BHUTAN LAW REVIEW

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CONSENSUAL SEX

When consent becomes a crime

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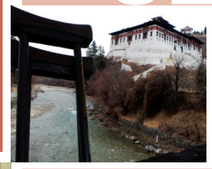
Content



1. Members of the Bhutanese judiciary attended a 16-day ex-country short-term training at the Judicial Training Institute (JTI) in Bangkok, Thailand.

2. A region-wise documentation of oral legal history was conducted to capture past legal practices within the nation prior to the establishment of the formal legal system. The target sources were religious personnel, retired officials and civil servants, retired armed forces personnel, former local leaders and village elders.

3. A 10-day Training of Trainers course was conducted by Prof. Melinda Jane Edwards and a core team from the BNLI and judiciary. The objective of the course which began on 10 March was to enhance the knowledge of trainers in imparting training to stakeholders and the general public.

4. The legal TV Series Zhidheyi Tsawa & Super Norbs was launched on the Bhutan Broadcasting Service on 28 March. The Series was designed to create awareness at understanding of the laws and challenges to the general public and the youth in particular.

5. A lecture series dedicated to the monarchs was held at all higher institutes and colleges within the nation. The lectures primarily focused on constitutionalism, rule of law, the making of laws, and administrative reforms. The objective of the lectures was to stimulate multiple perspectives on historical, ethical, moral, and broader societal issues.

6. Legal pamphlets were widely used as a dissemination tool and distributed across villages where legal dissemination projects were held. The legal pamphlets were published on 26 June.

7. A Symposium on Constitution and Human Rights was held in Paro on 26 June. The symposium focused on human rights and constitutionalism. The Justices of High Court and the Supreme Court attended the Symposium.

8. An institutional visit and short term training was held from 29 July to 8 August at the DJA, New Delhi, India. The Bhutanese team not only established institutional links but also received training on various legal topics.

9. A Rural Legal Dissemination Program was initiated to sensitize the rural people on existing laws and the new laws that have come into place. The Program helped people understand their rights, duties and obligations under different laws.

10. A two-day training on Management of Courts & Criminal Trial was held for Dungkhag judges at the Banquet Hall in Thimphu.

11. An ADR Mediation Training targeting elected female local leaders was held in Paro and Phuentsholing for GAOs, Mangmis & Tshogpas. The training aimed at reducing the number of cases in the court and reducing the wastage of time and resources of both the courts and litigants.

12. Supreme Court Justices, Police and BNLI Officials made an institutional visit to the Judicial Academy (JA), Singapore and officially established institutional linkages.

13. A Peer Mediation Workshops in Thimphu, Phuentsholing and Bumthang. The workshop trained people on resolving internal civil disputes amicably and inculcated the concept of peer mediation amongst youth.

14. A Training on Legal Draftings, Art of Pleading & Code of Conduct was held in Paro for Public Prosecutors and Private Practitioners.

15. Legal Officers from various agencies underwent a two week training on Child Justice with resource person Mr. Ghassan Khalil) in Paro from 9 October. The aim of the training was to create a pool of resource persons to train future trainers.

16. A three-day National Child Justice Conference was held in Thimphu from 13 November. The Conference drew a Road Map for Child Justice in Bhutan and got the commitments of all the stakeholders that work for children.

17. Moot Court for the PGDNL trainees was held in the Thimphu District Courts. The trainees presented their cases in real courtroom sittings, presided over by District judges.

Bhutan National Legal Institute Yearbook 2013

Annual Report

The Judiciary of the Kingdom of Bhutan, 2013

The publication of the judiciary Annual Report commenced from 1992. Together, with dedicated members of the Judiciary, we took giant steps in clearing the backlog cases, Human Resource Development, Information Technology, Dzongkha Usage and Infrastructural Development in 1991. Successive years have vindicated that commitment and we have triumphed over the adversities.

