US Code was written, with the English House of Lords case of *Director of Public Prosecutions v Morgan*[59] serving as the landmark decision on the matter. In recent years, however, many jurisdictions, including England and several states of the US, have changed the law to require a defendant's mistaken belief to be based on reasonable grounds.[60] This development has been welcomed, not only by feminist groups but by society at large.[61] It could be argued that the law would afford greater protection for women by requiring a man to take reasonable measures to ascertain whether the woman had consented before engaging in sexual intercourse with her. Might this also be what Bhutanese society expect to be the law today?[62]

Another somewhat controversial feature of the law of rape in Bhutan pertains to the offence of marital rape.[63] A husband who has sexual intercourse with his wife against her consent will be found guilty of this offence, which is designated as a petty misdemeanor, in contrast to rape, which is a felony of the fourth degree. In recent years, many legal systems have abolished the marital rape defence or otherwise ceased to treat husbands who rape their wives any differently from perpetrators of ordinary cases of rape.[64] Advocates of this development argue that any concession given by the law towards husbands who rape their wives endorses the outmoded and loathsome view that wives are the property of their husbands, to be dealt with as they deem fit. Do members of Bhutanese society think the same way?[65]

C. *Incapacity to Appreciate 'Criminality' in the Mental Disability Defence*

All legal systems provide for the exculpation from criminal liability of persons who were legally insane at the time of committing a crime. The defence of insanity takes the following form in the PCB:

58. US Code, s 2.04(1)(a).
59. [1975] UKHL 3, [1976] AC 182.
60. Interestingly, this has always been the law under the IPC where s 79 requires the mistake of fact to be 'in good faith', which the IPC defines as 'with due care and attention'.
61. Dolly F Alexander, 'Twenty Years of Morgan: A Criticism of the Subjectivist Vew of Mens Rea and Rape in Great Britain' (1995) 7 Pace International Law Review 207; Thomas Crofts, 'Rape, The Mental Element and Consistency in the Codes' (2007) 7 Queensland University of Technology Law & Justice Journal 1.
62. No formal surveys or interviews have been conducted on this issue. However, the authors gauged the response of the 25 law students at the JSW School of Law, Bhutan, whom they taught the course on 'Penal Law and Restorative Justice' in 2019. This group of students comprised a fairly good representation of members, aged between 19 and 22 years, of urban and rural communities across the whole of Bhutan. After the students were presented with these two alternatives, more than 90% were in favour of requiring the accused's belief to be based on reasonable grounds.
63. PCB, s 199.
64. Examples include Australia, England, Nepal, Singapore and several US states. India is also moving in this direction. See Sarthak Makkar, 'Marital Rape: A Non-criminalized Crime in India' (HHRJ Online, 1 Jan 2019) <https://harvardhrj.com/2019/01/marital-rape-a-non-criminalized-crime-in-india/> accessed 20 Nov 2019.
65. 95% of the law students in the group referred to in n 62, thought so.

https://doi.org/10.1017/asjcl.2019.38 Published online by Cambridge University Press

> 119. A defendant shall have the defence of mental disability if, at the time of the conduct, on account of a mental disability, the defendant lacked substantial capacity either to appreciate the criminality of the defendant's conduct or to conform the conduct to the requirement of the law.

The relevant part of section 119 for discussion here is the criteria that the defendant must have lacked substantial capacity to 'appreciate the criminality of the defendant's conduct'. By 'criminality', it is meant that the conduct was a crime according to the law of the land, ie that such conduct was legally wrong. This is the position under English common law.[66] However, another position permits the defence to succeed if the defendant lacked substantial capacity to appreciate the moral wrongness of their conduct. Several legal systems, such as those of Australia,[67] Canada,[68] New Zealand,[69] and India,[70] subscribe to this position. The drafters of the provision in the US Code,[71] which is almost identical to the Bhutanese provision, also expressed some support for this position when they said that '[w]rongness is suggested as a possible alternative to criminality, though it is recognised that few cases are likely to arise in which the variation will be determinative'.[72] While that observation might be true for the United States, it is less likely to be so for Bhutan because, in a developing nation such as Bhutan, the dissemination and instruction of the criminal law to the populace may not be very effective. Added to this are the heightened religious beliefs and practices of the Bhutanese people[73] compared to everyday US citizens.

