BHUTAN LAW REVIEW

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THE EVOLUTION & DEVELOPMENT OF BHUTANESE LAW

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BHUTAN LAW FACTS 2012

LIST OF ACTS PASSED BY FIRST PARLIAMENT

Legislations passed in 2008

1. The Constitution of the Kingdom of Bhutan, 2008
2. Election Act of the Kingdom of Bhutan, 2008
3. National Referendum Act of the Kingdom of Bhutan, 2008
4. Public Election Fund Act of the Kingdom of Bhutan, 2008
5. National Council Act of the Kingdom of Bhutan, 2008
6. Parliamentary Entitlements Act of the Kingdom of Bhutan, 2008
7. National Assembly Act of the Kingdom of Bhutan, 2008

Legislations passed in 2009

1. The Local Government Act of Bhutan, 2009
2. Prison Act of Bhutan, 2009
3. Royal Bhutan Police Act, 2009
4. The Cooperative (Amendment) Act of Bhutan, 2009
5. Waste Prevention and Management Act of Bhutan, 2009
6. Marriage (Amendment) Act, 2009

Legislations passed in 2010

1. Bhutan Standards Act, 2010
2. Entitlement & Service Conditions Act for the Holders, Members & Commissioners of Constitutional Office of Bhutan, 2010
3. Tobacco Control Act of Bhutan, 2010
4. Royal Monetary Authority Act of Bhutan, 2010
5. Civil Service Act of Bhutan, 2010

First formal legal course inaugurated in Thimphu 1995. The recruits with dignitaries and judiciary officials.

Legislations passed in 2011

1. The Anti-Corruption Act, 2011
2. The Financial Services Act of Bhutan, 2011
3. The Water Act of Bhutan, 2011
4. The Child Care and Protection Act of Bhutan, 2011
5. The Civil and Criminal Procedure Code (Amendment) Act of Bhutan, 2011
6. The Penal Code (Amendment) Act of Bhutan, 2011

Legislations passed in 2012

1. Tobacco Control (Amendment) Act of Bhutan, 2012
2. Public Finance (Amendment) Act of Bhutan, 2012
3. Child Adoption Act of Bhutan, 2012
4. University of Medical Sciences Act of Bhutan, 2012
5. Consumer Protection Act of Bhutan, 2012
6. Sales Tax, Customs and Excise (Amendment) Act of Bhutan, 2012
7. Druk Gyalpo's Relief Fund, 2012

Legislative Bills yet to be passed

1. Contract Bill (Passed by National Council, with National Assembly)
2. Alternative Dispute Resolution Bill (Passed by National Council, with National Assembly)
3. Domestic Violence Bill (Passed by National Assembly, with National Council)
4. Road Bill (Passed by National Assembly, with National Council)
5. National Flag Bill (To be discussed in 10th Joint Sitting)
6. Disaster Management Bill (To be discussed in 10th Joint Sitting)

Case Statistics

1. Total Cases Registered in 2012 in all tiers of Courts - 13,978
2. Total cases registered in 20 Dzongkhag Courts = 11154
3. Total Cases registered in 15 Dungkhag Courts = 2342

3 Busiest Courts of 2012

1. Thimphu Dzongkhag Court with 4,128 Cases
2. Trashigang Dzongkha Court with 901 Cases
3. Phuentsholing Dungkhag Court with 814 Cases

3 Least Busy Courts of 2012

1. Lingzhi Dungkhag Court with 15 Cases
2. Sombeykha Dungkhag with 18 Cases
3. Lhamoy Zingkha Dunghag Court with 22 Cases

Top 2 Cases as of 2012

1. Matrimonial Cases (4,393)
2. Monetary Matters (3,414)

Top 3 Colleges of LLB Degree attended by Bhutanese

1. Government Law College, Mumbai
2. Indian Law Society (ILS) College, University of Pune, India

- National Academy for Legal Studies and Research (NALSAR)

List of Law Firms

1. Sayanglo Law Chamber
2. Environ Legal Consultancy Firm
3. UD and Partners
4. UC Associates
5. Garuda Law Firm
6. KC Legal Service
7. Kuenphen Legal Service
8. Clues & Colleagues
9. ND Legal Services
10. PhendeyThrimDoen Leykhang

Lawyers including Judges & Parliamentarians

1. Total Lawyers in Bhutan as of 2012 – 192
2. Male Lawyers – 130
3. Female Lawyers – 62
4. Lawyers working outside Bhutan - 2

Activities of Bhutan National Legal Institute

The following are the activities that were carried on by BNLI from 2010 to 2013.

1. Conference on Constitution and Democracy: 25.12.2010. In this Conference, all the professional Judges were trained on constitution and democracy. The Conference was held in Paro.
2. Retreat on finalization of BNLI Strategy Paper: This event helped to finalize the strategy paper
3. Judges Book Club: 6.8.2011: This was initiated to promote reading culture, created forum for discussion & comparative dialogue between shared experiences & beliefs.
4. Attachment program with the Queensland University of Technology (QUT), Australia: High Court Justice & District Court Judges. This resulted in institutional linkage built on behalf of BNLI with the QUT.
5. Introduction of Law Clubs in Schools: This was targeted to Higher and middle secondary schools in the country. This was aimed at creating respect of law from younger generation. Prevent them from coming in conflict with the laws. Created awareness among the younger generations...etc. This was formally launched in Punakha on 21 February 2012.
6. ADR Mediation Training (Region-wise): This was focused on Mangmis (local leaders)
7. Visit to Delhi Judicial Academy (DJA), India: Formally established institutional linkage with DJA & the Institute could send its staff for short term courses there after.
8. Training on Women & Child Friendly Procedures: This was focused on to judges, Police Officials, Lawyers & Attorneys. This was organized in 11.04.12 and ended in 12.4.2012. This has led to enhancement of knowledge of judges, police officials, lawyers & attorneys in regard to women & children.
9. Training on Role of Registrars and Bench Clerks vis-à-vis quick disposal of cases. This was held in 05.06.12 to 07.06.12 in Thimphu. The outcome was Enhanced knowledge of Registrars & Bench Clerks on their roles & quick disposal of cases.
10. Institutional visit to Judicial Training Institute (JTI), Bangkok, Thailand. This was organized in 02.06.12 to 26.06.2012. The results were that it officially established institutional linkage with the JTI on behalf of BNLI.
11. Ex-Country Short-Term Training, Judicial Training Institute (JTI), Bangkok, Thailand. This was held in 29.01.13 to13.02.13 for a period of 16 days.
    This resulted in further strengthened the institutional linkage established by the Hon'ble Justice Rinzin Gyaltshen of Supreme Court & undergone two weeks training with the 6th Batch of Bench Clerks from the Judiciary of Bhutan.
12. Oral Legal History (Region-Wise): This targeted religious personnel, retired officials and civil servants, retired armed forces personnel, former local leaders & village elders. This recorded and captured the views of past legal practices in the country prior to the establishment of formal legal system in Bhutan. The regions included Punakha, Gasa & Wangdue, Mongar,T/gang,Lhuntse & T/yangtse, B/thang, Trongsa & T/phu, and other parts of the country. However, it covered all over Bhutan.
13. Publication of Law Magazine/Journal (Bhutan Law Review): This was done to provide a platform for writing for the legal professionals and judges. The Law magazine was published and distributed for free to various institutes and organization as part of legal dissemination tools.
14. Training of Trainers (ToT- Prof. Melinda Jane Edwards): The ToT was constituted by core team members from BNLI and the judiciary. It was for organized for 10 days from 10.3.2013 to 20.3.2013. The training resulted in enhanced the knowledge of trainers in departing training to stakeholders & general public as a whole.
15. Launching of Legal TV Series (Zhidheyi Tsawa & Super Norbs): The TV Series was launched on 28.3.2013. The Legal TV Series helped in departing legal dissemination & awareness to general public & youth in particular.
16. Lecture Series in Higher Institutes & Colleges: Lecture Series were held institutes of higher learning. This Lecture Series were primarily focused on colleges across the country. The Lecture Series covered Sherubtse College in Kanglung, CST Phuentsholing, Gedu College of Business Studies, Teacher Training College, Samtse, Royal Thimphu College, Paro College of Education, Paro, and College of Natural Resources, Lobesa. The Lecture Series was focused on: The lectures were delivered on Constitution alism & Rule of Law, the Making of the Law, and the Administrative Reforms on which the Institute intends to bring multiple perspectives, historical, ethical, moral, and broader societal importance. Lectures were delivered by Justice Tshering Wangchuk, Justice of Supreme Court, Dasho Phuntsho Wangdi, Attorney General and Dasho Pema Wangchuk, Director of the Institute.
17. Publication of Legal Pamphlets: As a part of the legal dissemination tool, the Legal Pamphlets were published and distributed across villages where the legal dissemination projects were carried on. The legal pamphlets were published on 26.06.13.
18. Symposium on Constitution & Human Rights: This was held in Paro. The symposium focused on Human rights and the constitutionalism. It was held on 26.6 2013. The Justices of High Court and the Supreme Court attended the Symposium.
19. Ex-Country Short-Term Training in DJA, Delhi, India: Institutional visit & undergone short term training was undergone in 29.07.13 to 08.08.13. The visit not only made institutional links but also received training on various legal topics.
20. Rural Legal Dissemination Program: Rural Legal Dissemination Program was initiated to sensitize the rural folk on the laws that are existing and on the new laws that has come into place. The Rural Legal Dissemination Program was initiated in various areas like:
    a) Dagala, Thimphu;
    b) Laya, Lingzhi, Khatoe & Khamey;
    c) Digala & Langdurbi, Zhemgang;
    d) Merak & Sakteng, Trashigang;
    e) Shingkhar Lauri, Samdrup Jongkhar;
    f) Dungna & Metakha, Chhukha.

    The Rural Legal Dissemination Program disseminated laws to the knowledge of the people and helped them understand their rights, duties and obligations under different laws. The program was undertaken primarily to achieve the noble objectives of the Hon'ble President to take justice to the door step of the people in the communities. The program also contributed towards materializing the noble vision of His Majesty the King of creating & promoting harmonious communities-ultimately promoting the philosophy of Gross National Happiness.
21. Training on Management of Courts & Criminal Trial: The two day training was held for the Dungkhag judges in the Banquet Hall in Thimphu.
22. ADR Mediation Training to Elected Female Local Leaders: The training focused on female GAOs, Mangmis & Tshogpas. The first batch of training was held in Paro while the rest were held in Phuentsholing. The training aims at reducing the number of cases in the Court reducing the wastage of time & resources of both the Court & litigants.
23. Institutional visit to Judicial Academy (JA), Singapore: The visit was made by SC Justices, Police Official & BNLI Officials for a period of one week. This program officially established institutional linkage with the JA.
24. Peer Mediation Workshop (Prof. Melinda Jane Edwards): The Peer Mediation Workshop was organized in three areas. They were in Thimphu, Phuentsholing and in Bumthang. The Peer Mediation Workshop trained on solving internal civil disputes amicably in the schools and inculcated the concept of peer mediation amongst youth.
25. Training on Legal Draftings, Art of Pleading & Code of Conduct: This training was held in Paro. The participants included Public Prosecutors & Private Practitioners.
26. Training of Trainers on Child Justice (ToT- Mr. Ghassan Khalil): The participants of this training were Legal Officers from various agencies that work for children and Bhutan National Legal Institute. It was conducted in Paro for a period of two weeks from 9- 24 October 2013. The training aims to create a pool of resource to train future trainers on Child Justice.
27. National Child Justice Conference: The National Child Justice Conference was held in Thimphu for a period of three days with effect from 13-15 November, 2013. The Conference drew a Road Map for Child Justice in Bhutan and drew the commitments of all the stakeholders that work for children.
28. Moot Court for PGDNL trainees: Moot Court for the PGDNL trainees was held in Thimphu District Courts. The trainees presented their cases in the real courts presided over by a District judge of the respective courts.

The infamous Gyelpozhing Case – can the actions of the past haunt the present

By: Jangchuk Norbu, Judge

A brief summary of the case drawn from media reports before the article.

The political miscalculation of the Prime Minister
In a parliamentary democracy, the Prime Minister, as the head of state, is responsible for all the political decisions taken by the ministers of his government. The ministers, in turn, are collectively responsible for every action taken in the name of the state. The Gyalpoishing land case in Mongar that gripped the attention of the media and the public alike happened during the term of the first elected government under the then Prime Minister Jigme Y. Thinley. Indeed, it was ministers of the government who were involved in all the wrongdoings and hence made to appear before the court.

As the media dug deeper and deeper into the abuse of power, corruption and avaricious land grabbing, the prime minister was forced to allow the Anti Corruption Commission (ACC) to investigate the alleged official misconduct of the public officials. The Prime Minister, in doing so, should have conditioned that the investigation report be submitted to his office as a matter of public policy. Such a condition notwithstanding, the ACC should have acknowledged the executive authority of the government formed through the franchise of the people. It was the miscalculation of the Prime Minister to allow the ACC to investigate without any precondition as to what it ought to do. There can be no parallel policy whatsoever in a democratic state formed by the political sovereignty. The government of the day has the political legitimacy to decide on some public matters which would besmirch political morality. After all, it is "We the people" who decidedly formed the government for five years.

Command of the King and His Actions: Sacrosanct and Unquestionable

The country remained an absolute monarchy for little over a century (1907-2008). The monarch as an institution was the most revered political institution whose actions and commands were understood as the law of the land. Even a word of utterance by the king was deemed as law enforceable by the legal system. The legal question, if not the political question, is whether we can review the whole monarchical action. Which law(s) of the land provides for the review of actions of the past government? If the new parliament has enacted 39 Bills into laws, then one of these laws should reflect unrestrained authorities assigned to one body or institution to review all the actions of the past government. It is time for the people to absorb and understand that any action of the king remains beyond review. His actions cannot be reviewed nor could become the subject to be reviewed by the new laws enacted after the establishment of the democratic state. The question that every Bhutanese has to ask is the consequences of transforming the state from one form to another. There have been hurdles, and the road to democracy was never smooth in the history of such transformations. Bhutan is not an exception.

Inconvenient ruling of the court

If the court of law justifies or admits the offence under the repealed law, the very institution meant to provide justice through proper application of the laws breaches the basic tenets of the rule of law. The original court of jurisdiction could have dwelled into the constitutional authority of the prosecuting agency. The special law herein referred to as the Anti-Corruption Act, 2011, does not provide any overriding clause or any unbridled power to the Commission to review and investigate past actions. The justice must establish itself through the proper balance of laws when it pertains to past actions. The acceptance of charges framed against an individual under Thrimzhung Chhenmo not only violates the procedural due process but also the substantive due process of the laws.

The court through application and enforcement of the Thrimzhung Chhenmo could have reflected back as to who was the agency to prosecute an individual in the event of any violation of the provisions of the Thrimzhung Chhenmo. It cannot be construed that every offence deemed to have been committed during the operation of that repealed law would be prosecuted by a future investigating agency. However, the precedent got established and conventionally the court of law had accepted the Royal Bhutan Police as an investigating agency as well as the prosecuting agency. It is in these jurisprudential perspectives that a new investigating agency clothing itself in investigating the past alleged executive malfeasance endangers the rule of law. It is time that every institution established under the constitution with good intention by the framers of our constitution understands the nature of their duties and their jurisdictional reach.

The trial court while admitting the charges in the Gyalpoishing case could have studied with clarity that any charge framed under the Thrimzhung has no standing. The application of Thrimzhung Chhenmo ceased to operate on the day of enactment of the Bhutan Penal Code 2004. Besides, it was on 18 July, 2008, that the Bhutanese people accepted the constitution of Bhutan as the Supreme law of the land. It not only ended the historical absolute monarchy but also transformed the state into a Democratic Constitutional Monarchy which means any law unless otherwise protected by the Constitution ceases to operate retroactively.

Old Prescription for the New Disease

The maturity of democracy depends on how it is nurtured through acceptance of democratic principles herein referred to as the "Rule of Law". The liberty of the people will be at stake if the state agency undermines the spirit of the rule of law. It will be far worse if the protector of the liberty concedes to the laws which have no relevancy to the matter brought before him. Application of laws without the application of the mind worsens the judicial faith of the people. The temple of justice is losing its reverence when the person occupying the high seat hands down a ruling which lacks reasons. The rulings of the Monggar court, with due respect, has only shown the prescriptive way of outlining outdated laws insensibly reflecting the bud of a tree gnawed by hungry insects.

The judiciary has equal footing, if not above the other two arms of the government, to protect the democracy. Governments will come and go. The politicians will overzealously guard themselves from any intrusion after they are elected to the office but it is the judicial institution that must protect the liberty of the people through the fair application of laws. Any deviation would impede the purpose of providing the liberty enshrined in the constitution. The ruling of the court, therefore, is like prescribing old medicine for the new disease. It has serious flaws for the failure to interpret criminal jurisprudence. There is no reason why the appellate court should vary the rulings of the trial court.

The higher court must now establish what the ruling ought to have been and needs to guide the public as to how the impugned law is to be read. Above all, it is time that the constitutional courts throw light to the people indicating that the buck must stop somewhere even if faced with strong resistance.

The rulings must reflect the core applicability of the repealed law in the post constitutional era. If the constitution does not provide the application of ex post facto laws it means that no law could be applied for the past actions of an individual. The retroactive application of the laws often undermines the basic liberties of the person as guaranteed by the constitution.

The Royal Kasho of 1987: Its Enforceability and Constitutionality

The kasho (decree) or the edict of the king remained valid and enforceable until 17 July, 2008. With the adoption of the Constitution all edicts automatically gave way to the supremacy of the written constitution. What is more interesting at the present scenario is the enforcement of the edict by the court of law in determining the guilt of an individual person. The edict has to be read as the directive to the executive, the non-compliance of which should necessarily attract the sanction of the relevant authority. The court should have framed a legitimate jurisprudential issue before imposing self-doctrinated sanctions of its own like whether the written kasho has specified the sanctions, if any, for non-compliance by the executive. If the answer is affirmative, which institution or authority has been granted the power to prosecute? Whether the kasho has the force of law? Whether it is to be used as a legal source to impute any individual who in his best of understandings has complied with respect and dignity? Which state agency of the new democracy has the power to continuously validate and enforce the past Kashos of the king? The rulings of the court, in fact, have seriously undermined the document of liberty in which the people of Bhutan as faithful citizens have formed a new democratic state, and the preamble to the Constitution has proudly declared *"We the People of Bhutan."* Every state organ created by this historic document owes its allegiance to the Constitution and to the people as the source of power. It is in this argument that the action of the Commission transgressed the fabric of the political sovereignty. The court of law has the duty to protect the individual from the hungry clutches of irresponsible bodies whose actions keep flagging high in the air. The actions of the past government must not be reviewed by any agency even if the action proves to be illegal. The written constitution of 2008 must be construed as a lid to the political pot of the past government. It is unconstitutional on the part of any investigating agency to impute any person under the past kasho.

Anti-Corruption Act, 2011: Is it a Curative law?

The preamble to the law provides the need for an anti-corruption law in the country. The language used by the maker of the law seems explicit. The law has been given paramount importance imposing equal duty to every Bhutanese to fight the menace of corruption. The contents of the law, no doubt, reflect that it is a curative law as well. But it is also a law intended to apply prospectively with exception to Section 173 of the Act. Interestingly enough, the court has overlooked section 128 (3) of the same Act while admitting the prosecution by the Commission. The above provision of the Act needed further research if not jurisprudential enquiry. It does not reflect that the Commission has the jurisdic-

tion to prosecute any individual based on the repealed law nor does it provide unbridled retroactive power to prosecute before the court of law. The prudence of the judge determines the fairness in the application of the laws. The changing society demands reasoned judgment over the mere application of prescriptive law.

Consensual sex : when consent becomes a crime

SANGAY CHEDUP
Legal Officer, Bhutan National Legal Institute.
Judgment No. (Thimphu 2012/939).

Several provisions of the Penal Code of Bhutan 2004, was amended by the first Parliament of Bhutan on 15 July, 2011. The amended version has since been enforced as the Penal Code (Amendment) Act of Bhutan 2011.

The definition of rape, the grading of statutory rape from second degree to a first degree felony and the grading of rape of a child above the age of 12-years from a third degree to a felony of the second degree are the key amendments.

These changes essentially articulate Bhutan's vital interest in ensuring that its naturally weaker members are legally protected and that the welfare and advantage of its children and youth will be safeguarded and fostered.