Firstly, major sweeping reforms under the command and guidance of His Majesty nullified the delays and cleared the backlog of cases. Secondly, the Judiciary has strategically invested in legally qualified Judges with LLM and Ph.D degrees without replacing the lay judges completely, sourcing the wisdom of the past. Thirdly, use of Information Technology is pervasive in the Judiciary and it has enabled the courts to eliminate the manual processes of cause list generation, preventing any manipulation by vested interests. Further, the use of data storage and retrieval system has facilitated statistical and quantitative methodology for comprehensive analysis. Fourthly, the Judiciary has always strived to promote Dzongkha in keeping with the national policy. Training in Dzongkha for the Drangpons and Bench clerks initiated in 1991 has finally culminated with the training in Situ-delchhen the highest form of Dzongkha grammar. Knowledge is always a blessing. Dzongkha grammar and spelling is important, it will invariably enhance the quality of the court's written decisions. The Judiciary's effort to promote Dzongkha is also aimed at preserving our spiritual heritage, culture and traditions. Progress and development of the Judiciary has always been grounded in tradition and modernity, keeping pace with the rapid socio-economic changes. Finally, infrastructural development has been implemented successfully. The construction of court buildings are an integral part of the structural reforms within the Judiciary. Eleven District Courts and Eleven sub-division courts are being constructed with generous assistance from our donors. The court building manifest physical separation of power affirming the principle of independence cardinalto the doctrine of equal protection enshrined under the Constitution. The court buildings will forever remain enduring symbols of friendship and generosity of our donors, united in our effort to elevate and secure justice.

The legal profession is the custodian of the sacred trust to uphold the rule of law. Its essence is the assurance that no one is above the law; that everyone is answerable to it; that corruption will not be tolerated; that every citizen should have the greatest equality of opportunity; and the ideals of our national pledge should be pursued by each citizen with dedicated personal effort relying on the strength of their abilities, and not on their race, language, region or religion.

Statistics:

As mentioned in the World Bank Report, "Statistics are effective when information on clearance rates and time to disposition is generated for each judge." The workload of the Courts in 2013 is as follows:

(1) 1,054 cases were brought forward from 2012.

(2) 19,653 new cases were registered.

(3) The highest numbers of cases were recorded in Thimphu, Phuentsholing and Paro with 6,791 cases, 1,317 cases and 1,095 cases respectively.

(4) 19,304 cases were decided. Out of which 12,857 cases were decided within 108 days.

(5) 305 cases were appealed to the High Court. Out of which 226 cases appealed to the Supreme Court, 44 cases were admitted.

(6) Out of 1,403 pending cases, 68 cases have been pending beyond one year. Comparative Statistics of 2012 and 2013

(7) There was an increase of 5,870 registered cases, an increase by 40.12%.

(8) The Courts rendered 19, 304 decisions, an increase by 0.44 %.

(9) There were 6,133 monetary cases followed by 4,696 matrimonial cases, excluding the application for marriage certificates. Thanks to the unremitting effort and the work of the Judges and Bench Clerks, I am happy to report that:

a) The rule of law provides to citizens equal and unhindered access to the justice system, to defend their rights and to contest law suits between private citizens and between private citizens and public institutions. Therefore, there were 32,080 Miscellaneous Matters registered in the Registry of Courts. Access to justice is vital in redressing the grievances of victims. Through unhindered access, victims would be comforted and the offenders be made accountable. It also acts as a deterrence to potential perpetrators;

> "Therefore, there were 32,080 Miscellaneous Matters registered in the Registry of Courts. Access to justice is vital in redressing the grievances of victims."

b) We remain in the comfortable situation of not having backlog of cases and adhering to clearing cases within ONE YEAR. We have only 68 cases that are pending beyond one year, despite the Judges being distracted by ongoing continuing legal education programs, official functions and occasional travel abroad to attend meetings, workshops, and seminars. Apart from the above reasons, the cases remained pending due to the time taken for forensic reports, parties not reporting to Court on time, party missing etc.