To illustrate, consider the case of X who, due to a major psychotic disorder, believes that a deity has commanded him to kill a baby as a sacrifice in order to avoid a plague that will kill his whole village. X knows that such a killing is a crime, but believes that his act is morally justified. Were X to be charged with homicide, he would be denied the defence under section 119, since he had appreciated the criminality of his conduct. Such an outcome would probably be viewed as highly inappropriate by Bhutanese society. The crux of the matter is that X had been found, on account of mental disability, to be lacking substantial capacity to reason about the rightness or wrongness of his conduct which 'sane' people would be capable of doing. It is likely that most Bhutanese would agree with the proposition that no person should be convicted and punished for a crime, however heinous, whose mental faculties were so disordered as to prevent them from living 'socially integrated lives and to choose conduct which confirms with both moral and legal norms'.[74]

66. *R v Windle* [1952] 2 QB 826 (CA).
67. *Stapleton v R* (1952) 86 CLR 358 (HC).
68. *R v Chaulk* (1990) 62 CCC (3d) 193 (SC).
69. Crimes Act 1961 (New Zealand) (Public Act No 43 of 1961), s 23(2)(b).
70. IPC, s 84.
71. US Code, s 4.01(1).
72. *Model Penal Code: Official Draft and Explanatory Notes* (n 29) 62.
73. Buddhism, the national religion of Bhutan, is subscribed to by a vast majority of the population. It is practised alongside Bhutanese folk beliefs called *luso*, as well as vestiges of Bon, the pre-Buddhist religion prevalent across the Himalaya.
74. Andrew Simester, Warren Brookbanks & Neil Boister, *Principles of Criminal Law* (5th edn, Thomson Reuters 2019) 458.

https://doi.org/10.1017/asjcl.2019.38 Published online by Cambridge University Press

D. *Mandatory Minimum Sentences*

The PCB adopts the US Code in specifying categories of crimes according to degrees of felonies and misdemeanours, and prescribing penalties for each of them. Notably, these penalties comprise a range, from a minimum to a maximum sentence.[75] In recent years, there has been growing criticism against the use of mandatory minimum sentences, the primary one being that they prevent the sentencing judge from dispensing justice in an appropriate manner by imposing a penalty which best fits the particular offender.[76] There could certainly be cases where the rehabilitative aim of punishment can be achieved, such as where the prisoner was a first time offender, or was young, and the victim was supportive of the offender being given a lighter sentence or one which assists their reformation.

As a Buddhist nation, Bhutan's criminal justice system has long subscribed to Buddhist principles, not least those pertaining to restorative justice.[77] A clear example of this is the declaration before the Bhutanese Parliament that the PCB had been drafted in order 'to reinstate the dignity to the victims of crime and increase the possibilities of reform and rehabilitation of the offenders.'[78] This was meant to echo the values and aspirations of the Bhutanese people concerning the treatment of offenders. In informal communications with the authors, some judges have expressed disquiet with the mandatory minimum penalty regime embodied in the PCB, which they regard as running counter to principles of restorative justice. This is especially so in cases where the offender has expressed deep and real remorse for their crime, and the victim has forgiven them. There is also the longstanding use (predating the formal judicial system) of mediation by community leaders to settle disputes, which seeks to rectify the imbalance created by offending through non-punitive means.[79] The practice of mediation runs counter to the use of mandatory minimum sentences.

VI. THE WAY FORWARD

This article began by presenting the qualities of a good code, as viewed by Macaulay, the original drafter of the IPC, which is the longest serving penal code in the world. To recapitulate, for a code to serve the purpose for which it was created, its provisions

75. PCB, Ch 3.

76. For a discussion of recent thinking and developments under US Federal law, see Paul Larkin Jr & Evan Bernick, 'Reconsidering Mandatory Sentences: The Arguments for and Against Potential Reforms' (The Heritage Foundation, 10 Feb 2014) <https://www.heritage.org/crime-and-justice/report/reconsidering-mandatory-minimum-sentences-the-arguments-and-against> accessed 20 Nov 2019.

77. For an account of the role that Buddhism has played in the Bhutan criminal justice system, see Lungten Dubgyur, 'Buddhism – A Source of Bhutanese Criminal Justice System' (2019) XI Bhutan Law Review 17. See also Richard Whitecross, 'Of Texts and Drama: Delivering Justice in Bhutan' (2016–2017) 2 Buddhism, Law & Society 77.

78. See National Assembly of Bhutan, 'Translation of the Proceedings and Resolutions of the 82nd session of the National Assembly of Bhutan 2004' (n 2).

79. Lobzang Rinzin Yargay, 'Mediation: Treading the Middle Path in Dispute Resolution for Community Vitality and Gross National Happiness' (2019) XI Bhutan Law Review 29.

https://doi.org/10.1017/asjcl.2019.38 Published online by Cambridge University Press

must be clear, precise, and readily understandable. In addition, the code must cover the subject matter comprehensively, and must be readily accessible to the community. A good code would also have to embody the norms, values, and expectations of the society which it serves; otherwise, the law would lose public confidence and gradually fall into disrepute.[80]

The thrust of this article has been that there are many areas of the PCB which do not possess these qualities. The ambiguities and gaps described in this article constitute only a small representation of the problem. Regrettably, the PCB contains numerous ambiguities and gaps that have required, and will continue to require, judges to interpret and elaborate upon them as best as they can in the interest of criminal justice.[81] Although this is no fault of the judges, such judicial activism runs counter to Macaulay's insistence that a penal code should be the creation of 'the Legislature, by those who make the law, and who must know more certainly than any judge can know what the law is which they mean to make'.[82]

At this juncture, the following pronouncement by His Majesty the King of Bhutan is apposite:

> It is very important for the people to understand our legal system. All the judges are performing their duties and responsibilities very well. But it also is imperative to disseminate legal education and increase awareness of the people on laws and legal system so that they become law-abiding citizens.[83]

This pronouncement affirms the quality of accessibility, which is a hallmark of a good code. However, its successful achievement through public legal education is conditional on the laws being comprehensible, precise, and comprehensive. Sadly, the PCB currently lacks these qualities in many of its provisions.