The Amendment Act is most commendable in its intention but it does, however, raise pertinent legal issues. Is it possible to strike an appropriate balance between protecting children from sexual abuse and exploitation while at the same time allow for the sexual expression of young people going from adolescence into adulthood?

The media often highlight cases that create strong public opinion as to the fairness of these laws and their repercussion on offenders.

Consider the case of the Office of the Attorney General v. Sonam Phuntsho. Sonam Phuntsho, 21, and his 16-year-old girlfriend went to Olakha where they spent the night near Pelkhil School. The next day, they decided to go to Bjemina and spend the night in his father's house.

In court, the girl stated that sexual intercourse with her boyfriend was purely consensual. This was supported by the medical report which contained no evidence of physical violence or intoxication.

The court, however, ruled that the accused had violated the provision of rape of a child above the age of 12-years and sentenced Sonam Phuntsho to nine years imprisonment.

In another case, 19-year-old Tshering Dorji was charged by the Thimphu District Court for impregnating a 16-year-old girl. The trial court's verdict stated that Tshering Dorji had not raped the girl but according to Section 183 of the Penal Code, the defendant was guilty of rape because of sexual intercourse with a minor between the ages of 12 to 18-years. Tshering Dorji had appealed on grounds that the sex was consensual but the High Court upheld the judgment and sentenced him to nine years in prison.

And the list goes on.

These cases are not new to Bhutan yet the issue remains less debated in any public discourse or by legal professionals, academics, researchers and scholars. While criminal law provides for the punishment of those that violate established societal morals and rules there is hardly a penal code that can be said to have a single basic principle running through it.

STATUTORY RAPE LAW IN BHUTAN

In Bhutan, according to criminal law, statutory rape law assumes that all sexual activities with a person below a certain age are coercive, even if both parties believe their participation is voluntary. Generally, statutory rape laws define the age below which an individual is legally incapable of consenting to sexual activity. Thus, instead of including force as a criminal element, these crimes make it illegal for anyone to engage in sexual intercourse below the set age bar. This essentially took on a dual function: protect minors from being taken advantage of sexually by adults, and helping to prevent teen pregnancies. The later, however, may be a misguided attempt in light of additional research that shows these laws have little effect on girls who actually become pregnant.

Then, what is the statutory age-limit set by the Bhutan Penal Code that constitutes statutory rape? The term is roughly defined in the Bhutan Penal Code which sets two statutory age-limits under two separate provisions: (i) Statutory Rape, and (ii) rape of a child above 12-years of age. Both provisions tag such sexual activity as a criminal offence regardless of consent and factual circumstances.

There are two clauses that call for an insightful analysis.

1: A defendant shall be guilty of the offence of statutory rape, if caught in any act of sexual intercourse whatever its nature with a child below 12-years, or an incompetent person, either with or without knowledge of the other person being a child or an incompetent person.

2. This amended section has added a new phrase "whatever its nature," retaining other words as existed in the earlier Sectio181 of the Penal Code.
However, the phrase "whatever its nature" is an unnecessary insertion because any sexual intercourse with a child below 12-years or an incompetent person is an offense; and statutory rape does not require any qualification to constitute an offence.
One major change in the amendment act includes punishment for statutory rape. It is increased from the second degree felony to the first degree felony which shall be liable to imprisonment for a term of 15- years and a maximum of which shall be a life imprisonment.

What is 'rape of a child above 12-years of age' as envisaged by the Amendment Act?
S.183: A defendant shall be guilty of the offence of rape of a child above the age of 12-years if the defendant commits any act of sexual intercourse against a child between the ages of 12 to 18 years. However, consensual sex between children of 16-years and above shall not be deemed to be rape.
S.184: The offence of rape of a child above the age of 12-years shall be a felony of the second degree.
What then could possibly be the difference between 'statutory rape' and 'rape of a child above 12-years' as protected by the Penal Code.

The two provisions, in close scrutiny, are actually one and the same because both label any sexual activity with a minor as an offence regardless of factual consent or other circumstances. These provisions consider the act itself be prima facie evidence of guilt, as any consent between partners, even if freely given, does not meet the standard of law as it is given to a minor. Both the provisions therefore impose strict liability, and the accused in these cases normally have no defense. The only difference lies in the degree of punishment.
If any sexual activity is a crime (regardless of circumstances), is there a need of two separate provisions with the same meaning and qualification? Or do these provisions intend to say that the rape of a minor above the age of 12-years is less harmful than rape of a child below the age of 12-years?

The definition of statutory rape will clarify why there is no difference between these two provisions.
In common law jurisdiction, the term 'statutory rape' refers to sexual activities in which one person is below the age of legal consent. The criminal offence of statutory rape is committed when an adult sexually penetrates a person who, under the law, is incapable of consenting to sex. This clearly indicate that statutory rape need not present overt force or threat; and the law presumes coercion because a minor or mentally challenged adult is legally incapable of giving consent to the act. A defendant may be convicted of statutory rape even if the complainant explicitly consented to the sexual contact and no force was used. By contrast, other rapes generally occur when a person overcomes another by force and without consent.
This definition is categorically incorporated under Section 181 of the Bhutan Penal Code. But then, what about Section 183? Where is the element of "consent" in Section 183?
The consent element is negligible and insignificant in Section 181 of the Penal Code of Bhutan but it is considerably significant in Section 183. Section 183 disregards neither consent nor force as a significant element of rape. The term "whatever its nature" as inserted in Penal Code (Amendment) Act of Bhutan 2011 defies the requirement of consent. These legal ambiguities need to be changed.

ROMEO AND JULIET CLAUSE

Section 17 of the Amendment Act, however, contains an 'exception clause' generally known as the Romeo and Juliet Clause. The Romeo and Juliet Clause was added to address concerns about 'matured minors' being labeled as sexual offenders or sexual predators as a result of participating in consensual sex. This clause is an exception to Section 17 of the Amendment Act, which provides 'consensual sex between children of 16-years and above shall not be deemed rape.' The problem typically arises when the male is 17 or 18, the female is between 14 and 16, and the parent of the younger teen presses charges. Under Bhutanese legal framework, even Romeo would be labeled as a sex offender today as he was believed to be 16 and Juliet just 13 during their relationship.

Romeo and Juliet law intends to protect the group of young sexual offenders who are relatively close in age to their victims and engaged in consensual sex. However, the law is silent on many grounds. What is the legitimacy of prosecuting 15-year-old Dorji for consensual sexual intercourse with his 17-year-old girlfriend? Is the 17-year-old girlfriend equally liable under 'rape of a child above 12 years?
This issue remains unanswered in Bhutanese criminal law. As a matter of practice, the law enforcement agencies including the Police, Attorneys and Judiciary would assume that the 'boyfriend' is guilty of statutory rape despite both parties being minors. The enforcement of

the law of this country always assumes statutory rape defendants are male and their victim's females.

THE RATIONALE FOR STATUTORY RAPE LAWS

Historically, the reason most often provided to justify punishment for statutory rape is that children below a certain age are incapable of making significant decisions. They are unable to consent to sexual intercourse, and thus, are vulnerable and deserve state protection. In cases involving older children, the courts claim that it was the states responsibility to protect young women because they were inherently weak or were emotionally and intellectually incapable of consenting to sexual intercourse, or because female chastity was necessary to maintain the moral character of a society. More recently, the argument used to justify punishment for statutory rape has focused on the state's interest in preventing teenage pregnancy.

i) Protect young people from sexual abuse

The Constitution of the Kingdom of Bhutan, 2008, provides that the State shall endeavour to take appropriate measures to ensure that children are protected against all forms of discrimination and exploitation, including trafficking, prostitution, abuse, violence, degrading treatment and economic exploitation. This truly demonstrates the firm commitment and strong willingness to improve the situation of children. Likewise, statutory rape is one step in ensuring child protection from sexual exploitation, harm and abuse. Legislatures presume that the power disparity inherent in a relationship between a child and an adult translates into a child's inability to resist an adult's coercive influence.

(ii) Enforce morality

In Buddhist philosophy, while a bhikhu (a fully ordained monk in the Theraváda tradition) has to take 227 rules of conduct, the lay Buddhist has to undertake a course of training in refraining from wrongdoing in respect of sexuality. Thus, Buddhism believe that indulgence in sexual activity for pleasure is not evil, but attachment to sexual pleasure is evil, wicked or sinful.

(iii) Prevent teen pregnancy

Prevention of teenage pregnancy is one major state policy of the government. Teenage pregnancy is particularly problematic for girls as they are socially isolated, have limited education opportunities and face other associated risks. It affects not only the girls' lives but also the health and wellbeing of the children they will bear. In view of these, the Marriage Act of Bhutan prohibits traditional marriage of children and has set the legal age of marriage at 18-year for both genders. This is to ensure less teen pregnancy, and to reduce complication during child delivery.

(iv) Reduce welfare dependency

Welfare dependency is related to teenage pregnancy. Like America and rest of the world, childbearing by teens has been viewed as one of the most pervasive and insidious social problems, linked to poverty, increased school drop-out rates, crime and a host of other social ills. It is believed that aggressive enforcement of statutory rape laws would reduce teen pregnancy and thus reduce welfare expenditures.

Generally, young women of 18 and under who give birth outside of marriage are more likely to go on public assistance and spend more years depending on family members.

DO STATUTORY RAPE LAW WORKS?

The straight answer would be 'No.' The statutory rape law neither reduces sexual abuse and exploitation of young people nor is the law effective in preventing teen pregnancy. The rationale for statutory rape to enforce morality itself is not justified.

1. Ineffective measures to reduce sexual abuse

The statutory rape laws are not effective in protecting young women from sexual abuse and exploitation. Although commercial sexual exploitation of children has not been identified as a problem in Bhutan, sexual abuse is a rising phenomenon.The Thimphu referral hospital alone shows a total of 246 sexual assault cases reported in both minors and adult women between 2005 and 2012. Besides sexual assault, the hospital also recorded 326 case of domestic violence and 572 cases of common assault and battery. Likewise, reported rape of minors are very few but some 6% of sexually active Bhutanese report having experienced forced sex, with urban and rural females twice and four times more frequently than urban and rural males. On the other hand, Statistical Yearbook of Bhutan 2012 maintained by the National Statistics Bureau shows seven statutory rape cases and 17 cases of rape of a child above 12-years. Despite stringent laws regulating sexual violence, particularly sexual abuse, statutory rape, and rape of a child above 12-years, the crime of sexuality remain a menace to society. This illustrates how statutory rape law is ineffective in reducing sexual abuse and exploitation of the children.

2. Statutory rape law fails to prevent teen pregnancy and reduce welfare dependency

A key rationale for the statutory rape law is to prevent teenage pregnancy thereby ultimately reducing welfare dependency. Against this wisdom, the Marriage Act of Bhutan 1980 criminalizes marriage of young person's below the age of 18. Despite prescribing the legal minimum age of marriage, Bhutan Living Standards Survey 2012 Report shows otherwise. About 60% of women aged 15–49 years reported giving birth at some point in their lives. In the age group of 15–19 years, 5.7% (9.0% females and 2.2% male) are either married or living together 12 months before the time of survey. Overall, about 2% of teenage women in this age group gave birth in the 12 months before the survey interview.

Similarly, Bhutan Multiple Indicator Survey 2010 indicates that About 31% of women aged 20–49 years reported having been married (or having entered a marital union) before the age of 18. Moreover, 15.2% of women aged 15–19 years are currently married or in a marital union, with a higher percentage of women in the rural areas (21%) compared to urban areas (6%), and in the Eastern region (25%) compared to the Western and Central regions. The report also identified that 8.5% of women aged 15-19 have already had a birth, 2.5% are pregnant with their first child, thus summing up to 11% having begun childbearing. 0.5% has already had a live birth before the age of 15.

Among women 20-24 years old, 15.3% have had a live birth before 18 years of age. Early childbearing decreases with wealth and education, thus it is almost 10 times more common among women 20-24 years old with no education (24%), compared with women with secondary plus (2.7%). Early childbearing is more common in rural areas (18%) and in the Eastern and Central regions (18.7 and 18.1) respectively. The percentage of women with live birth before the age of 18 has remained relatively unchanged over the last 25 years.

This indicates complete failure of statutory rape laws to prevent or reduce teen pregnancy. As the young population multiplies, these data may escalate phenomenally over a period of time. Statutory rape therefore is not a solution to stop teen age pregnancy.

3. Morality alone is not justified

The morality view is that any sexual intercourse outside marriage is not permissible, and therefore, extra marital affair, adultery, and fornication is prohibited under the Marriage Act of Bhutan. However, is statutory rape law as a means to enforce morality justified?

Given the fact that adolescents begin to learn about their sexuality with maturity, they engage into sex. According to the BMIS 2010, 4% of never-married women aged 15-24 had had sex. Of all women 15-24 years old, 3.7% had had sex before the age of 15. This happens so because, among marginalised and at-risk adolescents (13-18 years old), 36% were sexually active and the average age of sexual debut was 15 years for males and 16 years for females. This concludes that although the age of maturity is 18 years, sexual maturity can be judged by age of sexual debut, and physical capacity.

THE CALL FOR CHANGE

It is easy to comprehend the provisions of the law that any sexual activity with children under the age of 18 is prima facie evidence of guilt. Such unconditional law of the statutory rape encompasses series of questions

A study conducted by the Department of Youth, Culture and Sports (DYCS) in 2000 revealed that 58% of adolescent boys, viewed sexual activity as a natural process of youth and were sexually active. The fact that puberty encompasses dramatic changes in hormone levels, body shape, and physical size, and adolescent sex is a natural process, the law of statutory rape needs to be proportionately balanced. The Bhutanese statutory rape law, however, does not adequately balance between protection and harm. Perhaps, the state regulating sexual behaviour of minors creates more harm than good.

On the premise whether sex with a minor is prima facie crime of violence, the sensible answer would be that adolescent sexual conduct is not unusual, and therefore consensual sex brings little violence. Bhutanese penal legislation tag rape of a minor above 12-years of age as a "crime of passion" rather than a "crime of violence." However, today most commentators agree that rape should be characterized as a "crime of violence" rather than a crime of passion. The state cannot justify prosecuting a major for passionately having sex with his girlfriend; rather the states can easily justify prosecuting for having violent sex.

The law must place a reasonable and fair balance between the need of adolescents to be protected from unwanted sex and their equally needed freedom to engage in self-determined sexual relationships. This problem can be answered through clear study of other jurisdiction and legislative intervention.

In Bhutan, the age of consent for sex is overlooked and any sexual intercourse with children under 18-years of age, with or without consent, is guilty of a (i) statutory rape, and (ii) rape of a child above 12-years.

Study and d

The Legislature needs to amend this law incorporating the age of consent, be it 15 or 16-years. The spirit of such new incorporation is, however, not to deregulate consensual teenage sex. To this effect, there are could be few

notable exceptions to the law depending on what you are doing and who you are doing it with.

Minimum age limit
While considering the minimum age limit it is critical for Bhutanese legislators to study and draw from the best practices from jurisdictions like that of Canada and the United States.
Given the fact that law is dynamic and not static, statutory rape provisions here can be changed. Bhutanese statutory rape law is right in principle but wrong in practice. We need law that is more practical, and less principle.

School Curriculum
Given their developmental stage and their developmental tasks, it is not unusual or necessarily unhealthy and harmful for adolescents to engage in sexual behaviour as they begin to learn about their sexuality and become more mature in several life domains. Experts defined "healthy" sexual behaviour as "behaviour that is mutually consensual, wanted, desired, non-violent, safe (in terms of using methods to minimise risks of STI transmission and pregnancy), and for which the individual feels emotionally and physically ready." For many reasons, different children will obviously be ready for different forms of sexual exploration at different stages of their lives. Thus, the best possible way to help children deal with their sexual development in a healthy manner is to ensure that they seek out advice and help from appropriate individuals. For this to be effective, it is viable for the schools and institutions to incorporate sex education.

Although Bhutan has initiated School Health Programme in 1984 with WHO assistance, activities were primarily limited to de-worming and health education on various topics. In 1999, the Comprehensive School Health Programme (CSHP) focusing on health and hygiene linked to provision of water and sanitation facilities was initiated. Further, reproductive health has long been part of the school curriculum in middle and higher secondary schools. The need to enhance young people's awareness in reproductive health and family planning both as individuals and advocates was reflected in the Ninth Plan of the RGoB (2002-2007). These initiatives evidently explain the government's response towards the needs of adolescent's sexual education and awareness. However, these programmes do not stop young people from engaging in sexual conduct, and in fact, the child in conflict with law is increasing. Many school children are accused and victimized of their own willful conduct, and it happens because of the ignorance of the law.
Legal Dissemination
Perhaps the biggest obstacle to understanding youth rape laws is the ignorance of it. It is only in the court of law that parents know the legal sanction of nine to 15-years imprisonment for accused. At this juncture, parents reportedly argue in the court of law that they did not know about the severe punishment, and want to withdraw charges. However, by this time, it would be too late. Hence, such problems will certainly be addressed through legal dissemination, making public aware of the law and its implications.

Judicial Activism
The next issue is whether the judges have a legitimate power to dismiss the case of consensual sex between a child of 17-years and a major of 18-years, for example? The straight answer would be YES. The definition of rape as it incorporates in Section 177 is so clear that "Rape means any sexual conduct against the will of other." This definition can be inferred to Section 183 – rape of a child above 12-years – and can be dismissed if the sexual activity is: (a) consensual, (b) no element of force; and (c) no intoxication. This is because rape of a child above 12-years as incorporated in Section 183 is silent about consensual sex. Section 28.1 of the CCPC also empower judges to fill the lacunae.

Bhutan and Australia – a comparative analysis of the legal access to information

-Nima Dorji

The right to or freedom of information is very important in a democratic society. It is fundamental to the preservation of an open democratic society and integral to the freedom of speech. Similarly, information is a means to self-realization and enables an individual to grow, become fulfilled, to learn and to develop their rational faculties. The availability of information will also enhance social interaction leading to the development of a peaceful community. One of the most important functions of this freedom is that it ensures transparency and accountability.

The Right to Information (RTI) has different meaning and nature in different jurisdictions. Special reference can be made to Bhutan and Australia. Article 7(3) of the Bhutanese Constitution uses the expression 'right to information' whereas in Australia it is 'the Freedom of Information Act 1982 (Cth). Therefore, it can be said that in the Bhutanese context it is a positive right, meaning the government is duty-bound to ensure the access to information. In Australia it can be understood differently. 'Freedom' signifies a negative duty upon the state hence rather than guaranteeing the right it limits the freedom.

In Bhutan, the RTI is a fundamental right recognized by the Constitution wherein a most liberal approach has been adopted from the human rights perspective. This can be attributed to the Article 19 of the Universal Declaration of Human Rights (UDHR), and the International Covenant of Civil and Political Rights (ICCPR), which provides that everyone has the right to seek, receive and impart information.

However, in Australia whether right to information is a Constitutional right or not is uncertain. Some Judges, particularly Mason J., held that the right to information is part of the implied freedom of political communication. He maintained that elected representatives have a responsibility not only to ascertain the views of the electorate but also to explain and account for their decisions and actions in government and to the people. Many scholars and writers seem to agree to this statement. Anthony Gray argues that there is clear links between freedom of communication about political affairs, and the nature of right guaranteed by the Freedom of Information Act (Australia), and this freedom must be recognized as implied freedom of political communication.

However, to date the freedom of information as an implied freedom is unclear. It seems that the decisions on the implied freedom have largely concentrated on the more obvious aspects of free speech and electoral laws concerning political affairs. While the freedom of information as a constitutional right is not certain, it can be ascertained that this freedom is accorded the legislative protection through the Freedom of Information Act 1982. Therefore, in Australia the right to information is accorded legislative protection and not Constitutional protection as guaranteed in Bhutan.

Given the difference in the nature of this right, both scope and purpose of protection will also be different. It is important to note that there is a high degree of difference between an ordinary right and a Constitutional right. A fundamental right is considered even higher in degree than that of a constitutional right. The right guaranteed by an ordinary legislation can be terminated any time by the act of the Parliament. However, right guaranteed by the Constitution cannot be altered easily as it involves strict amendment procedures. In Australia Chapter VIII requires that the absolute majority in both Houses must adopt the amendment, and a majority in the referendum must further confirm it. Similarly in Bhutan, the amendment of the Constitution is effected only by a three-fourth majority of the total number of members in a joint sitting, compared to a simple majority requirement for amendment of ordinary legislations.

Most interestingly, as the RTI in Bhutan is given human rights status, its scope is higher in degree. Article 10(25) states that existing international conventions and treaties before adoption of the Constitution and international conventions and treaties ratified by the Parliament, shall be deemed to be the law of the Kingdom. As Bhutan is party to ICCPR, Article 19 of the said Covenant will have the same legal recognition as any other domestic law. This is something different from Australia. As in there is a requirement there to enact a domestic law to give an effect to the international treaty. Therefore, the RTI in Bhutan is wider in scope; it can cover any information which is essential for citizens to participate in a decision-making process and for their development of human dignity.

In Australia, the right is limited to the provision of the Freedom of Information Act, the scope and purpose of which can be related to legislative history. As per Curtis, the Freedom of Information Act mirrors the view expressed by Mason J in Commonwealth v John Fairfax and Sons Ltd: non-disclosure of documents can be justified only if it would injure the public interest. Otherwise, disclosure will be in the public interest 'in keeping the community informed and in promoting discussion of public affairs'. Therefore, it seems that the objective behind this law was to give the public access to documents held by the government. More importantly, after going through the Act, it appears to be true that the Freedom of Information Act is framed around the request for existing documents rather than information more generally. It would be unfortunate if the information sought is not contained in an existing document. An individual seeking information will not get it as an agency or ministry is not obliged to respond to the request by creating a new document.

Bhutan is still a young democracy just as its judiciary. There was only one occasion where the judiciary was called upon to consider the validity of a legislation: The Government of Bhutan v the Opposition Party. Though the Supreme Court of Bhutan did not develop step-wise validity tests, the result is that provisions of any law, which are inconsistent with the Constitution, shall be null and void. In Australia, however, the Court has adopted four steps of characterization; (i) identifying head of power in the Constitution, (ii) identifying the subject matter covered by the head of power, (iii) examining whether

there is sufficient connection; and (iv) examining if there is any limitation under the Constitution.

The first test will not apply to Bhutan as there is no division of legislative powers. Bhutan has a single bicameral parliamentary system. Article 10(1) provides that all legislative powers are vested in the Parliament. As per Article 10(2) the Parliament can enact laws, which are to safeguard the interests of the nation and fulfill the aspirations of the people. The expression "all legislative powers" shows that the Parliament has unlimited power to legislate on any head. Therefore, there is no requirement to identify the head of power for legislating on a subject matter.

It is not necessary to dwell into the second and third tests in detail. Article 10(1) and (2) makes it clear that the Parliament can legislate on any head and in any subject matter as long as it is not limited by the Constitution itself. Therefore, legislating on right to information is well within the legislative power, conferred by Article 10, to the Parliament.

The fourth test of validity questions whether the legislative power is limited by the Constitution. To answer this, the whole text of the Constitution must be read. The test, however, is to apply Article 1(10), and see if provisions of the Right to Information Bill violates or is inconsistent with the provisions of the Constitution.

Legislating on the RTI may limit the fundamental right to information guaranteed by the Constitution. This is because, a fundamental right is wider in nature while the right provided by the Information Bill is restrictive. As per s40 of the Right to Information Bill, information can be provided only if the overall public interest in disclosure outweighs the harm to a protected interest from that disclosure. Therefore, it can be understood that information can be denied if its disclosure has no relevance to public interest. However, under Article 22, the Parliament can impose reasonable restriction on fundamental rights only by law. The understanding of this provision is that the RTI can be restricted only by enacting law to that effect, and the law so enacted must be reasonable. Restrictions can be imposed if it concerns sovereignty, security and public order. Restrictions imposed can be reasonable only if there is high risk and danger to security, and stability of the nation. Therefore, limitation or restriction imposed on the freedom of information by the Right to Information Bill if not reasonable may not pass the reasonability test.

The Right to Information Bill makes an attempt to reduce fundamental rights to ordinary rights. Section 43 provides for a list of exempted information; that is information which the government has no duty to disclose. Some of these exemptions are additional to restrictions permitted by Article 22. Another compelling reason is that it takes away the fundamental right to approach the court directly. Otherwise in Article 7(23), a person has the right to initiate appropriate proceedings in the Supreme Court or High Court for enforcing fundamental rights guaranteed by the Constitution. Therefore, imposing too much of restrictions and taking away fundamental rights to judicial proceeding is untenable.

The Right to Information Bill may also result in discrimination. Chapter 4 of the Bill authorizes the Ministry to establish a fee structure for giving information. Therefore, citizens who want information have to pay for it. This could become a platform for discrimination, as some marginalized group may not be able to afford the fee. This might contravene Article 7(15), which ensures equality before law and prohibits discrimination on the grounds of race, sex, religion or other status. This not only concerns discrimination issues but also reduces the fundamental right to a distinctive or unusual right.

Free flow of information is very important in a democracy. The charging of fees would tantamount to imposing an unreasonable restriction. It is the duty of the government to publish and make information available to the public, free of cost.

The adjudication of right to information cases by the Ministry may breach the doctrine of separation of powers enshrined in the Constitution. The Bhutanese Constitution explicitly provides that there shall be separation of powers between the branches of the government with no permissible encroachment. Under Chapter 6 of the Right to Information Bill, the Ministry of Information and Communication is empowered to decide information cases. The power conferred includes power to decide on issues of refusal, reasonability of fees, time taken to give information, adequacy of information and more. Since the power exercised by the Ministry is enormous, it might amount to the exercise of judicial power thereby encroaching upon the independence of the judiciary.

In Australia, similar powers conferred to the Ministry in Bhutan are to some extent enjoyed by the Office of the Australian Information Commissioner. It is by virtue of s 8(h) of the Information Commissioner Act 2010, and ss 54L and 54M of the Freedom of Information Act 1982 an agency or ministry is conferred with the power to review decisions relating to refusal or grant of access. However, the Administrative Appeals Tribunals (AAT) under s 57A can further review decision reviewed by the Information Commissioner. The only power it has is to review decisions on balancing the interest of disclosure and non-disclosure of information. It has no power to remit a decision to an agency for reconsideration or to sanction remedy.

In the Bhutanese context, while the Ministry enjoys similar power, it also has the extreme power to order an agency to compensate the complainant for any loss or other detriment suffered, and to order the agency to take steps as necessary to secure compliance with the provision of the Act. Therefore, the power given to the Ministry in Bhutan is wider than the power exercised by the Information Commissioner in Australia.

In Australia, judicial power of the Commonwealth is vested in the High Court of Australia and other federal courts created by the Parliament. In Bhutan, judicial power is vested in the Royal Court of Justice, which comprises the Supreme Court, the High Court, and other lower courts. This power may also be conferred to other courts and tribunals established by the Druk Gyalpo on the recommendation of the National Judicial Commission. Under Article 21(1), the judiciary is given the power to safeguard, uphold, and administer justice fairly and independently in accordance with the rule of law. This vests on judiciary the power to adjudicate disputes between subjects, and subjects and the government.

Secondly, it is important to examine the nature and scope of the judicial power exercised by the conferred agency. In Australia, Griffith CJ made an effort to define 'judicial power' as power to give binding and authoritative decision over controversies between subjects or between subjects and the Crown by a Tribunal, which is called upon to take action. Another aspect of judicial power is that it consists of giving decisions in the nature of adjudications upon disputes as to rights or obligations arising from the operation of the law upon past events or conduct. The judicial power includes the decision pass judgment into effect between the contending parties. In simple words, judicial powers involve giving binding and authoritative decision on disputes relating to rights and obligations, and the decision must be executable by the authority making the said decision. However, in Bhutan no attempt has been made to date in defining 'judicial power'.

Relying on these backgrounds, does the Ministry in Bhutan and the Information Commissioner in Australia exercise judicial power? The Information Commissioner in Australia merely reviews the decision concerning refusal or grant of access to information relying on conflicting interest of disclosure and non-disclosure. It cannot bind the party to its decision, as it is further subject to review by the AAT. Therefore, there is no decision made by adjudicating upon disputes as to rights or obligations. It is thus clear that the power exercised is not a judicial power. On the contrary, the Ministry in Bhutan is empowered to issue orders to an agency requiring it to take certain steps and also to pay compensation to the complainant. This indicates that the Ministry is accorded with a power to adjudicate upon disputes as to rights or obligations. Interestingly, s 53 provides that the appeal against the decision of the Ministry must be made within 10 working days of the receipt of such a decision. This time frame for appeal is practiced within the tiers of Courts in Bhutan. This attribution indicates that the Ministry's decision was intended to be binding and conclusive, thereby, fulfilling all the attributes of judicial power. Therefore, power conferred to the Ministry in Bhutan is ultra vires Article 21(2) of the Bhutanese Constitution.

Another distinguishing factor is that the power to adjudicate or decide on matters related to fundamental rights is explicitly given to the Supreme Court and High Court by the Constitution in Bhutan. As the RTI is a fundamental right under Article 7(3), only these two Courts can decide matters relating to it. The Right to Information Bill, by conferring power to the Ministry, takes away this power from the Supreme Court and the High Court. Therefore, it encroaches upon judicial power, which is conferred to these two Courts by virtue of Article 7(23) and 21. Therefore, as the Ministry is not equivalent to the Supreme Court or High Court, and as it is not established as per the procedure required for the establishment of the court, it cannot exercise the judicial power.

The only possible hope of defending this breach is the limitation provided for by second part of the Article 7(23). Under this provision, the individual has the fundamental right to initiate appropriate proceedings in the Supreme and High Court for enforcing his or her fundamental rights. However, the second part provides that this right is limited to 'procedure prescribed by law'. Therefore, can it be said that the Right to Information Bill prescribes for procedure within the purview of this provision. That is, can it be argued that conferral of adjudication power related to right to information is well within the power conferred to the Parliament by the second part of the Article 7(23).

The expression 'procedure prescribed by law' should be read to mean that it is to be followed by the Supreme Court and the High Court' while deciding matters relating to fundamental rights. To interpret otherwise would mean to give unlimited power to the Parliament to take away judicial power by enacting laws. It would be absurd if the Parliament enacts law enabling the Legislative or Executive branches of the government decide on Consti-

tutional cases. Therefore, legislating on matters taking away judicial power would undermine the very objective of having the Constitution and the principles of the rule of law. It would undermine the doctrine of separation of powers enshrined in the Constitution. Hence, the provision of the Right to Information Bill, which takes away power conferred on the Supreme Court and the High Court by Article 7(23), cannot pass the Constitutional validity test under Article 1(10).

Therefore, the Right to Information Bill, if passed would be invalid to the extent of inconsistency and constitutional limitation. In other words, the whole Bill may not be invalid. That is to say, the validity of the Bill if enacted can be challenged on the grounds discussed and examined. That is, charging of fees can lead to unreasonable restriction and even to discrimination. The addition of exemptions for disclosure of information, which is provided under Article 7(22) of the Constitution, may not pass the reasonability test. Similarly, provisions relating to the adjudication power conferred to the Ministry can be challenged. It purports to confer the judicial power, and more importantly exclusive judicial power conferred to the Supreme Court and the High Court by Article 7(23) of the Constitution. However, provisions relating to the procedure for obtaining information, and other consistent provisions will continue to remain valid. This is because, in the Government of Bhutan v Opposition Party, the Supreme Court invoked the doctrine of eclipse and severability. It was held that this doctrine is enshrined in the wordings of the Article 1(10) of the Constitution. The assumption is that only provisions, which undermines or are inconsistent with the provisions of the Constitution, will be invalid. It likely that some of the provisions of the Right to Information Bill if passed by the Parliament may not pass the Constitutional validity test.

Marriages are made in heaven – hell often follows
Is Bhutanese Marriage Culturally or Legally Driven?
Is 'Marriages are made in heaven' or so the saying goes. Is it really so?

Marriage as an integral institution of society existed since time immemorial; it is as old as human civilization itself. Societies have developed and flourished because the institution of marriage has produced families which form the basic foundation of these societies.
"Societies rely on families, built on strong marriage, to produce what they need but cannot produce on their own: upright, decent people who make for reasonably conscientious, law-abiding citizens. As they mature, children benefit from the love and care of both mother and father, and from the committed and exclusive love of their parents for each other," wrote the eminent jurist Sherif Girgis.

In essence, the practice of marriage has succeeded in propagating the human species and helped societies evolve for the common good.

The forms of marriage, ways of legal recognition, and process of formalization of marriage differ across cultures and customary practices and has evolved over time. The act of marriage as such is a special union of a male with a female for procreation, and bearing children who can succeed them and continue their progeny. They make one out of fusion with respect to body and mind. While marriage, by the law of nature and cultural practices, is union of two people of the opposite sex some jurisdictions have recognized same sex marriage. However, Bhutanese law does not recognize any other form of marriage.

In his book 'Bhutan: Land of the Peaceful Dragon,' G.N Mehra states that "Marriage system in Bhutan is simple." While he did not elaborate, the simplicity of marriage in Bhutan lies in the fact that Bhutanese marriage does not require a formal solemnization with elaborate wedding ceremonies as compared to other jurisdictions. It was not too long ago when in rural Bhutan a boy and a girl was considered married by the community if the boy was seen coming out of the girl's house in the morning. To an extent this system still exists though awareness of the law and impact of the education is making some differences.

Even in the urban set up the practice and system of marriage is not much different. 18-years and above can meet, fall in love and agree to marry so as to lead a happy married life. Once this mutual understanding is reached between them, they start visiting each other's houses, appearing and introducing each other to their respective parents and relatives as a couple. This is essentially done to secure approval and consent of the parents for the ultimate tying of the nuptial knot. Upon establishing that there is no objection from any corners to their union, they begin to live together as a legally wedded couple.

As such customary practices already existed, the Marriage Act of 1980 does not prescribe a particular way of marriage to take place before a couple is legally recognized. The Act provides that a boy and a girl who has attained the age of 18-years on their free will can contract a marriage if permissible under the customary practices of the partners. This can be done without considering the differences in their status, caste, wealth or appearance. The types of marriages, however, barred by the Act include under-age and incestuous marriages and marriages prohibited by the local customs.

Although the Bhutanese legal system does not prescribe specific marriage ceremonies and rituals for legal validity, the Act requires registration of marriage in a competent court of law. As a proof of registration of the marriage, courts issue Marriage Certificates. Irrespective of the duration of cohabitation, the couple is considered legally wedded from the day of issuance of the Marriage Certificates by the Courts. The marriage certificate is thus the conclusive proof of the marriage of a couple and is valid under law.

Marriages may be made in heaven but the union isn't always a bed of roses. Hence a couple cannot mediate matrimonial disputes out of court unless it has been registered in a court of law. The couple can, however, pay prescribed fines for failing to register the marriage to settle the dispute. This is important as the matrimonial compensations (Gao, Log Jyel and Drok Zhenpai Zhenthued) are determined based on the duration of the marriage.

The legal age for marriage differs across jurisdictions and cultures. In Bhutan the bride and the groom should both be at least 18-years old. This is important for both the parties as they are making a decision of lifelong partnership. They should be able to make an intelligent one and it should be backed by law. For the Law to appreciate and value the decision of their union, it is also necessary for the couple to fully comply with the requirements of the law in order to avail its protection. A free consent to marry given by a minor will not be valid as by age he or she is not competent enough to do so under law. So, the consent of such persons of whatever nature cannot validate any act performed or promised as minorities. As in other jurisdictions, even in Bhutan, the law regulates the practice of marriage in the interest of the society.

However, there are instances where the age of one or both the couple is less than 18-years. Such incidents continue to make headlines in the media today. Given that the contract of marriage was not consummated with informed and free consent of parties, the elder party is charged and punished for rape of a minor.

Thus, there was pressure on the Parliament to review the law on rape. The Penal Code (Amendment) Act of Bhutan, 2011 has amended section 183 of the Code and now reads as:

A defendant shall be guilty of the offence of rape of a child above the age of twelve years if the defendant commits any act of sexual intercourse against a child between the ages of twelve to eighteen years. However, consensual sex between children of sixteen years and above shall not be deemed to be rape.

The question now is whether the amendment actually resolved the real issue of rape of minors connected with underage marriages in Bhutan. While this was apparently intended to protect children below 18-years from falling prey to the lust of adult predators, it legalised sexual liaisons and probable marriages between children from 16 to 18-years. This amendment ensures only vertical protection and not horizontal protection. There is no guarantee that children between 16 to 18-years will not exploit each other sexually. This defeats the very purpose of the legal requirement of 18-years for marriage.

As per the doctrine of separation of powers, the primary function of the judiciary is interpretation of laws enacted by the Parliament. The question is whether the judiciary should literally fold its hands and perpetuate the legal lacunae or deficiencies?

The amendment in the age of the person for consensual sex has indeed affected the sanctity of the marriage. Recent cases that surfaced from Trongsa and Samtse Dzongkhags actually revealed the characteristics and nature of the marriage system in Bhutan. In the Trongsa case, the father consented to the marriage of his 16-year old daughter to a 22-year old suitor. They lived as a 'married' couple for eight months when a marital discord took the couple to the court following which the man was charged for rape and sentenced to 9-years in prison. On appeal to the High Court, the trial court decision was reversed and the case is now on appeal to the Apex Court.

In Samtse a 19-year old boy and a 17-year old school girl were married with the blessings of their families. The matter came to light when the girl did not come to the school. Consequently, the boy was charged and convicted for rape of a minor. However, he was released on Royal Pardon and reunited with his wife and family. The legal issue still lingers as the girl is a minor and the union is not valid under the existing law.
As the law exists in the interests of the community and its members and to promote the smooth running society there is the need to assess whether the amended law is meeting that objective. If not, it may be a good reason for the Parliament to review it and harmonize it with other laws.

As the Bhutanese saying goes, "One should not hasten spiritual pursuits nor should one delay marriage." However, at the end of the day, it is regulated through legal procedures and given legal recognition and not only social acceptance. Therefore, despite the freedom to marry with anyone irrespective of caste or creed, the legal criteria (minimum age accompanied by valid and voluntary consent) must be met. One very important requirement is Marriage Certificate in the absence of which the Court has to seek evidence of their cohabitation from the village head man or the member of the Assembly or three witnesses not related to the couple.
Marriage as a union between two heterosexual partners ensures continuity of human species. Marriage is a creative art of life developed by every sentient being, especially humans. Though, marriage per se is crucial to ensure continuity of humans on earth, its products depend upon the perception that is attached to it. While procreation and rearing of children form the core objective of a marriage it creates interpersonal kinships between the couple which is very intimate and coitus in nature. Therefore, the parties as a unit of family expect that there was commitment from both sides to "romantically loving and caring for each other and to share the burdens and benefits of domestic life."

A healthy marriage culture benefits children since they "fare best in health and wellbeing when reared by their wedded biological parents, [and] the erosion of marital norms adversely affect children, forcing the state to play a larger role in their health and education" and other social services. This is true as well in case of Bhutan since breakdown in marriages have contributed to the burdens of the state and suffering of the children. Amongst others, instability in marriages and ultimately their disintegration were accounted for youth coming in conflict with the law through the trafficking and abuse of drugs and involvement in other petty crimes. It is evident that children become the victims of the sour relationships. It is therefore imperative that parents fulfill their moral obligations towards children in caring and rearing them in a most conducive atmosphere.

Marriage and rearing of children is an important aspect of human civilization. It is at the very heart of the society. It is the basic building block upon which the entire community and the nation is founded. All laws pertaining to the institution of marriage need to be thoroughly analyzed so as to best serve the needs of society. The amended marriage law in particular because it is very important and necessary that laws keep track of changing Bhutanese values and traditions, and reflect the dynamic nature of law.

Contributed by Drangpon Tharchean, Bhutan National Legal Institute

The validity of the Agreement – laws that govern an everyday undertaking

By: Justice Lungten Dubgyur
Royal Court of Justice
High Court

Most of our judges and lawyers alike have now begun to draw inspiration from the High Court and more importantly Supreme Court on various decisions of the cases. Citations of cases are becoming a norm to guide them in their arguments and their hope for similar decisions. Prosecutors and law practitioners are also beginning to analyse cases and question decisions through formal or informal discourses.

The High Court recently made a number of decisions based on Supreme Court rulings which has in turn been well received by the District and Dungkhag Courts. This emerging judicial trend of being bound by higher courts' decisions pegs its foundation on the constitutional normative values – the Supreme Court as the final authority on its interpretation (Article 1, section 11) and as the Court of Record under Article 21, section 3 of the Constitution. It is a departure from traditional practices wherein Bhutanese Courts need not necessarily be bound by earlier or case precedent principles. The culture of case laws and judicial precedent also imbibes constitutionalism and rule of law in the country.