The primary objective of this article is therefore to alert the Bhutanese Parliament, the paramount body responsible for making good law, that the PCB is defective in significant ways, and that a solution should be found as soon as possible. The authors suggest two possible avenues, as follows.

The first is to engage in a major review of the PCB. This exercise would involve comparing its provisions closely with the US Code to clarify any ambiguities and fill any gaps for those parts that have obviously been borrowed from that Code. The review exercise should also engage in extensive community consultation and legislative debate over whether some of the existing provisions accurately reflect Bhutanese norms, values, and expectations about human behaviour and social conduct.

---

80. See the main text accompanying n 27.

81. cf Lyonpo Sonam Tobgye, 'Judges and Judging in Democratic Bhutan' (2018) IX Bhutan Law Review 19, 28, stating that '[j]udges do not make law' and, quoting the *Thrimzhung Chhenmo*, that the 'judge shall decide cases and award punishment strictly in accordance with the provisions of the law. He shall not allow himself to be swayed by any personal opinions while interpreting the provisions of law.'

82. Thomas Macaulay et al (n 14) v (referring to the legislative quality of the illustrations appearing in the proposed Code).

83. His Majesty the Druk Gyalpo, Jigme Khesar Namgyel Wangchuck, 'The Roles of the Judiciary in creating a Just, Civil Society: A Society based on Justice, Equality and Fairness' (2018) IX Bhutan Law Review 4, 5. It must be emphasized that His Majesty is highly revered by his citizens.

https://doi.org/10.1017/asjcl.2019.38 Published online by Cambridge University Press

The second possible avenue is to abandon the current PCB altogether and start afresh. Should this option be taken, we would like to put forward the IPC as a serious contender to be adopted and adapted in the context of Bhutan. Not only has that Code stood the test of time, it has the added attraction of being the principal source of penal law for India, a country with close social, historical, political, economic, and religious ties with Bhutan. Consequently, it is reasonable to assert that Bhutanese penal law should have a greater affinity with India's than with the US'.

With that said, it has been noted at the start of this article that the IPC has not been kept up-to-date and has lost many of the qualities of a good code. This unsatisfactory state of affairs has recently come to the attention of the Singapore Parliament, which considers this a major cause for concern.[84] As a result, a team of penal law experts (which included one of the authors) was invited to look into the matter. In 2013, the team produced a book entitled *Criminal Law for the 21st Century, A Model Code for Singapore*[85] for the government's consideration. Following this, in 2016, a joint committee of the Ministry of Law and Ministry of Home Affairs, called the Penal Code Review Committee, was established. Among the key areas of reform, the Committee was to consider '[r]ationalizing, recalibrating and modernizing General Principles, Exceptions and Explanations in the Penal Code'. The Committee delivered its report in August 2018.[86] After extensive public consultation, the *Criminal Law Reform Bill 2019* was tabled in Parliament in February 2019.[87] Its preamble reads:

> An Act to amend the Penal Code and certain other Acts, to update the criminal offences, keep up with technological changes and emerging crime trends, enhance protection for minors and vulnerable victims, harmonise the criminal laws and update the sentencing framework.

After an uneventful passage through Parliament, the Bill become law in May 2019, ushering Singapore's equivalent of the IPC into the twenty-first century.[88]

In conclusion, it is hoped that the Bhutanese Parliament will make a major review of the PCB a priority. The task may be demanding, but there are ready tools and expertise at their disposal to perform it. Ultimately, the Parliament owes it to the people of Bhutan to enact a good penal code.

---

84. As noted previously, the Singapore Penal Code is almost identical to the IPC.
85. Chan Wing Cheong, Stanley Yeo & Michael Hor, *Criminal Law for the 21st Century, A Model Code for Singapore* (Academy Publishing 2013).
86. Ministry of Home Affairs, 'Penal Code Review Committee Report' (MHA Aug 2018) <https://www.mha.gov.sg/docs/default-source/default-document-library/penal-code-review-committee-report3-d9709ea6f13421b92d3ef8af69a4ad0.pdf> accessed 20 Nov 2019.
87. Criminal Law Reform Bill (Bill No 6/2019) <https://sso.agc.gov.sg/Bills-Supp/6-2019/Published/20190211?DocDate=20190211> accessed 20 Nov 2019.
88. ibid.

https://doi.org/10.1017/asjcl.2019.38 Published online by Cambridge University Press