A case in point would be the interpretation of the validity of the Agreement even if it was objected to within 10 days of signing when the agreement was proven to be a valid written document in Tshering Penjore Vs. Nyephug Goenpa. The case relates to the interpretation of the validity of an agreement under section 36 (h) of the Evidence Act, 2005, and other relevant laws.

High Court decision affirmed

The Supreme Court of Bhutan in Tshering Penjore Vs. Nyephug Goenpa; vide Decision No. (HUM-12-12), dated 20.12.2012 affirmed the Larger Bench Decision No. (LB-12-89), dated 10.05.2012 wherein it held that a valid written agreement cannot be nullified purely based on section 36 (h) of the Evidence Act but must be read in conjunction with section 150.6 and section 150.8 of the Civil and Criminal Procedure Code. The revocation must be subjected to other valid grounds as specified in the laws challenging the validity of such agreement. The decision was affirmed on the reasoned decision of the Larger Bench of the High Court.

Brief Facts of the Case

Nyephug Goenpa's Truelku entered into a valid written agreement with nine persons concerning the land and property transactions in the vicinity of Nephug Goenpa under Shaba Gewog in Paro Dzongkhag. Tshering Penjor was one signatory to the agreement. However, within ten days of signing the agreement, he lodged a written complaint to the Gewog Office and then to the Paro District Court contesting its validity invoking section 36 (h) of the Evidence Act.
Section 36 (h) states that: A written agreement shall not be valid, if it is objected to by any party in a Court within 10 days of its signing.
The questions before the court were whether parties can revoke the valid written agreement within 10 days of its execution; and whether courts can invalidate such an agreement if objected to within 10 days irrespective of its validity as per section 36 (h) of the Evidence Act.

Types of Agreement

Bhutanese litigants enter into various types of agreement. Some of the more common ones are:
(a) Execution of sale deeds (land or property transaction)
(b) Execution of the transfer of property (inheritance and other property transfer)
(c) Loan agreements (private and financial)
(d) Signing of Contracts (on various business ventures)
(e) Negotiated Agreement (resolution of disputes through mutual settlement)

Governing Laws now and then

(i) Thrimzhung Chenmo, 1957
(ii) Loan Act, 1979
(iii) Inheritance Act, 1980
(iv) Movable and Immovable Property Act, 1999
(v) Land Act, 1979 and 2007
(vi) Civil and Criminal Procedure Code, 2001
(vii) Municipal Act, 2007
(viii) Penal Code, 2004
(ix) Evidence Act, 2005
(x) Contract Act, 2013

What is a valid and invalid Agreement?

The validity of the agreement was elaborately defined and enumerated under Chapter 11 of the Thrimzhung Chenmo (sections Da-3-1 to Da-3-14). The Chapter has since been superseded by new laws. However, it may be noted that the Thrimzhung Chhenmo actually covers a wide range of issues that define the validity of the Agreement. For instance, it provides that any deed, agreement or contract must be voluntarily signed by all parties involved and the terms and conditions do not contravene the law. It should not have alterations, defective seals, and it should be affixed with legal stamps. The person entering into an agreement should not be of unsound mind and must be in senses at the time of signing. The agreement is not valid if it has been entered into under duress and that Barmi (middleman) has resorted to fraudulent means, intimidation and distortion of facts in the course of negotiation or the misuse of property that is in dispute between the parties.

Similarly, Section 35 of the Evidence Act states that a "Valid written agreement" is the one when such written agreement is:
(a) Made in the presence of one witness of each party;
(b) Signed by all parties or another person duly empowered by a legally binding writing; and
(c) Legally executed with a legal stamp.

From the understanding of the above section, it can be interpreted that any written agreement in order to be valid must be made in the presence of a witness representing each party, signed by all parties involved and legally executed with a legal stamp. The term "Legally executed" is of fundamental significance to understand whether the written agreement should be considered valid or not.

The term "Legally executed" and the validity of the agreement must be tested as per section 36 of the Evidence Act. Section 36 states that:

Invalid written agreement

36. A written agreement shall not be valid, if it:
(a) Has an erased word
(b) Has an alteration which is not counter-signed by the parties executing the agreement
(c) Has a defective seal or signature
(d) Does not have the proper legal stamp
(e) Is entered into while a party was mentally unsound
(f) Is entered into while a party was under duress
(g) Is entered into by a party, who is a child
(h) Is objected to by any party in a Court within 10 days
(i) Is in breach of law
(j) Is executed to conceal an illegal act; or
(k) Does not conform to any of the requirements for a valid written agreement as set forth in this Evidence Act.

Professor Dicey pointed out that:
"The essential validity of a contract is (subject to the exception herein mentioned) governed indirectly by the proper law of the contract……Proper law of the contract means the law, or laws, by which the parties to a contract intended or may fairly be presumed to have intended, the contract to be governed; or (in other words) the law or laws to which the parties intended or may fairly be presumed to have intended to submit themselves."

Decision Explained
Under the rules of interpretation, statutory interpretation must ordinarily be construed according to plain and grammatical meanings. In the legislative Acts and contractual documents, the expression 'shall' has mandatory and obligatory connotations. The word 'shall' has its own identity in legal jurisprudence. Therefore, the plain reading of section 36 (h) of the Evidence Act, and the word "shall" connotes mandatory nullification of a valid agreement if it is objected to by a party in a court within 10 days. The reading and interpretation of this provision, in isolation, made some judges and lawyers take decisions that nullified the actually valid agreement.
Applying the literal rule of interpretation, it can be deduced that even if all other stated conditions were fulfilled, a written agreement, if it is objected to by any party in a Court within 10 days, can presumably be invalidated or revoked. Therefore, it raises very fundamental question whether this particular provision was intended to nullify a validly written agreement just because one party objects to it within 10 days of its execution. To answer this question, the Court went beyond the particular interpretation of section 36 (h) of the Evidence Act. As the Act comes under the classification of procedural laws, the impugned section was read with sections 150.6 and 150.8 of the Civil and Criminal Procedure Code (CCPC). The interlocking interpretation concerning procedural application of laws becomes relevant to absolve ambiguity. Section 150.6, of the CCPC states that:

"The party shall raise objection to the validity of such settlement agreement within 10 days of the agreement."

From the above provision, a party can raise an "objection to the validity" of the agreement. This means that the concerned parties are only permitted to raise objection and prove its validity. The revocation is not automatic simply because one has raised an objection under section 36 (h) of the Evidence Act. It is clear from the above section under CCPC that any party may raise objection to the validity of an agreement, but such objection must be confirmed of not having validity under section 36 of the Evidence Act. Hence, it is deduced that the Court must test the validity of the objection raised before it through merits. If the written agreement was proven to have been validly entered into, then such agreement must be honoured. This also goes well with the arguments that the expression 'validity' also assumes equal importance and calls for close examination. According to Black's Law Dictionary, the word 'Validity', is defined as having legal strength or force; executed with proper formalities; incapable of being rightfully overthrown or set aside; founded on truth of the fact. It is the quality of having legal force or effectiveness. The legislative intent of incorporating 'validity' in this section is to preclude parties from seeking relief of revocation of the agreement any time after its execution. Considering instability of human minds, a natural propensity is that it is subject to tutoring, undue influence and manipulation. Given the opportunity, any party would certainly seek to revoke the agreement, which otherwise would have been entered legally. It is often stated that the law intended by the parties is the law which governs the validity of contract.

Further, section 150.8 of the CCPC also provides the grounds for the courts to declare the nullity of the agreement if the objection was valid.

"If the agreement dehorns existing laws or a valid objection to its legality is raised by one of the parties, the Court may declare such agreement null and void and resume hearing."

Thus, section 150.8 clearly specifies that the Court may declare such an agreement as null and void only on the grounds that the objection raised was valid; or that the agreement dehorns or violates the existing law. This infers that if the objection was not valid and has not violated the existing laws, the objection, even if it is raised within 10 days, cannot nullify a lawfully executed agreement. Moreover, section 155 of the CCPC prohibits parties to revoke their action which was relied upon and are stopped from rescinding the contractual obligation.

The New Contract Act, 2013
The new Contract Act with fourteen chapters, including miscellaneous provisions, was enacted by the Parliament that came into force on 14 March, 2013. The Act was enacted to consolidate, codify practices and regulate contracts and performances to ensure compliance, (in other words performance) and to ensure rights of the people concerning contractual transactions.

People in their daily affairs enter into a number of contracts knowingly or unknowingly. Each contract creates some rights and duties on the contracting parties. Most of the controversies and anomalies that stem from the absence of a Contract Act is expected to be resolved thereafter by the courts.

Among other detailed provisions of the new Contract Act, it determines the circumstances in which promises made by the parties to a contract shall be legally binding. Contracts mainly ensure reasonable fulfillment of expectation created by the promises of the parties and also enforcement of obligations prescribed by an agreement between the parties. Hence this legislation encompasses the enforcement of contractual rights and duties on the contracting parties. Under the Act every promise and every set of promises forming the consideration for each other is defined as an agreement. An agreement is a contract and shall be enforceable if it is made with the free consent of competent parties for lawful consideration and for lawful object and is not declared to be void or illegal under the laws. An agreement which is not enforceable by law shall be void and an agreement which is not enforceable at the option of one or more of the parties thereto, but not at the option of the other or others, shall be a voidable contract.

For the validity of an agreement, such a contract must be made by the free consent of the parties, members of which must be competent, be of the age of majority; of sound mind and not disqualified by law. The consideration or object of an agreement shall be deemed lawful if the contract is not forbidden or in breach of laws; fraudulent, involves injury to the person or property of another and is immoral or against public policy. Therefore, under the Act, an agreement which has all the essential elements of a contract is called a valid contract. A valid contract can be enforced by law. Therefore, section 36 (h) of the Evidence Act must be read so as to confirm the validity of the agreement and becomes enforceable under provision of the Contract Act.

The Act also has a comprehensive provision defining "void Agreements". It states that an agreement is void when an agreement restrains a person totally from carrying a lawful profession, trade, business and legal proceedings other than arbitration; to perform an impossible act, uncertain agreement, restraining marriage and contingent contracts where event is impossible, illegal or the conditions cannot be enforced.

For the breach of a valid contract, the parties to the contract shall have the right against the party who has committed the breach. The remedies available under the Act are compensatory damages, punitive, exemplary damages, rights of the beneficiary though non-contracting party, or claims on the basis of quantum meruit.

The contractual interpretation under commercial jurisprudence has shifted from the textual approach (which is to focus on the text of the agreement) to the contextual approach to ascertain parties' intentions. This decision was arrived by Lord Hoffmann's in Investors Compensation Scheme Ltd v West Bromwich Building Society in 1998 by setting out five principles for interpreting contracts - as to the reasonable person having all the background knowledge and 'matrix of fact'; the parties' declarations of subjective intent; admissibility in an action for rectification and reasons of practical policy; interpretation that the meaning of words is not a literal meaning, but the one reasonably understood from the context; and that the words should be given their 'natural and ordinary meaning.'

Lord Hoffmann's contextual approach finds striking resonance in Bhutanese legal system with the civil law approach to contractual interpretation. Judges in civil disputes inquire into a wide range of factual inquiry in the quest to ascertain the 'matrix of facts' and intention commonly held by the parties to the contract. However, the civil law approach should not be confused with that of the common law approach to evidence in contractual interpretation. The Civil and Criminal Procedure Code allows comprehensive discovery process and admits far more documentary evidences than the civil law system. Hence, the legal system, with quite a mixed jurisdiction, allows rooms for judges which otherwise is impeded through usually independent approaches of common law or civil law jurisdiction to contractual interpretation.
In the morden context, the traditionally quintessential jurisdiction of laws are no more applicable. The proliferation of bi-lateral, multinational trade and investment flows are the trend in the world today and are befittingly commerial norms. The exponential growth in trade and devlopment compounds capital market flow and an array of new investment ventures. This demands a legal environment that is conducive to bussiness gurantees. As Bhutan ventures into the complexity of transnational jurisdictions, lawyers and the courts may not easilly get away with a purely national or territorial jurisdictional focus. In this inter-connected world, it is only a matter of time before the legal system is responsive to this emerging trend where both lawyers and courts alike are able to tackle and provide foreign investors with perspectives on domestic as well as international laws. The legal systems must be prepared to resolve commercial disputes of an international nature in court proceedings and also before international arbitration tribunals with skills available to interprete domestic, foreign or

international laws.

RIGHT TO LEGAL COUNSEL/JABMI: A BHUTANESE PERSPECTIVE

Introduction

Of all of the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have. - United States v. Cronic.

The right to legal counsel or Jabmi in the Bhutanese context as is a human right that is integral to the right to a fair trial as guaranteed under the Constitution of the Kingdom of Bhutan. This right is recognized internationally as well as regionally.

The right to legal counsel is expressly guaranteed under the International Covent on Civil and Political Rights (ICCPR), 1966 and mentioned under UN Declaration of Human Rights, 1948. It is likewise guaranteed under the American Convention on Human Rights and European Convention on Human Rights.

In Bhutan, the right to legal counsel is not new and has been in existence for a long time. The right is clearly depicted in Karma Lingpa's fourteen Century text introduced in the form of Raksha Mangcham, performed nationwide on the Second Day of the three day festival. In the Raksha Manghcam, Lha Karpo is the defense counsel and Due Nagpo, the prosecutor.

While the right to legal counsel was rather vague under the Thrimzhung Chhenmo earlier, it became an absolute right from 2001 with the enforcement of the Civil and Criminal Procedure Code, 2001. This was reaffirmed further in 2008 with adoption of Constitution of the Kingdom of Bhutan.

The right to legal counsel is a basic human right and a fundamental right but the term Jabmi was never defined exclusively or exhaustively either in the Jabmi Act, 2003 or the Civil and Procedure Code, 2001. Under the Civil and Criminal Procedure Code, 2001, the term Jabmi has been partially defined as an officer of the legal systems, a representative of clients and a public citizen having special responsibility for the quality of justice. The Black Laws Dictionary states that the term legal counsel refers to the services given by an attorney or the attorney himself.

Another unique feature of the right which remains ambiguous is that unlike in many other jurisdictions where the right to legal counsel is guaranteed mostly in criminal proceedings, in Bhutan the right is guaranteed equally in criminal as well civil proceedings. However, in definition, the constitution does not have the word 'arrested person' pertaining to the right.

Legal Counsel/Jambi as a right under the Constitution and Civil and Criminal Procedure Code, 2001.

The right to legal counsel is a fundamental right guaranteed under Article 7(21) of the Constitution to all persons in Bhutan, which reads as, a person shall have the right to consult and be represented by a Bhutanese Jabmi of his or her choice. Under this Article all persons in Bhutan have right to a Jabmi in all legal matters before any court, board, tribunal or similar institutions in or before which a client is entitled to appear (Jabmi Act, 2003. However, like any other fundamental right under Article 7 of the Constitution, the right to legal counsel is also subject to Article 7(22) of the Constitution where, under certain circumstances laid down from Article 22(a)-22(f) the state can impose reasonable restriction.

Under the Constitution, the right to legal counsel is while expressly guaranteed is subject to reasonable restriction. This clause does not spell out who can waive the right to legal counsel and under what circumstances a person can exercise the right to counsel. All these rights are detailed out in the Civil and Criminal Procedure Code, 2001. Section 33 of Civil and Criminal Code, 2001 stipulates the right to legal Counsel and this is the only section under Civil and Criminal Procedure Code that deals particularly with right to legal counsel. It reads, a person may: (a) plead or defend himself/herself in person; or (b) be represented by a Bhutanese Jabmi of his/her choosing and where this right waived it shall be done competently and intelligently.

The only important provision under this section that differs from the Constitution is regarding the waiving of the right to legal counsel. Under the Constitution the state can waive the right to legal counsel in rare circumstances under Article 7(22) by imposing reasonable restriction. However, section 33 of Civil and Criminal Procedure Code, 2001 states that only the concerned person can waive the right to legal counsel which must be done competently and intelligently.

The provision on right to legal counsel under the Article 7(21) of the Constitution and Section 33 of Civil and Criminal Procedure Code, 2001 is general in nature. Under Civil and Criminal Procedure Code, 2001, various stages of proceedings are laid down for conducting a fair trial and there are certain specific provisions, particularly on criminal proceedings, to determine the right to legal counsel. The Civil and Criminal Procedure code, 2001, does not expressly say from which stage of proceedings the right to legal Counsel begins but it's implied from many provisions relating to right to legal counsel under the Code.

In the Civil proceeding as expressly given under section 31.1(e) , the right to legal counsel starts right from the registration of the case. According to Article 7(21) of the Constitution, a person can settle a case outside the court through the use of a Jabmi of his or her choice. But for conducting a fair trial in the court the right to legal counsel is determined normally in the preliminary hearing. In a criminal proceeding, determination of the right to legal counsel begins the moment the person is arrested or detained. After the arrest, the person has the right to a Jabmi prior to any interrogation unless he or she chooses to waive the right. This is covered under section 184.3 of Civil and Criminal Procedure Code, 2001.A confession taken from a person who has not been informed of his or her right to a Jabmi is inadmissible in court (Evidence Act, 2005).

Further, as all persons are equal before law and entitled to equal and effective protection of the law under the constitution, the right to a Jabmi of choice is a foregone one under the Civil and Criminal Procedure Code, 2001.

Arguments

The importance of Right to legal Counsel

The constitution guarantees all persons right to life, liberty and security, and such rights can be deprived only in accordance with the due process of law. The due process of law ensures that the state must respect all of the legal rights that are owed to a person and all proceedings should be fair for any deprivation of the right. The due process law is more about the right to a fair trial and in ensuring that the right to legal counsel is must. There cannot be justice without a fair trial and there cannot be a fair trial without the right to legal counsel.

It is not possible for a layman without any legal knowledge to defend or argue a case without legal representation. If a layman was to allow pro se legal representation it will be no better than taking a flight without a pilot or taking a ride with a driver who does not know how to drive.

Realizing that a fair trial can be ensured only through the right to legal counsel, the right has been guaranteed a long time back around the world by their respective constitutions or in absence of a constitution, by virtue of due process of law. In 1945, the Nuremberg trial which was described as 'the greatest trial in history,' by Norman Birkett, one of the presiding British judges, the Nazi war criminals were given the right to counsel by t he London Charter of the International Military Tribunal, 1945. Prior to Nuremberg, the right to legal counsel was realized and given importance in the POWELL V. ALABAMA case wherein the U.S Supreme Court held that the trial court's appointment of an unprepared attorney in a capital case is a violation of the defendant's DUE PROCESS rights and accordingly reversed the convictions and returned the case to state court.

Implementation or enforcement of right to legal counsel as per provisions under the Constitution and Civil and Criminal Procedure Code, 2001

That there are concrete written laws in place guaranteeing the right to legal counsel is beyond doubt. The provisions in the Constitution and the Civil and Criminal Procedure Code, 2001, clearly uphold the right. The Miranda Warning which the Police is mandated to give to an arrestee before any interrogation is covered under evidence Act, 2005.

It is, however, not guaranteed that whatever provisions are there in law books are implemented 'as is' effectively. For instance, the Evidence Act, 2005, uses the words 'voluntary' confession. In reality do arrested persons make voluntary confessions and admissions on their own will? Or is it out of fear? Do the Police inform an arrestee about the right to remain silent and that if anything is said relating to the commission of crime, it will be used as evidence during the trial? Do the Police inform an arrestee about the right to a legal counsel of choice? If informed, did the arrestee waive the right to a Jabmi competently and intelligently? Was the arrestee aware that it is the duty of the government to provide a Jabmi if he or she cannot afford one? These questions need to be addressed to determine whether the right to legal counsel provision is enforced effectively or not.

In Bhutan, unlike other countries, there have been no cases relating to the right to legal counsel. Until today no case has been remanded back to the trial court on the ground that the right to legal counsel was not granted to the aggrieved person or convict.

As far as the right to legal counsel in conducting the trial, civil as well as criminal, the judiciary has been playing a vital role in implementing such rights effectively as the courts defend the right to legal counsel. The only exception is when the right is waived by person before the court. Before the actual trial begins the role of court is to ask whether the arrestee or aggrieved person is

represented by a Jabmi of choice, but the discretion solely rests with the arrestee. While there is no empirical evidence as such but today most of the cases are pro se represented which could be mainly because either they are competent enough or they cannot afford legal counsel or there are legal counsellors within the jurisdiction. As there are a few licensed legal professionals, that too in Thimphu only, hiring a legal counsel can be expensive for the client located in other districts.

While the right to legal counsel seems to be effectively enforced and implemented, this is, however, not the case with the Police. Today, most people are convicted based on statements they gave when they were interrogated which is actually self incrimination and not allowed in other jurisdictions. Under the Evidence Act, 2005, a confession can be admissible as evidence provided it was made voluntarily and the confessor has been informed the right to legal counsel. A voluntary confession is very unlikely as no person would want to go behind bars without a fair trial.

In a recent case, the Mongar Court sentenced three men ranging from 15-years to 18-years imprisonment for vandalizing a Chorten based on their confession as reported by Kuensel. Whether they were given the right to legal counsel and whether the confession was made voluntarily is doubtful. Commonsense will say that they will not incriminate themselves for such long sentences. Were the accused represented by a legal counsel? They did commit the crime but a fair trial should be given which can be achieved only through the provision of the right to legal counsel.

How to ensure the right to legal counsel is exercised by all persons

The right to legal counsel is a fundamental right guaranteed to all persons in Bhutan but what if justice is hinged upon how good a lawyer one can hire?. If this is the case then the poor will never get justice irrespective of their merit in the case.

Justice Hugo Black of the USA stated for the Supreme Court in Griffin v. Illinois that there can be no equal justice where the kind of trial a person gets depends on the amount of money he or she has. If this is the case then people will prefer to be rich and guilty than to be poor and innocent.

To avoid this situation and to provide equal access to justice irrespective of economic status the Article 9(6) of the Constitution states that the state shall endeavour to provide legal aid to secure justice, which shall not be denied to any person by reason of economic or other disabilities. Further, Section 34 of Civil Procedure Code, 2001, states that only an indigent accused shall have legal aid provided for one's defense where the interest of justice so requires.

The right to legal counsel cannot reach the poor if there is no legal aid from the government and the right to legal counsel can be exercised by all persons only if the government provides legal aid. Today, the reason for people waiving the right of legal counsel is not because that they are competent enough to argue the case but because of the inability to finance the legal counsel. As a result, they are compelled to waive the right of legal counsel incompetently and unintelligently.

The main objective behind the state providing legal aid is to secure justice, which the state shall not deny to any person by reason of economic or other disabilities. In line to this provision under the Constitution, the Civil and Criminal Procedure Code clarifies what kind of persons and when such legal aid can be provided by the state. The Civil and Criminal Procedure Code, 2001, denotes the indigent as those deserving aid from the Government to avail the legal service. The judiciary determines it on a case by case basis. In the tax case of Opposition Party vs. the Government it was held that the opposition party cannot avail legal aid service from the government and only the person who is unable to bear the cost for a trial can get the legal aid.

It is evident that the provisions on the right to legal counsel under the Constitution and various other laws guarantee equal right to legal counsel, both in criminal and civil proceedings. While in countries like the US and India, the word 'arrested person' is used in the context of legal counsel, it is not so with the Bhutanese constitution. 'All persons have right to consult and be represented by his/ her Jabmi of their choice.'

In terms of bare laws with regard to the right to legal counsel little is required to done as there are so many clear provisions that guarantees right to legal counsel and other rights associated with right to legal counsel. The focus should be enforcement of these laws which are lagging behind, particularly the right to counsel post arrest, pre trial. The judiciary is implementing the right to legal counsel very effectively but is desired for before the case reaches the court; that is following the arrest. The onus of this lies with the police. Just as it is of paramount importance for the police to read an arrestee the Miranda Warning, it is equally important for the legal system to disseminate information to the general public about the right to a Jabmi.

The legal aid which is very important to secure equal access to justice should be given equally to both civil litigants as well as accused persons. Though the constitution says that to secure justice the state can endeavour to give legal aid the Civil and Criminal Procedure Code, 2001, section 34 expressly says only the indigent accused will get legal aid if justice so requires. It seems that civil litigants are not covered under section 34 despite their fundamental right to legal counsel.

Further, it has been five years since the adoption of the Constitution in 2008 wherein Article 9(6) states that the state shall endeavour to provide legal aid to secure justice but no endeavour has been made thus far. Therefore, to ensure equal access to justice the government should establish legal aid centers. The government should set the standards clearly as to who are eligible and who are not eligible for legal aid and allocate enough resources through a different budget. Further, the government should encourage legal counsels and law firms to provide pro bono legal services to the needy.

Chimi Dorji 'B',
- PGDNL, RIM , Simtokha

Bail and not jail, if you please

Tshokey Dorji

What is bail?

Black's law dictionary defines bail as a security such as cash or a bond; esp., security required by a court for the release of a prisoner who must appear in court at a future time.

There is no definition of bail in the civil and criminal procedure code of Bhutan 2001, although the terms 'bailable offence' and non-bailable offence have been defined in section 199.2 and section 199.8. Bail has been defined in the law lexicon as security for the appearance of the accused person on giving which he is released pending trial or investigation. What is contemplated by bail is to "procure the release of a person from legal custody, by undertaking that he/she shall appear at the time and place designated and submit him/herself to the jurisdiction and judgement of the court."

The Bail Procedure (general)

When someone is arrested, he or she is first taken to a police station to be booked. When a suspect is booked, or processed, a police officer records information about the suspect (name, address, birthday, appearance) and the alleged crime. The police officer conducts a criminal background check, takes the suspect's fingerprints and mug shot and seizes and inventories any personal property, which will be returned when the suspect is released. The suspect is also checked to see if he or she is intoxicated and usually is allowed to make a phone call. Finally, an officer puts the suspect in a jail cell, usually with other recently booked suspects.

The bail procedure in Bhutan

According to the civil and criminal procedure code of Bhutan, the bench shall;

a) Pronounce whether the court is considering release of the defendant upon execution of a bond for such sums of money by one or more sureties, or without posting a bond based on a promise to return and other conditions set by the court in the case of indigent defendants in accordance with sections 199 and 199.1 of the code;
b) Order that the bond amount shall be fixed at ten to thirty percent of the annual income of the surety in accordance with section 201 of the code;
c) In making determining whether to grant bail and the bail amount, consider severity of the charges, past criminal record, likelihood of flight, potential threat to society, the age of the suspect, physical or mental health condition, and views of the victim or aggrieved person in accordance with section 199.2 of the code
d) Ensure that the person released on bail complies with conditions prescribed under sections 199.4 to 199.8 of the code;
e) Ensure that the relevant documents pertaining to bail are duly completed in accordance with the prescribed forms;
f) Ensure that the defendant and the surety fully understand the conditions of the bail and bond; and
g) Adjourn the trail with relevant orders.

Police Bail

Bail means being given liberty until the next stage in a pending case. Police bail entails release of a suspect on bail while they make further inquiries, meaning that the suspect is released from custody on condition that they return to the police station on a specified date in the future. In a defendant's case, bail is given on condition that he/she appears in court at a specified date.

Police bail is some type of property deposited (mostly in monetary value) to a court of law to convince it set free a suspect from prison, on condition that the suspect will go back for trial when called upon. Bail primarily depends on the type of crime that an individual has committed and the effects that such suspects will have on the court case in case they are released. Bails are mostly used in cases where the case involved is not heinous and where

the identity of the suspect is known.
Need for Police bail in the country
The introduction of Police bail will not only ensure that the citizens are given justice but also will help the system in delivering efficient and quick justice. Police bail is a form of decentralization of powers, thus acting as a check on the misuse of powers.
The grey area of Bail in our country (Problems faced by the people)
Section 199.8A of civil and criminal procedure of Bhutan 2001states that the court shall not grant bail to a person who has been charged with;
(a) an offence against the security and sovereignty of the country; and
(b) an offence of or above felony of the second degree
Section 199.8A (a) gives blanket discretionary power to the judge. The phrase "an offence against the security and sovereignty of the country" can be understood or interpreted to include any offence that has direct or indirect affect to the security and sovereignty of the country. Therefore, there is need for defining what kind of offences can be categorized as offences against the security and sovereignty of the country.
In this section there is discretion to the judge. If a judge don't like an accused, there is a probability that the judge may interpret the act committed by an accused as an offence against the security and sovereignty of the country and may not grant a bail to an accused.

Section 188.1 of the civil and criminal procedure of Bhutan 2001 states that any person arrested and detained with/ without warrant shall be produced before a court within 24 hours of the arrest exclusive of the time necessary for the journey from the place of arrest and the government holidays.

The drawback of this provision is that if a person is arrested on Friday evening he has to stay behind the bar for three nights. By not being able to produce before the judge, three days freedom is taken from him. When a judge is out of station for more than a month there is no one in the court who will be able to grant a bail. In that case also freedom of a person is taken from him. Therefore, Police should have the power to grant bail, as understood from Section 188.2 (a) "A person arrested and detained for bailable offence may be released on bail provided he/she makes available to the police as and when required during the course of the investigation. The expression "during the course of the investigation", and not "during the course of the hearing" can be understood to mean that even the Police can grant bail.

Another grey area of bail in our country is that the timing of granting bail is not clear. The people are confused whether it is during the production before the judge, during the miscellaneous hearing or during the preliminary hearing. The people are of the view that if it is during the preliminary hearing then the liberty of person is taken from the person from the date of arrest till the preliminary hearing.

Article 7 section 1 our constitution states that all persons shall have the right to life, liberty and security of person and shall not be deprived of such rights except in accordance with due process of law, Article 7 section 20 states that a person shall not be subjected to arbitrary arrest or detention and section 21which provides that a person shall have the right to consult and be represented by a Bhutanese Jabmi of his or her choice.

The above mentioned article and section provides that our constitution grants right to bail. The law of bails has to be to merge two conflicting demands, namely, on one hand, the requirements of society for being shielded from the hazards of being exposed to the misadventures of a person alleged to have committed a crime; and on the other, the fundamental canon of criminal jurisprudence viz., the presumption of innocence of an accused till he is found guilty. Bail and not jail should be the governing principle when it comes to adjudication of the criminal cases in our country.

TOPIC: PLEA BARGAINING

SUBJECT: THE CIVIL AND CRIMINAL PROCEDURE CODE OF BHUTAN, 2001

SUBMITTED BY: DUNGAY TSHERING
Roll No. 1605

A speedy trial is an essence of criminal justice and any delay in the trial by itself constitutes denial of justice. A longer trial period can be construed as an engine of oppression for the under trial prisoners.
Following the traditional trial systems, courts are burdened with huge case loads which result in under trial prisoners languishing under the harsh realities of judicial custody. Most Judiciaries worldwide are criticized for delay in dispensing justice, prolonging cases, unending process of appeals, huge swell in the volume of litigation and the ratio of judges to population. The alternative to these problems lie in plea bargaining wherein speedier trails are enabled and mutually satisfactory dispositions found. However, in Bhutan, plea bargaining is rarely or not used.

1. DEFINITION OF PLEA BARGAINING

Plea bargaining is a concept used to describe the bargaining that takes place between the accused and the prosecutor wherein the accused agrees to plead guilty to lesser charge in return for reduction in sentence. It is a pre-trial negotiation between the accused and the prosecution during which the accused agrees to plead guilty in exchange for certain concessions by the prosecution.

Generally there are two types of plea bargain, 'charge' bargain and 'sentence' bargain. The former occurs when the prosecutor allows the defendant to plead guilty to a lesser charge or to some of the charges that have been filed against him and the latter takes place when the defendant is told in advance that his sentence will be reduced if he pleads guilty. Therefore plea bargaining is nothing but a contract between the prosecution and the defendant or accused and both the parties are bound by this contract.

The object of plea bargaining is to reduce the risk of undesirable orders for either side. Another reason for the introducing the concept of plea bargaining is the fact that most of the criminal courts are over burdened and hence unable to dispose off the cases on merits. A criminal trial can take days, weeks, months and sometimes years while guilty pleas can be arranged in minutes. Another object or rather benefit is that the parties (say defendants) can save a huge amount of money which they might otherwise spend on advocates. It always takes more time and effort to bring a case to trial than to negotiate and handle a plea- bargain. Incentives for accepting plea-bargaining, as far as judges and prosecutors are concerned are obvious. Over crowded courts do not allow the judges to try every case that comes before them. It also reduces the caseloads of the prosecutors.

Some of the salient features of 'Plea Bargaining' are that it is applicable in respect of those offences for which punishment is up to a period of 7 years. Moreover it does not apply to cases where the offence committed is a socio-economic or where the offence is committed against a woman or a child below the age of 14-years. Also once the court passes an order in the case of 'Plea Bargaining,' no appeal can be raised with any court against that order.

2. HISTORY OF PLEA BARGAINING

The concept of plea bargaining originated in United States of America and indeed the same has been put to use by the American Judiciary in the 19th century itself. The American courts have often upheld the constitutionality of plea bargaining and today ninety nine percent of cases are resolved through plea bargaining.
In Bhutan, the Concept of Plea Bargaining found favour of courts only in the recent past. It was only in 2001, the concept found an infiltration into the Bhutanese Legal System with an adoption of the Civil and Criminal Procedure Code of Bhutan, 2001. The concept has its place under Section 197 of the Code.

3. PLEA BARGAINING UNDER SECTION 197 OF THE CIVIL AND CRMINAL PROCEDURE CODE OF BHUTAN, 2001.

Under the Civil and Criminal Procedure Code of Bhutan, 2001, the law relating to plea bargaining is provided under Section 197 of the Code. The Section reads as follow:
197. With agreement to provide information to the prosecution and in lieu of a full criminal trial, a suspect may choose to plead guilty to an offence lesser than the offence charged and be sentenced accordingly.
197.1. The prosecution may consider a plea bargain in exchange of evidence deemed critical for prosecution against other criminal suspect.
197.2. Discretion as to whether or not to consider a plea bargain rests fully with the prosecution which shall amongst other factors consider:
(a) the nature of the offence;
(b) the circumstances under which the crime was committed;
(c) the person's prior criminal record and status; and
(d) whether it is voluntary in nature.
197.3. Before confirming a plea bargain, the prosecution shall determine whether the defendant is mentally competent and is a 'child in conflict with law' , and if so is represented by parent/member of a family/legal guardian/ Jabmi, and understands:
(a) the nature of the charges emanating from the plea bargain;
(b) the mandatory minimum and maximum penalties provided by law, if any;
(c) that a plea bargain may be made as well during the course of
the Criminal trial; and
(d) that if the prosecution accepts the plea bargain, the defendant waives his/her right to a trial.
198. The Court shall still have the power to order the defendant to make restitution and pay compensation to a victim.

The Civil and Criminal Procedure Code of Bhutan, 2001 nowhere defines the concept of Plea Bargaining. The Chapter on Plea Bargaining only provides instances where Plea Bargaining could be agreed upon and certain procedural aspects of it. Under Sections 197 and 197 (1), there could be a contact of Plea Bargaining between the prosecution and the defence, when an agreement is reached to provide information to the prosecution and in lieu of a full criminal trial, and in exchange of evidence deemed critical for prosecution against other criminal suspects respectively.

One salient feature of Plea Bargaining in Civil and Criminal

procedure Code of Bhutan is, Plea Bargaining can also be agreed upon in exchange of Evidence deemed critical for prosecution against other criminal suspect. Plea Bargaining is also practiced as an exchange of Information to the prosecution. Thus, in Bhutanese legal setup, the defence need not necessarily plead guilty to lesser charge or few charges in lieu of reduction in sentence or dismissal of other charges. It suffices if he agrees to furnish information or evidence necessary to speedy disposal of the case. Contrary to this, most countries do not bargain lesser charge or few charges in lieu of furnishing information or evidence. They bargain only on the plea of guilty perse.

Under section 197 (2), the defendant cannot claim Plea Bargaining as a matter of right. The decision to plea bargain is fully vested in prosecution, which exercises the discretion only at the aftermath of considering certain pre-requisites such as the nature of the offence committed and the prior criminal record of the defendant, among others. Generally, plea bargaining is applicable only in respect of those offences for which punishment is up to a period of 7 years. Moreover it does not apply to cases where the offence committed is socio-economic or is committed is committed against a woman or a child below the age of 14-years. In addition to this, plea bargaining shall not be available to persons with prior criminal records and to ones who committed crimes intentionally.

Another procedural prerequisite of Plea Bargaining as under Section 197 (3) is, the prosecution is mandated to determine if the defendant is mentally competent or is a child in conflict with law. If the defendant is a child in conflict with law, he/she should be represented by a parent or member of a family, legal guardian or Jabmi. Such representatives are mandated to understand; (a) the nature of the charges emanating from the plea bargain; (b) the mandatory minimum and maximum penalties provided by law, if any; (c) that a plea bargain may be made as well during the course of the Criminal trial; and (d) that if the prosecution accepts the plea bargain, the defendant waives his/her right to a trial. One indispensable requisite of is that the representatives should be mindful that if the prosecution accepts the plea bargain, the defendant waives his/her right to a trial. The representatives are also mandated to understand the mandatory minimum and maximum penalties provided by law in addition to their requirements to understand the nature of charges.
The last part of the Section vests discretion in Court to order the defendant to make restitution and pay compensation to the victim, even if the trial was adjudicated by way of Plea Bargaining.

4. PROS AND CONS OF PLEA BARGAINING

The proponents of the concept of 'Plea Bargaining' rationalise the concept on the fact that it reduces the risk of undesirable orders for either side. They argue that most of the criminal courts are over burdened and hence unable to dispose off the cases on merits. For most defendants the principal benefit of plea-bargaining is receiving a lighter sentence than what might result from taking the case to trial and losing. Another benefit which the defendant gets is that they can save a huge amount of money which they might otherwise spend on advocates. It always takes more time and effort to bring a case to trial than to negotiate and handle a plea- bargain. Incentives for accepting plea-bargaining, as far as judges and prosecutors are concerned are obvious. Over crowded courts do not allow the judges to try every case that comes before them. It also reduces the caseloads of the prosecutors. It could enhance the efficacy of the court and save resources.

While advantages are countless, Plea Bargaining is not without disadvantages. There are flaws hidden beneath the whole concept. No doubt, plea bargaining is nothing but a cover up the inadequacies of the government in dealing with each and every case that comes before it. It indirectly shows the incompetence of the traditional procedural laws. Some of the major drawbacks of the concept of plea bargaining widely recognised are, coercion because of the involvement of the police and impugning the impartiality of the court. Further, involving the victim in plea bargaining process would invite corruption. If the guilty plea application of the accused is rejected, it would become difficult for the party to prove innocence.

5. JUSTICIABILITY OF PLEA BARGAINING IN BHUTAN

The rationale underlying introduction of the concept of plea bargaining in the Judicial System worldwide was to enable speedier trials in certain offences of less serious character to find a mutually satisfactory disposition, and to save the public money. In Bhutan, Section 188 of the Civil and Criminal Procedure Code, 2001 seemingly rationalises the introduction of the Concept of Plea Bargaining. There is, however, the argument that there was not much use in implementing the concept in Bhutan. The Judiciary is not as burdened as other judiciaries and courts have very less pending cases. It is also in direct contrast to the right against self-incrimination, the right to free and fair and open trial contained in the Civil and Criminal Procedure of Bhutan, 2001.

The Civil and Criminal Procedure Code of Bhutan clearly states that every person is entitled to a fair and public trial by an independent and impartial Court in any proceedings. As opposed to this, in Plea bargaining, the promise of a lenient criminal sanction entices the accused to confess guilt, thus waiving the right to trial. The court condemns the accused on the basis of his confession, without independent adjudication. Further, the moment a contract of plea bargaining is entered between the prosecution and the accused; there is an understanding that the latter forfeits his right to appeal. Thus, plea bargaining violates the right of an accused to appeal which is provided under Section 109 of the Civil and Criminal Procedure Code.

Plea Bargaining also violates fundamental rights of the accused as enshrined under Article 7(1) of the Constitution. As per the Article, a person shall not be deprived of his right to life, liberty and security except in accordance with the due process of law. Now, say a person pleads guilty to an offence of fourth degree felony, while he was actually in contention to have committed an offence of third degree felony. The plea of guilt in the example is void of due process of law, for the plea was without proper trial. The fourth degree felony involves commission into imprisonment for a term ranging from three to five years. Irrespective of years, imprisonment per se is deprivation of life and liberty which is guaranteed under Article 7(1) of the Constitution.

Further, plea bargaining operates in contravention to the right against self incrimination. In most other countries, the right against self incrimination is guaranteed as a fundamental right. Though the Bhutanese Constitution is silent on this right, it should be incorporated as a statutory right under Bhutanese Law. Self Incrimination occurs when an accused provides or is induced to provide information pursuant to the crime he was charged with. It is an act of accusing oneself of a crime for which he shall be prosecuted. Thus, plea bargaining incriminates a person as he was induced to provide information or evidence against himself.

Even if supporters of plea bargaining can advance consequential arguments, the validity of those claims can still be assessed. First, even if plea bargaining benefits those guilty defendants who would otherwise be convicted at trial, it hardly benefits those innocent defendants who pleaded guilty, who would otherwise be acquitted. Moreover, the extent to which plea bargaining actually saves public money and resources may be vastly overestimated. Plea bargaining can weaken the deterrent and incapacitative effects of punishment; it may increase the rate of crime, produce a larger number of arrests, and thereby actually increase social costs.
The evaluation of plea bargaining on the touchstone of fundamental rights rests on the premise that it jeopardises fundamental rights an individual which is otherwise celebrated as upholding the dignity of an individual. Therefore, the implementation of plea bargaining in Bhutan should be discouraged.

6. CONCLUSION

Plea bargaining as we see is often use as a judicial machinery to speed up adjudication and save public money. In doing so, an individual's right is seemingly forgone for speedy trial. The jurisprudential analysis points to how an individual rights is associated with his or her dignity, the violation of which should not at any time be encouraged, not even for the larger benefit of the public. The rights being key upholder of an individual dignity and respect for his existence needs an extreme protection, especially when those individuals form a minority within a society. Therefore, the concept of plea bargaining which abridges an individual of his right to fair and public trial under Section 4 of the Civil and Criminal Procedure Code of Bhutan, 2001, the right against self-incrimination and his right not to be deprived of life and liberty except according to the due process law guaranteed under Article 7(1) of the Constitution should not be encouraged. Further, the concept of plea bargaining does not serve all the societal interests in its Criminal Justice System. It rather provides scope for a variety of risks that may include the prosecutor framing highest charges than normal and that an innocent accused may end up getting punished. Looking at the cost and time taken to adjudicate a case, it would not be incorrect to say that there is great possibility of an innocent, poor accused being convicted in order to save himself from a long, expensive and harassing trial.

Therefore, Unless without complying certain checks and balances such as; The hearing must take place in court; The court must satisfy itself that the accused is pleading guilty knowingly and voluntarily; Any court order rejecting a plea bargaining application must be kept confidential to prevent prejudice to the accused, plea bargaining should not be encouraged in our Criminal Justice System.

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Rule of law – for the benefit of the people

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We often come across the statement "Rule of Law", especially in law related speeches, articles or texts. The frequency of its use speaks for the importance of the statement, which also makes it imperative that we understand it in its correct sense. However, speeches, articles or texts by themselves do not clearly convey the definite meaning to those who are not familiar with the statement.

What is rule of law?
Let us analyze and simplify the statement beginning with main component word, "rule". The word "rule" in the statement has the same meaning as it has in "King rules country". The word "rule" refers to the "act of ruling or the act of governance". That is to say that the word is used as verb and not as noun. It cannot mean a particular or a collection of legislation or any form of delegated legislations (which are also collectively referred to as laws) because, then the rule of law would mean laws of law. Hence, the word rule refers to an act of ruling not to law or delegated legislations.
Law refers to the collection of Acts passed by the Parliament and includes Rules or Rules and Regulations authorized by these Acts. The Rules and Regulations are also called delegated legislations. If Rules or Regulations are not authorized by an Act passed by Parliament or legislative authority (e.g, National Assembly), they are invalid, especially when these rules or regulations create rights and impose penalties not authorized, because none other than Parliament can pass a law binding citizens.

This is because the concept governance in a democracy means that the government is run, on behalf of and for the benefit of all the citizens, by a group of people elected from "among the equals".

In 350BC, an ancient Greek philosopher Plato wrote:
Where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state.

On the other hand, a common man is entitled to do whatever is not expressly prohibited by law because conditions set by law are their concessions to abide in interest of general public. Hence, while what is not within the scope of law is legitimate domain of members of general public, what is expressly provided is the only legitimate domain of the government officials. While general public is the source of law, law is the source of power for government officials.

The fact that officials are paid from the public treasury is further testimony to their limited authority and the relationship of master (people) and servant (government). Accordingly, under Article I section 1 of the Constitution the Sovereign power belongs to the people and people act through their representatives in Parliament. The ultimate authority therefore rests with people and any legislation not having people as ultimate authority cannot bind a citizen.

Practical Applications
The need to observe rule of law, it may be noticed, is not particularly because the governed do not trust the government but for certainty and objectivity of actions, decisions and orders. Unguided individual actions or decisions cannot ensure good social order, which is one of the primary purposes of a formal government. It is usual to expect different individuals to make differing decisions on the same point. It is also not unusual if one individual's decision on the same point differ with time, place and circumstances. Knowing that every human being including Dashos, Lyonpos or an official of any rank is susceptible to the same kinds of weaknesses under similar circumstances, rule of law is the remedy against the vagaries of human nature. If the decisions or actions are not in accordance with law, one man cannot command obedience of another man, both of whom are equal by nature.
Rule of law in the day to day functions of the government means that the scope of action must be pre-determined duly considering the primacy of public interest. Today, however, rather than laying down the rules of procedure or a standard operating procedure as they are commonly called, most government agencies resort to forming committees in order mostly to diffuse the impact of inadvertent wrong decisions or sometimes in the faith of more heads turning out better decisions or for apparent transparency. If there is no predetermined (written) decision making procedure, objectivity of the decision may be questioned and it would not make a difference whether the decision is made by one or a group of persons (committee). Unguided decisions quite often create personal grudges which may have devastating implications in a society where everyone knows almost every other.

It may be noted here that rules of procedure or standard operating procedure differ from the rules or regulations creating rights, duties and prescribing penalties. Former is the method of giving effect to the latter. Thus by nature, the creation of the former need not be subject to the same restraint as the latter. Although it is desirable, the Rules of procedure need not comply with legal technicalities, it needs only be understood by all in the sense determined by institutional mandates. The benefits are that it facilitates transparent, objective and consistent decisions. It also leaves no room for personal grudges if the compliance is absolute.

Motivated by the divine concerns and compassion for the subjects, Their Majesties the successive Kings were, during their respective reigns the architect, owner and guardian of the country. There was therefore no reason to suspect bad faith in their governance. However, there may have been times when the trust and respect in the Kings were exploited by the people attending them, thereby undermining the benevolence otherwise enjoyed by the subjects. Perhaps in obedience to the call of their wisdom, the governance had been handed down to the people's own hands. It was since then that the rule of law became pertinent.

TREATY LAW AND PRACTICE UNDER THE CONSTITUTION: TREATY LAW AND PRACTICE UNDER THE CONSTITUTION: PROBLEMS AND PERSPECTIVES

Introduction and Research Methodology
"The legal methodology of treaties legitimizes the process of economic exploitation; and international treaty jurisprudence is today a Might-Right maneuver to subjugate, without arms, nations which are forced to jettison their national sovereignty and abandon their commitment to their people by the diplomacy of signatures. The pen has done without blood what needed a gun before; what once required wars of conquest are accomplished by words of treaties" - Justice Krishna Iyer

Over the last century, one of the greatest legal phenomena that the world has witnessed is the unprecedented growth in the premise and importance of international law. It has developed in huge proportions as the world grows forth to become what we call a global village. This has had tremendous impact on national legal systems, leading to international law acquiring a significant space in most national Constitutions around the world. Consequently, the conflicts and controversies between international law and national law and the validity and application of international law by domestic courts have also reared its ugly head. The notorious conflicts that have arisen in the European Union as regards the supremacy of either European Union law or the law of the Member States is a good example in this regard.

As a result of these controversies and conflicts, much juristic ink has flowed in an attempt by international scholars and judges to dissipate the fog beclouding the true relationship between international law and municipal law of a state. Many theories such as monism, dualism, incorporation and transformation, static incorporation, dynamic incorporation and incorporation by reference, have emerged to elucidate the inter relationship between the international law and the municipal law.

In Bhutan, until the adoption of the Constitution, foreign policy was the prerogative of His Majesty the Druk Gyalpo. Under the guidance and leadership of the monarchs, Bhutan's foreign policy was never an issue. Bhutan's relationship with the international community was good and so was her reputation as regards obligation towards the international community. However, the adoption of the Constitution in 2008 brought about three important changes with regard to Bhutan's treaty law and the relationship of international law and municipal law.

Firstly, Bhutan's treaty law and the relationship between international law and municipal law received a specific mention in the Constitution. Secondly, there has been an increase in the number of conventions, treaties, and agreements as well as the subject matter of those

instruments adopted or ratified by Bhutan. As the breadth of Bhutan's treaty obligations broadened, their depth increased as well. Thirdly, the number and category of countries with which Bhutan established diplomatic relations changed drastically. For example, in 2008, Bhutan had diplomatic relations with only 22 countries but in 2013, the number of countries with whom Bhutan established formal diplomatic ties increased to 52.

The indiscreet and disastrous entry by the Government into treaties and diplomatic relations, especially with some countries, without wider consultation and even contrary to popular opposition, has been severely criticized both within and outside the country. It also became one of the main issues of the election campaign of some political parties in 2013 elections. The Government has been accused of having bartered away the sovereignty of the people by entering into diplomatic relations with some countries.

In view of the fact that foreign policy is no longer a prerogative of His Majesty the King and that these changes are taking place at a time when the understanding of the primary constitutional mechanism for making treaties remains confused and contradictory, the legal and practical approach adopted must be given due importance. In other words, the current incongruity in the treaty law and State practice which is vague, vagarious and liable to be abused drives home the urgency of the need for a critical study of the treaty law as provided in the Constitution.

What is the institutional design envisaged by the Constitution as regards the application of international law? Does mere ratification ipso facto transform the treaty into domestic law? Do treaties require incorporation in order to gain domestic validity? Is Bhutan a monist or a dualist state?

The proper resolution of these constitutional questions have important consequences for Bhutan's sovereignty, foreign policy, democracy and the effectiveness of the application of international law within the domestic legal system. It also has consequences both for international instruments into which Bhutan has already entered, such as the UN Charter, and for international agreements into which Bhutan may enter in the future, such as the WTO. If and when the validity of such commitments of the Government or the conflict between the national law and international law reaches the Bhutanese Courts, the courts must look to the monistic and dualistic schools to explain the relation and the solution for the conflicts.

The law relating to the relationship of international and municipal law is contained in Article 10 (25) of the Constitution which provides that "except for existing International Conventions, Covenants, Treaties, Protocols and Agreements entered into by Bhutan, which shall continue in force subject to section 10 of Article 1, all International Conventions, Covenants, Treaties, Protocols and Agreements duly acceded to by the Government hereafter, shall be deemed to be the law of the Kingdom only upon ratification by Parliament unless it is inconsistent with this Constitution." Although monistic in construction, Article 10 (25) is ambiguous and is open to three conflicting interpretations:

(i) Bhutan is a monist State: Article 1 (10) and Article 10 (25) of the Constitution makes treaties and international instruments the law of the land, on par with the Constitution and the statutes that must be enforced by the courts. Therefore, an international instrument once ratified by Parliament automatically becomes part of the law of the land, and there is no need for Parliament to enact an enabling legislation. Unlike Article 25 (10), the constitutional provisions of other countries are very specific in spelling out the ratification process and the need for a separate enabling legislation for validating the international instrument. For example Section 253 of the Indian Constitution provides that "….Parliament has power to make any law…for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body."

However, Article 25 (10) is silent about the need for legislation and the ratification process. In addition, the treaty practice of the erstwhile National Assembly as well as the new democratic Parliament also confirms that no enabling legislation is required and that mere ratification by Parliament would transform a treaty into municipal law. For many notable international treaties acceded to by Bhutan, the National Assembly and Parliament have not enacted any enabling legislation to put those international instruments into effect. What has Parliament done at best is passed non binding resolutions ratifying these instruments. To make the matters worse, the resolutions ratifying the international instruments are passed without any debate or consultation. For example, the First Session of the First Parliament ratified the Agreement for the establishment of the South Asian University and Agreement on establishing the SAARC Food Bank without any discussion or consultation. Parliament seems to have given importance to the Governmental or Ministerial signature rather than the ratification process. There are other international instruments in force, but for which no enabling legislations has been enacted. Therefore, it can be safely said that Bhutan is a monist state.

(ii) Bhutan is a dualist State: The second plausible interpretation is that Bhutan is a dualist state, in that, after ratification of an international instrument, Parliament must enact an enabling legislation to put that international instrument into force. For some international instruments, the Government and Parliament has taken affirmative steps by enacting legislations putting into effect the provisions of the international instruments. For example, the Enabling Act for the Suppression of Terrorism, 1991, was enacted to implement the SAARC Regional Convention on Suppression of Terrorism. Parliament also enacted Child Care and Protection Act in 2011 which implements the Convention on Rights of the Child (CRC). By enacting the Act, Bhutan has committed to advance the policies and principles that are in harmony with the principles of CRC. The Youth Development Fund (YDF), established in 1999, is another affirmative action of the Government to advance the cause of children. YDF aims to promote a healthy environment for child development and enables the Bhutanese youth to realize their full potential as productive citizens. Parliament also enacted the Tobacco Act in keeping with the provisions of the Framework Convention for Tobacco Control (FCTC). Therefore, it may be inferred that the resolutions of Parliament are only hortatory and non binding and that a separate legislation is needed to effect the international instruments.

(iii) Bhutan is both a monist and dualist State: For some international treaty, Parliament has enacted, in addition to the ratification, enabling legislations, while for others, the mere fact of ratification of the treaty has been considered as incorporated and domesticated into the municipal law. Therefore, due to this incongruence, it can be inferred that like Canada, Bhutan is both a monist as well as a dualist state.

Given these ambiguities in law as well as in practice, how should Parliament and judges interpret the constitutional provisions? Should Parliament and judges interpret Bhutan's treaty commitments through the monist or dualist lenses? What about in cases where there is a conflict between domestic law and foreign law? Which will prevail? Can Bhutanese courts cite international treaties as domestic law in the absence of enabling legislations?

Understanding the Key Concepts

Traditionally, the relationship between international law and national law, even though not precise, has been described by reference to two competing theories, that of monism and dualism.

These terminologies have been criticized, as being too dichotomous in flavor, since there are various degrees of direct application of treaties. Nevertheless, even though not precise, the monist-dualist distinction continues to be a valuable tool to highlight the differences in the approaches various legal systems take to defining the relationship between international and domestic law.

Monism

Contemporary notions of monism evolved from the writings of fifteenth, sixteenth, and seventeenth century legal scholars, but it was Hugo Grotius who brought the theory of monism into its modern form by secularizing natural law, thereby distinguishing it from divine will.

The monist theory supposes that international law and national law are simply two components of a single body of knowledge called law. As a result, there is no need for any domestic implementing legislation. Rather, once a treaty has been signed and ratified, it becomes domestic law. Thus, international law is directly applicable in the national legal order, and the executive is obliged to take care that international law is faithfully executed within the state and that the national courts give effect to international law in their decisions. In the case of conflicts between the two, international law is said to prevail.

Dualism

At the heart of the theory of dualism lies the premise that international law and domestic law are two different, independent unconnected systems, and the sources and rules of international law have no bearing on internal legal matters and the norms of internal law have no influence over international legal subjects. International and national law are two circles that do not intersect, they are merely contiguous. When a state signs and ratifies a convention, it approves it as a source of international law, without any repercussion in its internal legal system. To convert a treaty into a source of internal law, there must be "an act of transformation", and the state has to enact a new statute that reproduces the treaty's rules in order to have it applied to internal legal relations. Other legal instruments can also serve as an act of transformation, including a regulation of an administrative body, and possibly even an action or decision of a court or tribunal. However, the administrative body or the tribunal must have been authorized. Similar to the "act of transformation", there are other terms or theories used such as "incorporation," "adoption," "reception", "incorporation

and transformation," "static incorporation," "dynamic incorporation" and "incorporation by reference.

To the dualist, international law could not claim supremacy within the domestic legal system although it was supreme in the international law legal system.

Arguments Favoring Monism

Giving direct application to treaties increases the importance and effectiveness of international law. It will also give assurance that all parties will carry out their obligation under the treaty, thereby increasing the effectiveness of the treaty. Direct incorporation of foreign law can also be a powerful mechanism for solving coordination problems and ensuring reciprocal compliance with agreements among sovereigns or quasi-sovereigns. The respect and prestige of the international norms will be enhanced, which will in turn benefit the world order.

Lawmaking is often costly. Parliament or the body introducing legislations incur huge costs in consultation fees, for undertaking expensive scientific studies, and for drafting the legislations. The Government or Parliament could free ride on the work done by others by directly incorporating the treaty. This approach is especially attractive if the law requires continual updating in light of new knowledge.

Yet another argument for direct application is that it better assures the rights of individuals in the legal system when a treaty contains norms designed to apply to those individuals. The individuals can thus base claims on the treaty norm without the need for government intervention or an act of transformation. An act of transformation, it can be argued, gives too much temptation to governments to depart from the precise wording of the treaty.

Arguments Favoring Dualism

Monism or direct incorporation poses a prima facie threat to the democracy of the incorporating polity because it takes decisions out of the hands of the people's representatives in that polity and delegates them to persons and bodies that are accountable only to a different polity. Direct application undermines self-government and results in a democratic loss.

Perhaps closely related to this argument is a notion that builds on concepts of national "sovereignty": that when a nation undertakes an international obligation, that nation is entitled to determine for itself its method of implementing or fulfilling that obligation, so long as it does so in good faith. Indeed, it is sometimes argued that urging the direct application of treaties is tantamount to "interference in the internal affairs" of a sovereign state.

Another consideration militating against direct application is that legislatures may wish to tailor the act of transformation in certain ways, perhaps by rewording the treaty to match domestic circumstances. The legislators may also wish to elaborate on the treaty provisions, which they may view as ambiguous. For example, in the United States, the ambiguity of some treaty language has caused concern that its direct application to individuals might violate constitutional standards of due process.

Lost in the nuance of language – the eligibility of political contestants

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Can all registered Political Parties contest in the Primary Round of Election?

"Election to the National Assembly shall be by two political parties established through a Primary Round of Election in which all registered political parties may participate," Article 15(5) of the Constitution.

"All registered political parties shall be eligible to participate and contest in the Primary Round of Election," Section 189 (a) of the Election Act, 2008.

As far as these two provisions are concerned, all political parties once registered with the Election Commission are eligible and can participate or contest in the Primary Round of Election if they desire to do so. That is to say, if their registration is successful then there participation in the Primary Round of Election is automatic only subject to the parties themselves.

However, these two provisions are not conclusive when considering other provisions. It is the general principle of interpretation that an Act or other legislative instrument must be read as a whole. In other words, no provision within it is to be treated as independent or standing alone. That is because there is always a possibility that a general term used in one provision of an Act may be modified by another provision elsewhere in the Act.

Keeping this principle in mind, let us now consider reading Article 15(5) of the Constitution and Section 189(a) of the Election Act with Proviso to Section 198 of the Election Act which reads as "provided in the case of the Primary Round of Election the party intending to contest an election shall submit a Letter of Intent.....the Letter of Intent shall include a tentative list of candidates that it may field in the General Election."

These two provisions with the Proviso to Section 198, confirms one thing for sure, that is, the party though registered cannot participate or contest in the Primary Round of Election if they fail to submit the Letter of Intent to the Election Commission.

Even more interesting is latter part of the Proviso which reads "The Letter of Intent shall include a tentative list of candidates that it may field in the General Election." What does this phrase mean - tentative candidates for all 47 (forty seven) constituencies?

Can a person who is barred from participation or contesting in the election under Article 23(4) of the Constitution and Section 179 of the Election Act also be included in so called tentative list? Can a person who is not a member of that political party be included in tentative list?

Actually what does "tentative" mean? It is something that is not certain or something which is not agreed to yet. Therefore, tentative means something that is not final. The expression, "tentative list of candidates" in the Proviso to Section 198 would mean list of candidates which is not final or certain that it will or shall field in the General Election. As far as this Proviso is concerned it wants political parties to submit a name list of candidates who may participate in the General Round of Election should that particular party get through the Primary Round.

If tentative is not final, why would the law require political parties to submit a list of candidates that is not final? What would be the main purpose behind this requirement? The only reason one can think of is, should the party get through to the General Round of election, there should be enough tentative candidates who may participate or contest in the General Round of election. This is to avoid the problem of a constituency or constituencies remaining unrepresented at the time of the General Round of election. Would this then mean, political parties have to submit tentative candidates for all 47 (forty seven) constituencies? Logically and reasonably that should be the case; it is a prerequisite that political parties intending to participate or contest the Primary Round of Election should have 47 (forty seven) tentative candidates 'who can contest' in the General Round of election.

Can we then take 47 (forty seven) as mere requirement of numbers? Can political parties include in their tentative list, any person whether he or she meet the qualification requirements under Section 176 of the Election Act, or person who is disqualified under Section 179 of the same Act? Wouldn't it be absurd and redundant to include following person as tentative candidate?

1. Person who is not a citizen of Bhutan;
2. Who is not a registered voter of that constituency;
3. Who did not attain the age of 25 or exceed age of 65 years;
4. Who does not possess a formal university degree;
5. Who has been convicted of criminal offence and sentenced to imprisonment;
6. Who has been dismissed or removed from public service or the corporate sector;
7. Who is married to a person who is not a citizen of Bhutan;
8. Who has been accused of felony in a pending case and the competent Court has taken cognisance and charges have been framed against him/her; and
9. Who is working as a civil servant?

A simple logic can answer this doubt. Including candidates who do not meet the requirements of Section 176 and are disqualified under Section 179 of the Election Act is as good as not meeting the requirement of submitting tentative candidates for all 47 (forty seven) constituencies. If a political party can include in their Letter of Intent, person who does not meet or who is disqualified from contesting under the law, then the very objective as mentioned above is defeated. If that is the case we should altogether do away with the requirement of submitting tentative list of candidates.

If this logic or reasoning falls short of justification, there are other equally important reasoning we can resort to. The Proviso to Section 198 uses the expression, "tentative list of candidates." How do you define "candidate"? Interpretation Clause (c) of the Election Act defines candidate as person who has been or claims to have been duly nominated as a candidate at an election. Therefore, the word "candidate" that appears in electoral laws should be given the same meaning. That is to say, a person can be labelled as a candidate only if he or she has been or claims to have been nominated meeting all the requirements of electoral laws; first being the requirement under Section 209(b) which provides that a person should be member of that political party and his or her name should be reflected on the list of members of the party. The expression "duly nominated" demands the highest possible standards.

Therefore, while submitting the Letter of Intent, the political parties have the responsibility of providing the tentative list of candidates meeting the requirement of the Interpretation Clause (c) of the Election Act. The require-

ment of this Clause can be only met if the requirement under Article 23(3) of the Constitution, Sections 176 and 209(b) are satisfied, and if not disqualified under Article 23(4) of the Constitution and Section 179 of the Election Act, 2008. The expression, "tentative list of candidates" has to be read as "tentative list of qualified candidates" or "tentative list of candidates duly nominated by the party." The expression 'duly nominated' for this particular purpose must be read to mean a candidate who is nominated by a Party on meeting all the nomination requirements under the electoral laws.

The final understanding of the phrase, "tentative list of candidates" should hence be "tentative list of person who has been or claims to have been duly nominated as a candidate at an election." The tentative list of candidates for the purpose of submitting the Letter of Intent should be construed to mean a list of qualified candidates who may participate in the General Round of Election. "Tentative" should mean nothing more or nothing less than probability of candidate's participation. The person may or may not participate in the actual election, but the person included in the list should be a person who is qualified to participate in the election.

It is the responsibility of the Political Party that they submit the list of candidates who are qualified to contest the General Election. The Political Parties in Section 290 of the Election Act, 2008 is governed by the code of conduct that they shall at all times uphold the rights and freedoms of the people as guaranteed by the Constitution and provide equal opportunity to qualified persons to participate in electoral activities. By deducing from the expression "qualified persons", political parties have the duty to accord opportunity only to persons who are qualified and not otherwise, and doing so would tantamount to violation of their code of conduct.

The risk is that, if political parties are allowed to include persons who do not meet the nomination requirements in the tentative list, there is the possibility that a group of people may form parties with the mere objective of participating in the Primary Round whether they may or may not go through to the general election. If they go through, it would be like hitting the jackpot giving them ample time to nominate qualified persons as their candidates.
Therefore, the Election Commission will have to scrutinize and see whether the candidates included in tentative list are eligible or not, or at least require political parties to make the declaration stating that all persons included in list are duly nominated having met all the requirements of electoral laws.

The replacement winners: A legal perspective to the elections

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The 2013 elections may be over with the People's Democratic Party (PDP) wining by a landslide and the President of the party, Tshering Tobgay, assuming office as the second Lyonchoen in the history of democratic Bhutan.

In the run up to the General Election amid the fiery rhetoric and heavy mudslinging, the more pertinent, although less discussed developments that came to the fore were the replacement of party candidates, be it from within or from a party that had lost out in the primary round.

Apart from our personal opinions and views, what do the Constitution of Bhutan and the relevant election laws say so far as the replacement of candidates is concerned?
Article 15 of the Constitution of the Kingdom of Bhutan lays down provisions as far as political parties are concerned. Section 10 of Article 15 is quite relevant to the subject matter discussed in this article. It states "The members of the National Assembly belonging to one party shall not defect to the other party either individually or en bloc."

However, this provision is in relation to the members of the National Assembly. It does not say anything about the members of the political parties before they officially become the members of the National Assembly through elections.

Once a party is being elected to the National Assembly, its candidates become the Members of Parliament, members of National Assembly to be more specific. Being a member of a party forming the National Assembly, the Constitution bars any member from joining the other political party in the National Assembly. The members are not allowed to join the other party either individually or en bloc meaning in group. If all the members of a political party join another party, it would lead to the formation of a coalition.

The Constitution of Bhutan prohibits the formation of coalitions. Even individual members who might want to join the other political party are not allowed by law to do so. The stand of the law is clear so far as the restrictions on the members of National Assembly joining other political parties is concerned.

Interestingly, the Constitution merely says that defection by members of the National Assembly is not allowed be it individually or en bloc. It is silent on the issue of candidates of political parties joining other parties in the course of election, en route to the formation of the National Assembly. Therefore, it becomes important to study the relevant provisions of the Election Act to find an answer.

Chapter 12 of the Election Act of the Kingdom of Bhutan, 2008 is on 'Nominations and Withdrawal of Candidatures'. Section 209 of the same chapter reads "A person shall be deemed to be duly nominated to contest an election to the National Assembly, by a registered political party, if:
(c) He/She is a member of a registered political party which could not qualify for the General Elections but is admitted as a member and nominated as a candidate by a political party to contest in the General Election. However, his/her membership in the original political party shall be forfeited"

The above provision of the Election Act provides in clear terms that a member of a registered political party, which couldn't make it through the primary round of election, is free to join another contesting party in the general round.

Section 209 (c) also exclusively states that that particular member's membership in the original political party shall be forfeited. It is only rational and logical to have his membership waived in the original political party once he joins a new party. The law is very precise on this issue. Now, one is left with no confusion as to whether a candidate or a member of a political party can join another political party once the primary round of election is over. He can definitely do so but he is not allowed to do so if he is elected to the National Assembly in the general round of election, not even individually. The Constitution of Bhutan restricts it in exclusive terms.

While all this is very clear, why was there then a big hue and cry over some candidates of DNT joining PDP after the primary round of election since the former couldn't get the mandate to contest in the General Elections?

Many critics of the move of DNT candidates, and for that matter the supporters of DPT, painted a conspiracy theory behind the so-called replacement of candidates by the PDP with the ones from DNT. They feel that the two parties could have struck a secret alliance well before the elections commenced in a bid to oust the DPT.

On the other hand, PDP and the DNT had the full backing of the Constitution and the Election Act in their defence. They readily and rightly so, cited those provisions and defended easily that individual candidates are allowed by law to join another political party after the Primary Elections. What the law doesn't allow is the formation of a coalition by joining two or more political parties into one.

Another question we asked ourselves was "Is the President of a Political Party treated the same as other candidates?" Some readers might discard this question right away reasoning that the President of a political party is, after all, nominated and elected from amongst the candidates of the party. But if we give a deeper thought over it, once he or she becomes the President, the roles and responsibilities change from that of an ordinary candidate. As the President, he or she assumes the leadership of the political party. The party is represented by its President. Without him or her, the Party will be a body without a proper head. Apart from taking care of the voters' interests and support in his or her own constituency, he or she has to look after the affairs of the whole party. If he or she joins another party that means the President is discarding the child who had so much trust and faith in him or her.

Please do not see this article as politicised. By raising the above issues, I am meaning to ask what the intentions of the legislators were when they deliberated on and enacted the Election Act. One can attribute this anomaly to the lack of experience in legislation so far as the DPT legislators are concerned. If they foresaw such a scenario in the future where a political party's President joins another party, they would have come out with a specific provision under the Election Act on that issue. However, we don't find any. And ironically, DPT is the one who was not happy with a number of candidates of DNT, including its President, joining PDP for the General Election. This takes us nowhere but leaves with a question about the intention of the legislators while enacting the Election Act.

There are two main theories emerging from the debates and discussions in various media and forums. They basically came from different camps – the one that supports and has no problem with the replacement of candidates, and the one that is against, who are skeptical of replacement of candidates, and the desertion of a political party by its President especially.

The camp that was in favour of replacement of candidates said that all were first the country's citizens and then members of a political party. No matter whether it is the President or the candidates of a political party that joins another political party, let them do it. Firstly, the law doesn't have any problem with that. Secondly, if

he or she is capable, they have the right and it is only correct for him or her to join a new party contesting in the General Elections. Our country needs capable candidates and party loyalty comes later than the larger national interest.

On the other hand, the camp that was not happy with the replacement of the candidates said that they did not understand how a candidate can adopt the ideology and principles of a new political party after having spoken so much about his or her commitment to the ideology and principles of the former political party. Where is the commitment? The worse case, they felt, was that of a President of a political party abandoning it once it didn't get the required mandate to take part in the General Election.

At the end of the day, what law says matter and is final. Replacement of candidates is allowed under the election laws of Bhutan. Debates and arguments will never stop since it's a democracy where different political parties contest to sit in the Parliament. One assumption we can make for now is that the DPT legislators' lack of experience might have resulted in overlooking such possible problems in the future while they enacted the Election Act of the Kingdom of Bhutan, 2008.

'Getting it right for every child,' the Scottish way

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Introduction
The protection of Scotland's children – keeping them happy, healthy and safe from harm – is fundamental to the success of the Scottish Government's aspirations for children and young people. Children cannot flourish and become responsible citizens, successful learners, confident individuals and effective contributors to society if they do not have the best start in life.

Legislation and Policy for Children's Services The key legislation in Scotland for working with children who have been abused or face the risk of significant harm within their family situation is the Children (Scotland) Act 1995. This legislation states that the welfare of the child is paramount; it puts the child at the centre of all interventions with the child and their family.

The Children (Scotland) Act 1995 marked a significant stage in the development of legislation on the care of Scottish children. It is centred on the needs of children and their families and defines both parental responsibilities and rights in relation to children. It sets out the duties and powers available to public authorities to support children and their families and to intervene when the child's welfare requires it.

The essential principles behind the Act are:
- each child has a right to be treated as an individual
- each child who can form a view on matters affecting him or her has the right to express those views if he or she so wishes
- parents should normally be responsible for the upbringing of their children and should share that responsibility
- each child has the right to protection from all forms of abuse, neglect or exploitation
- so far as is consistent with safeguarding and promoting the child's welfare, the public authority should promote the upbringing of children by their families
- any intervention by a public authority in the life of a child must be properly justified and should be supported by services from all relevant agencies working in collaboration.

In support of the principles three main themes run through the Act
- the welfare of the child is the paramount consideration when his or her needs are considered by courts and children's hearings
- no court should make an Order relating to a child and no children's hearing should make a supervision requirement unless the court or hearing considers that to do so would be better for the child than making no Order or supervision requirement at all
- the child's views should be taken into account where major decisions are to be made about his or her future.

In addition, there is a requirement at various parts of the Act for those providing for children to have regard to religious persuasion, racial origin and cultural and linguistic background.
The Act makes provision for emergency measures to be evoked when it is considered unsafe for a child to remain with his or her family. These powers are short term measures but the Act allows children for whom it is not possible to be cared for by their family to be looked after in specialist provision for example with foster carers, these are families who have been assessed as being able to provide stable and nurturing care for children; or within specialist residential children's houses.

Building on the principles of the Children (Scotland) Act '95 the Scottish Government has developed the policy framework: 'Getting it right for every child' for all children's services. The framework puts the interests of the child at the centre of every process and decision that impact on the child's wellbeing. This includes services to protect children as well as those which are aimed at early intervention when it has been identified that the child and or their family needs additional support.

The Children's Hearing System The children's hearing system is Scotland's juvenile justice and welfare system that has been in operation since 1971. The system is for children and young people who are experiencing difficulties in their lives. The hearing system is designed to take decisions which will be in the best interests of the child. Children and young people can become involved with the children's hearing system for a number of reasons which are called 'grounds for referral' and include:

- a child being without control of any relevant person, for example the parent or carer;
- the chid having been abused;
- the child being at risk of harm, such as abuse;
- the child being likely to suffer from a lack of parental care;
- the child committing an offence; and
- the child misusing alcohol, drugs and or solvents.

The reporter to the children's hearing is independent in that he or she is there to make sure the process is fair, The reporter makes sure everyone gets copies of all the right paperwork and that the hearing runs smoothly. When all available information relating to the child is gathered from for example, education, health, social work and the police and it is decided that the child is in need of compulsory measures of support, a children's hearing can be arranged. The children's hearing is a meeting arranged by the reporter, who will be present at the meeting. The children's hearing is a confidential meeting. The decisions in the children's hearing are made by the children's panel; for each children's hearing the children's panel consists of 3 members of the public who have had training to allow them to carry out this function. The purpose of the hearing is to decide what needs to be done in the best interests of the child. A decision of the children's hearing can be to place a child under a compulsory supervision order; the order must be reviewed within 12 months and can be in place for a child living at home with parent or carers or for a child being looked after away from home.

Child Protection Process Social Work Services and the police are the responsible agencies for carrying out a child protection investigation. Anyone, a professional from any agency or service whether working with children or adults or a member of the public can raise a concern about a child's safety and wellbeing. Social work services and the police would then gather as much information as they can from professionals who know the child and their family and decide if further investigation is necessary.
While social work and police have this key role in the investigation of child abuse, the approach for child protection in Scotland is that the protection of children is 'everyone's responsibility'. Child protection committees are the multi-agency strategic professional groups which govern multi-agency child protection policy and practice within their local authority area. A key function of the committee is to raise awareness of child abuse and what members of the public and professionals should do if they are concerned about a child. Committees produce leaflets, posters and use other media such as web information to raise awareness of child abuse and the protection of children.

Following a child protection investigation if it is considered that a child has been abused and is at risk of abuse in the future or at risk of future significant harm multi-agency meetings involving the child (if age appropriate), the parents and key professionals from across agencies and services known to the child and family, take place. The purpose of the meetings is to agree the assessment carried out by social work on behalf of all agencies and services, develop a multi-agency plan, specific to reducing the risks and meeting the needs of that individual child and review the plan to ensure it is meeting the identified outcomes and primarily keeping the child safe.

National Guidance Child protection depends on the knowledge, skills and confidence of those who work with children and families. Staff must be able to manage risk and deal with the complex and highly uncertain environments that face the most vulnerable children and families. Professionalism, commitment and courage are needed to address the most challenging of circumstances, for example children who are living with abuse and neglect, who are affected by circumstances such as domestic abuse and parental alcohol abuse and or drug misuse. In 2010, the Scottish Government published revised national guidance for the protection of children in Scotland. The guidance reflects the Scottish Government's distinctive and strong commitment to working in partnership with practitioners across the child protection sector to best support local practice at national level. The guidance is comprehensive and is the foundation for multi-agency work going forward, underpinning the early intervention approach to delivering children's services and crystallising the set of principles for child protection that puts children's best interests first.

In Scotland it is recognised that procedures and guidance cannot in themselves protect children; a competent, skilled and confident workforce, together

with a vigilant public, can. Child protection is a complex system requiring the interaction of services, the public, children and families. For the system to work effectively, it is essential that everyone understands the contribution they can make and how those contributions work together to provide the best outcomes for children. Social workers, health professionals, police, educational staff and anyone else who works with children and their families, as well as members of communities, need to appreciate the important role they can play in remaining vigilant and providing robust support for child protection. The national guidance provides the framework for that understanding. It enables managers and practitioners to apply their skills collectively and effectively and to develop a shared understanding of their common objective – to support and protect children, particularly those who are most vulnerable.

The guidance provides a national framework within which agencies and practitioners at local level – individually and jointly – can understand and agree processes for working together to safeguard and promote the welfare of children and to improve outcomes for children and their families. It sets out expectations for strategic planning of services to protect children and young people and highlights key responsibilities for services and organisations, both individual and shared. It also serves as a resource for practitioners on specific areas of practice and key issues in child protection.

Inspection and Scrutiny External scrutiny for children's services is provided by the Care Inspectorate who regularly inspect all services and how they work together to protect children and provide all services which improve the live of children. Agencies and services working in local authority areas across Scotland use a national quality improvement framework, 'How well are we improving the lives of children and young people' to self-evaluate to ensure areas of best practice and areas for development are identified in order to improve the quality of services for children and their families.

Legal Provisions to Implement Climate Change Requirements in Bhutan – Dasho Ritu Raj Chhetri

Climate change is seen as the biggest environmental problem confronting humanity and is one of the most serious threats to sustainable development. Climate change is expected to have adverse impacts on almost every sector from agriculture and food security, to human health, economic activity, physical infrastructure and biodiversity. While the global climate varies, there is new consensus amongst scientists that climate change is a result of human economic activity through the emission of greenhouse gasses.

The UN Framework Convention on Climate Change (UNFCCC) is an international political response to try and address this global problem. The UNFCCC has the ultimate objective to 'achieve stabilization of atmospheric concentrations of greenhouse gases at levels that would prevent dangerous anthropogenic interference with the climate system…'

Bhutan signed the Convention during the Rio Earth Summit where it was adopted in 1992. The Convention came into force on 21 March 1994. Bhutan ratified the convention during the 73rd session of the National Assembly in 1995.

The convention adopts the Rio Principle of 'common but differential responsibilities', and is one of the primary principles used by developing countries during negotiations. This principle means that while all parties contribute to climate change, the problem is primarily a result of historic emissions from industrialized countries over the last 150 years.

- This principle states that while all countries should act to combat climate change, the developed countries should take the lead. 41 industrialized countries are listed in as Annex I countries.
- Annex II contains the OECD members of Annex I and are called on to provide financial resources to aid developing countries in meeting obligations under the convention.
- All other countries not listed in Annex I are the developing countries and are known as non-Annex I parties.

While the UNFCCC sets the framework for reductions of greenhouse gases, there were no legally binding obligations for Annex I countries and call on voluntary reductions in emissions to 1990 levels by the year 2000. As the target in the convention was a non-binding one, they were not met.

To address this issue, the Kyoto Protocol was negotiated with various legally binding targets set for Annex I countries. The Kyoto Protocol was adopted on 11 December 1997, and it came into force on 16 February 2005. Bhutan acceded to the Kyoto Protocol on 26 August 2002.

Bhutan as a non-Annex I party to the Convention (as well as an LDC) has limited obligations. These obligations are paying a token annual financial contribution (the amount is calculated as per usual UN norms) and submitting periodic reports known as National Communications. The National Communications are comprehensive reports that describe the national situation vis-à-vis climate change, emission levels of greenhouse gases, expected impacts and appropriate measures for adaptation to adverse impacts of climate change.

Bhutan submitted its First National Communications in November 2000 at the 6th Conference of Parties (COP 6). In this report, Bhutan highlighted the following issues:

- Its emission of greenhouse gases (using 1994 as the baseline) is negligible and in fact there is net absorption of carbon dioxide amounting to 3321.05 Gigagrams/year because of our high forest cover thereby providing a global environmental service while bearing negative impacts of climate change.
- Bhutan is highly vulnerable to the adverse impacts of climate change due to the fact that all the major economic sectors in Bhutan are vulnerable to climate change. Agriculture is vulnerable to changes and we can now see those crops which used to grow at lower altitude can be grown at higher altitude due to global warming and this is a serious concern for an agrarian economy. Further the vegetation grown at higher altitude may be extinct. Glacial Lake Outburst Floods impact downstream life and infrastructure and Bhutan has more than two thousand lakes which are potentially dangerous. Tropical diseases could spread to higher elevations. The hydropower sector which is considered to be the engine of economic growth is vulnerable to climate change since the Himalayan glaciers are fast melting and landslides and flash floods from intense and unusual rainfall were highlighted as problems.

The National Environment Commission (NEC) is the highest decision making body for environmental matters in the absence of the ministry of environment. The Prime Minister is the Chairman of the NEC but with the adoption of the National Environment Protection Act 2007, the Chairman could either be the Prime Minister or a minister nominated by the Prime Minister from a relevant ministry. The Commission comprises 4-5 nominee of the Prime Minister from relevant ministries who should be a highest ranking officer meaning the secretaries of the government, 3 persons representing the civil societies/eminent persons and head of NEC Secretariat as member secretary.

The NEC has recently signed a US$ 405,000 project to prepare Bhutan's 2nd National Communications to the UNFCCC with funding from Global Environment Facility. In addition to updating the data on greenhouse gas emissions from Bhutan and identifying long term climate change impacts and responses measures. This project will also address capacity building needs with respect to climate change and also create public awareness.

Adverse impacts and adaptation

Two articles, 4.8 and 4.9 are most important as it addresses the specific needs (funding, insurance and the transfer of technology) of developing countries in adapting to the impacts or implementing any response measures. Specific situations of some developing countries are recognized of which Article 4.8(g) describes countries with 'fragile ecosystems, including mountainous ecosystems' and Article 4.8(i) for land-locked and transit countries.

Article 4.9 highlights the 'special situations' of LDC and calls on parties to take full account of the needs of LDC's with regards to their funding and technology transfer.

As a result of these two articles, Bhutan can access funding for adaptation measures. Funding for LDC's has been more easily available under article 4.9 as compared to 4.8 Implementation of article 4.9 was given attention after the LDC's took a common stand on this article starting from COP7 in 2001. Since then a number of actions have been taken to strengthen the capacity building in LDC's with regard to awareness and negotiations on climate change, and also for adaptation such as the preparation of National Adaptation Programme of Action (NAPA) by LDC's.

The NAPA identifies urgent and immediate adaptation needs (essentially short term measures in dealing with the impacts of climate change. Bhutan completed and submitted its NAPA to the UNFCCC in May 2006. Out of 55 project ideas 20 were selected and 9 developed into priority projects amounting to Nu. 7.9 million. Of these priority projects several like the GLOF mitigation and Health responses have been developed into full size GEF project proposals. Most NAPA projects are to be funded either bt the Special Climate Change Fund or the LDC Adaptation Fund (both negotiated under UNFCCC articles 4.8 and 4.9 respectively). Several other projects are also likely to be funded pending availability of funding from these funds or bilateral donors.

Issues related to the Kyoto Protocol

The Kyoto Protocol sets legally binding reductions in greenhouse gas emissions for Annex I party members only. The USA and Australia are notable exceptions that have refused to sign the protocol. While the Protocol is relevant for action to be taken by Annex I countries, Bhutan is also a potential beneficiary from one of the three flexible mechanisms developed to help Annex I countries achieve their reductions. One of the flexible mechanisms is the Clean Development Mechanism where industrialized countries can invest in projects that reduce emissions in developing countries. The logic of this innovative program is that it might be cheaper to reduce emissions in developing countries and as far as the atmosphere is concerned it really doesn't matter where the emission is reduced. Both parties winning as credit goes to the investing country or the buyer of the certified emission reduction credits (CERs) and the host country gets proceeds from the sale of its share of emission reduction credits.

Benefits for Bhutan

The Chendebji Micro Hydro Project was commissioned as the first CDM Project (pilot) in Bhutan in 2004. As a pilot, the project was small and generated only 474 tons of Carbon dioxide equivalent credits since its commissioning in August 2005 to November 2006 worth approximately Euro 2844 for the sale of Bhutan's share of the CERs (which was 50% of the total CERs). The project was fully funded by E7, an international consortium of electric utilities. Other potential CDM projects like the Dagachhu Hydro Project (proposal under development) and also the Puna Tsang Chhu have the potential to generate significantly higher CERs. This is possible as this will be in cooperation with the Government of India and the projects will be using the baseline for emission reductions in India.

In the forestry sector, presently the CDM only allows afforestation (planting new forests) and reforestation and not avoiding deforestation. As Bhutan already has more than 70% forest cover the opportunities for forest activities in the CDM is limited, atleast in the first commitment period of the Kyoto Protocol (2008 – 2012), It is not known how negotiations for the subsequent commitment period of the Kyoto Protocol (post 2012) will proceed and there are growing calls for China and India and other leading developing countries to also take on commitments.

The CDM modalities are very time consuming and costly as it involves project preparation, registration, validation, monitoring, sale of CERs (known as transaction costs). These transaction costs are especially problematic for smaller projects. CDM modalities, however, allow 'bundling' of projects so that the operational cost is shared amongst many similar projects applying for CDM.

The NEC has been appointed by the government as the 'Designated National Authority' for CDM and all projects applying for a CDM arrangement have to be approved by the NEC. The NEC's role is to ensure that the projects confirm to CDM guidelines and modalities and more importantly, to ensure that the projects are in line with the overall government policies and programmes. However there are constraints due to limited (financial and human) to function as a fully active DNA comparable to other countries.

Justice – the plaintive call of the wild

Sangay
Office of the Attorney General

The South East Asian Region is categorized as an 'illegal wildlife corridor'. While the region has proper legislation in place to curb illegal trade in wildlife products and related crimes it still remains a nucleus point of these crimes. This was highlighted in a special topic on 'Wildlife Crime and the Rule of law' during the 16th Meeting of Conference of Parties to the Convention on International Trade in Endangered Species (CITES) at Bangkok, Thailand in March 2013.

The discussions gave rise to a key question; why does wildlife crime happen in the South East Asian Region despite the existence of legislation to curb it? Is the legislation too weak to prevent wildlife crime? Is it a problem with the lack of political will to implement the legislation? Is the weak enforcement of the law to blame for wildlife crime?

Wildlife crime is an environmental offence defined as "the illegal taking, disturbance, possession, trade or movement of animals and or their derivatives." It is a growing international problem that threatens the survival of many species. It is a big business. Much like the illicit drugs and arms trade, wildlife and animal parts are trafficked by dangerous international syndicates.

The number of wildlife crime in the form of Organized crime is on the high rise. The South Asian region has now become a gateway for such illicit trade between the east and the west. This is mainly attributed to factors such as the regions' rich bio-diversity, the geographical conveniences and the weaknesses in the legislations and enforcement mechanism.

Bhutan cannot take a back seat. In a society spiritually strong and culturally acquiescent we have an inordinate love and affection for all sentient beings. This includes animals as well as insects of any kind and principally we do not tolerate any harm on them. Killing or slaughter is considered a taboo here. Nevertheless, the meat of different animals is available in the market for consumption. The body parts of wild animals are used for many purposes ranging from the religious to decorative, like Cervid horns that can be seen placed above the entrance to many houses to drive away evil spirits. Similarly, the skull, horns and fur of rare species are found copiously hanging or decorating the walls and altar of monasteries, temples and homes.

Body parts of some of the animals are also considered very valuable in Bhutanese traditional medicine resulting in illegal poaching. The heart of a bear and the bile of musk deer are considered to be medicinally potent and fetch handsome returns. The list is countless.
Although, Bhutan does not have records showing illegal syndicates or illicit wildlife trade, it is a known fact that we share a small picture of a bigger pie in the region and so we have a stake in it. Unregulated and uncontrolled poaching or illegal trade of species will have serious ramifications to the developmental state of the country as well.

So what causes the wildlife crime? The first and the foremost reason is the demand. These portions of animal and plants are highly in demand in every part of the world. Almost all of the rare species of plants and animals have certain potent value that led to the skyrocketing elite demand. Yet, the bigger reason is certainly because of the impetus or the gaps in the protection mechanisms, which truly are corruption, toothless laws, weak judicial systems and light sentences.

For an incisive understanding of wildlife justice, the fundamental difference with other forms of crimes such as robbery, theft, arson, vandalism and the like should be acknowledged. Such crimes are criminalized because they inflict direct harm on people or property by creating uncertainty, diminishing confidence, and harming commerce and economic growth. However, these very reasons also apply to the criminalizing of acts against the natural resource systems; the fight against wildlife and forest crime is also aimed at ensuring sustainable use of our natural resource systems.

In the last four decades there were major developments in the international conventions and organizations that seek to protect the environment, natural resources, habitats, and the world's wild flora and fauna. This requires that the stakeholders engage in providing frameworks that directly or indirectly, regulate, control and limit international trade in wild flora and fauna. Such acts should be criminalized and not suppressed.

The evolution of CITES as a principal instrument to control and regulate international trade in protected species and to suppress any illegal dealings in wild flora and fauna has taken wildlife justice to a new era with its member increased to 175 in a short span of time (it formally came into force in 1975). Moreover the offences and international cooperation frameworks established by the United Nations Convention against Transnational Organized crime and the United Nations convention against Corruption enabled the criminalization, investigation and prosecution of those aspects of wildlife and forest offences that are linked to organized crime and corruption. At the same time the intervention from Non Profit organizations at international and national levels have also garnered attention for wildlife and animal justice.

Noting the spirit and the obligations arising out of the convention, member countries have enacted legislations reiterating the fundamental principles enshrined in the convention. We have Nature and Forest Conservation Act 1995 which was adopted three years after we ratified the CITES. Similarly, the Bio-diversity Act of Bhutan was adopted in 2003 in keeping with the decisions of the Conferences of the Parities. Most importantly the Constitution of the Kingdom of Bhutan 2008 imposes upon every citizen the fundamental duty to contribute to the conservation and protection of its natural environment and rich biodiversity.

However as is the case everywhere, laws are referred to as archaic and offences, compoundable. In other words, anyone apprehended for offences under these laws can merely pay fines and penalties and can walk free. Even if prosecuted for major violations they are entitled to bail and they need not have to worry about spending a single day behind bars. The various compensations prescribed are minimal as compared to the corresponding returns they get. On the flip side, the officials are conferred with wider discretionary powers to compound the offences and to assess the compensations and fines. These discretionary powers leave ample room for corruption and lapses within the enforcement mechanism.

Thus, it is important that wildlife and forest statutes, be it enacted or amended, should incorporate the mechanism of punishing the king-pins which also require an advance regulatory system. For the same end it is also recommended that the penalties imposed and restitutions made shall be commensurate with the offences committed, and make it non-bailable. It is indispensable to make the illegal trade in endangered species a very risky job. Important consideration shall also be given to human-wildlife conflict in order to balance the livelihood of the people living within the vicinity of wildlife zones. At the enforcement front, since most of these illegal trades

are operated beyond borders, information sharing and maintaining good terms amongst the counterparts is necessary which is now possible with the intervention of civil societies and the technologies in place.

Closer to these gaps are the gaps in the institutions that uphold the rule of law particularly the prosecutors and the courts. When these institutions lack sufficient knowledge on the wildlife and forest resources-problem it will be difficult for them to address the issues rightly and justly.

At the outset it is our moral duty to take care of our natural resources for the present and future generations. The best of the contributions from the mankind will be merely in the demand reduction in the commodity chain. The message that accompanies images of indiscriminate wild life consumption today is clearly 'when the buying stops the killing can too'.

INTELLECTUAL PROPERTY RIGHTS

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The World Intellectual Property Organization (WIPO) defines IPRs as follows:
"Intellectual Property shall include the rights relating to: literary, artistic and scientific works, inventions in all fields of human endeavour, scientific discoveries, industrial designs, trademarks, service marks, and commercial names and designations, protection against unfair competition, and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields."

Nature of Intellectual Property
Intellectual property of whatever species can be best described as an intangible property right. In each case it consists of a bundle of rights in relation to certain material object created by the owner. IPRs are the private rights. They are generally referred to as negative rights. IP is the fundamental right in some countries. It is protected by the Constitution. For instance, Article 7 (13) of the Constitution of Bhutan provides:
"Every person in Bhutan shall have the right to material interests resulting from any scientific, literary or artistic production of which he is the author or creator."
Further, the rights of the IP owners in Bhutan are being protected by the Copyright Act 2001 and the Industrial Property Act 2001.

What are the rights available to the IP owners?
Right holders of IP have the following rights:
Exclusive right to make use, exercise, sell or distribute;
Rights to assign and license; and
Right to surrender.
Types of Intellectual Property Rights: Intellectual property rights include rights on intellectual creations and trade signs.
a. Rights pertaining to intellectual creations:
Patent rights (invention);
Utility model rights (device);
Design rights (industrial designs);
Copyrights and neighboring rights (works);
Breeder's rights (new varieties of plants);
Layout-Designs (topographies) of Integrated Circuits rights (Semiconductor layout); and
Rights related to trade secrets.
b. Rights pertaining to trade signs:
Trademark rights (brand);
Service mark rights;
Trade name rights;
Trade dress (characteristics of the visual appearance of a product or its packaging (or even the design of a building);
Rights related to Unfair Competition; and
Rights related to Geographical Indications.
Patents, industrial designs, utility models, trademarks, service marks, trade names, geographical indications, and unfair competition used to be considered as different kinds of "industrial property rights."

Necessity to Protect Intellectual Property Rights
Intellectual property is becoming increasingly important for the present and future lives of people. Today, we live in this world of technology. Technological innovations as well as enhanced economic strength are indispensable for the growth of humankind and the development of industries. Technological novelties were conducive to the current affluence of our living and technological developments promoted the growth of the society. A great deal of funds, time and labour are required moreover, in order to develop these new technologies.

The fruits of intellectual creative activities are accumulated in the form of the common property of mankind and will enrich human lives for all time to come. If, however, new ideas and expressions made as a result of great efforts can easily be imitated, the incentive to be innovative will be lost. For this purpose, the intellectual property right system is designed to give protection to the right over a prescribed period of time for the benefit of the creator. The same has to be protected from infringement because intellectual property plays a crucial role in the development of industry, commerce and trade and in the growth of creative effort in almost every field of human endeavour. It also plays a key role in the transfer of technology. The strong protection system for intellectual property may attract foreign investment. For instance, if the foreign investors establish business in Bhutan, obviously they will employ our people and transfer technological know-how and should be used by us, which may in turn boost the economic growth of our country. It may also create employment opportunities.
Impact of IPR violation
Public Health and Safety Threat: For instance, fake pharmaceuticals with non-active or harmful ingredients can cause health and safety problems to consumers. Likewise, the counterfeit batteries and vehicle spare parts can lead to serious accidents and threaten people's life.
Organized Crimes: IPR infringement possibly finances organized crimes. It is considered to be easier business compared to other type of smuggling such as drugs or firearms.
Economic Development: The goods infringing IPR will retard economic development. The efforts of right holders will lose a chance to be rewarded. As a result, this will dishearten the IP owners to discover new innovations and creative activities.

It is, therefore, said that only human beings are capable of intellectual and creative activities, and the concept of "intellectual property" is designed to preserve these activities so that they can be widely utilized in society. Intellectual property is the most important key to making 21st century earth a better place to live and to allow everyone to lead a rich life.

The need to have justice for the Disadvantaged and the Disabled

Sangay Khandu,
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The constitution of Bhutan guarantees equal and effective protection of the law. However, considering inevitable circumstances, there are people who need special attention. These are the disadvantaged and disabled who are deprived of their rights to access to justice.

In Bhutan, both the privileged (intellectually and economically) and the disadvantaged live in perfect harmony. While most of the privileged live in cities and towns, the disadvantaged live in villages. People in far flung villages hardly know about the existence of laws and only those living in urban cities avail it.

Bhutan comprises people of diverse backgrounds inhabiting sparse scattered across its territory. The influence of geographical terrain, language diversity, heterogeneous culture and traditional lifestyle in the community are still a predominant impediment to access to justice. Economic impoverishment is another factor denying access to justice.

Disabilities can be of different types; the more pertinent ones being:
- intellectual disabilities;
- physical disabilities;
- sensory disabilities – such as hearing impairment, vision disability, speech degradation, ability to comprehend;

The disadvantaged are those who suffer the consequences of age, gender, geography, literacy and education, economic opportunities, health and hygiene and …..

The pertinent questions that arise when it comes to the access to justice for
the disadvantaged and disabled are:
- What are the difficulties encountered by them in getting easy access to justice?
- What role can the judiciary play in giving access to justice to them?

Access to justice
Access to justice is an essential element of the rule of law in a democracy. It is a fundamental right enshrined in the Constitution which states that:
"All persons are equal before the law and are entitled to equal and effective protection of the law and shall not be discriminated against on the grounds of race, sex, language, religion, politics or other status."

Similarly, Article 21 Section 18 states that, "Every person has the right to approach the courts in matters arising out of the Constitution or other laws."

Access to justice provides an opportunity to address and resolve people's needs. These needs may arise out of legal problems or other social, economic and cultural issues that create disputes.

Access to justice is much more than improving individual's access to courts or guaranteeing legal representation. It is about ensuring that legal and judicial outcomes are just and equitable.
Article 13 of the Human Rights Convention states that:
- Disabled people must have the same rights to go to court, take other people to court, act as witnesses and take part in what happens in courts as anyone else
- Disabled people must be given support to do this

which may include the provision of sign language

- There should be appropriate training for courts, police and prison staff to support this right.

The courts must treat disabled people fairly and render the best possible assistance to take part on an equal footing. It must arrange to provide information in advance so that they don't feel threatened and intimidated. Familiarization of the court and its premises is equally important so that they are not confused when the actual court proceedings take place.

People from far flung villages may not have visited the courts. They are unfamiliar with trials and proceedings. They find themselves procedurally disoriented. This kind of situational distress calls for assistance which can be rendered in terms of legal aid and services.

Barriers to access to justice

The Civil and Criminal Procedure Code, 2001, of Bhutan allows the litigants to institute a suit either by them or by a Jabmi (Lawyer) of their choosing.

However, disabled people are deprived of the privilege of this liberty. In Bhutan, there are presently a few legal firms. Disabled people cannot afford the lawyer's fees to either defend or assert their claims. In addition to this constraint, retired drangpons (Judges) cannot practice before any Court.

Consequently, there is inadequate legal-aid-service providers for disabled persons. Other barriers worth mentioning are that the courts are housed in the Dzongs (Fortress). Infrastructures in the Dzongs are not amenable for the disabled. The ambience around the Dzong can be viewed as hostile by new comers. Every court is flanked by security personnel. In some instances electronic gadgets like metal detectors are imbedded at the entrance to ensure safety. There are no ramps for physically disabled litigants. The ambience in-and-around the court premises is intimidating. Therefore, courts are generally less user-friendly.

The elderly people are accorded relatively less attention. They encounter numerous barriers while on their way to court. 'Ego' is one among many. Considering the Bhutanese mentality elderly people do not like being addressed as 'Wai Agay' (Hey! old man?) by security guards. The callous behavior of the court staffs further disheartening. These notable, yet, rectifiable attitudinal behavior, affects their right to justice. Even if they could appeal they have poor audibility. Visibility is another impediment to their right to information. They cannot access online information or read print media.

Geographical terrain and natural calamities are obstacles to people from access to courts. In Bhutan, not all remote communities and villages have road networks. People from such areas have to walk days to reach higher courts for an appeal. The illiterate can neither draft a complaint nor identify legal issues. They also fear of retribution.

The sensory disadvantaged are another section of people whose right to access to courts and information are notably deprived. The landmark judgments of the High Court and the Supreme Court are posted on the judiciary website. Hearing calendars are also posted on the website on a regular basis to keep track of their hearing schedule.

The process has been simplified for the convenience of all parties. Yet, the sensory disadvantaged are unable to access this information. For such people, taking legal services at their door step is futile. Consequently, they are unable to either assert or defend their legal rights. Although contemporary institutional infrastructure has been set up with adequate amenities, there is yet room for further improvement for the interest of the disabled. Thus, a fair and efficient system for providing justice to those disadvantaged people is crucial.