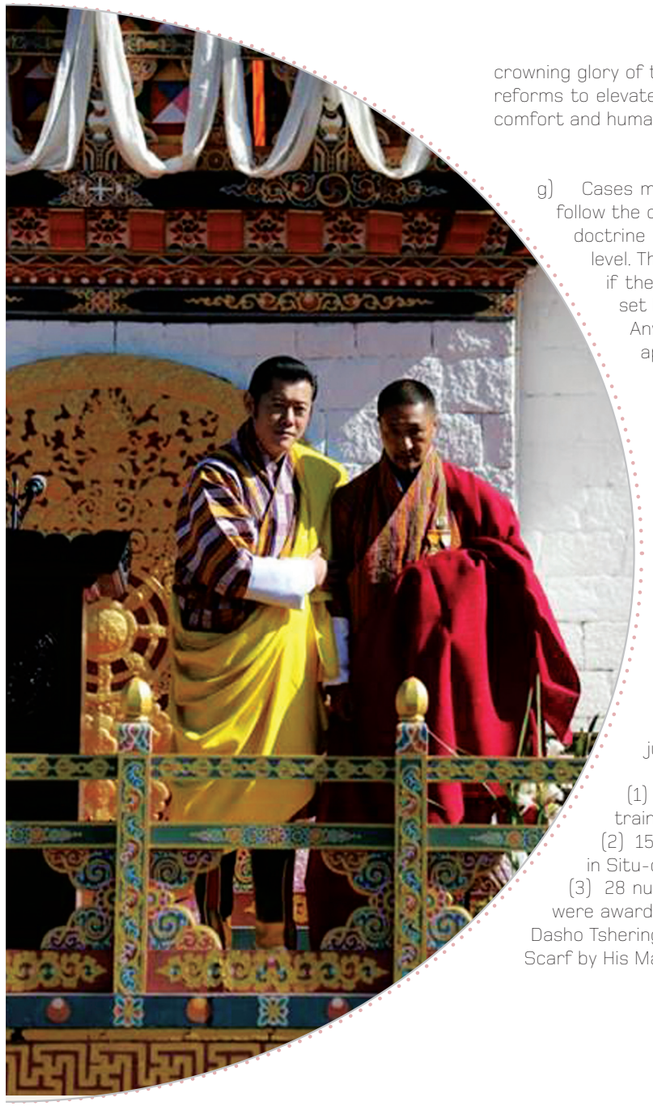
c) Appeals are disposed off timely, and judgments have become more learned. However, the appeal system may require further reforms. False ideas and vain expectations along with frivolous appeals should not be permitted to negate the legitimacy and efficacy of the appeal system. Excessive and indiscriminate access would invariably over burden the Supreme Court and High Court in due course of time. Especially, since the Justices sit en-banc to hear the appeals registered. The lead Justice allocated a case must read the case file in preparation for conducting a miscellaneous hearing. During the miscellaneous hearing the appellant makes an oral submission and proffers a written plaint, while the Justices seek clarifications through questioning. Thereafter, the lead Justice prepares a bench memorandum which is circulated to the Associate Justices. Then during the exclusive Justices Conference conducted every Monday and Thursday, a vote is taken whether to admit or dismiss an appeal;

> "We have only 68 cases that are pending beyond one year, despite the Judges being distracted by ongoing legal education programs, official functions and occasional travel abroad to attend meetings, workshops, and seminars."

d) Many law Universities were very helpful to provide admission and scholarships to our Judges for upgrading their education, skills, competence and professionalism, Swiss Judges and the Swiss Federal Administrative Court were exceptionally cooperative and forthcoming in their efforts to strengthen and support the Bhutanese Judiciary with Human Resource Development;

e) Construction of Dzongkhag Courts provides dignity to the litigants and provide conducive atmosphere for productive litigation and services to the people. We would like to express our deep appreciation to the Governments of India, Denmark, Austria, and Switzerland for their generous support. Legal institutions must spread throughout the country and be maintained on an ongoing basis, as law and justice is pervasive;

f) A few more Courts will be constructed with assistance from the Governments of India, Austria and Switzerland. We are looking forward to the unveiling of the iconic symbol of Indo-Bhutan cooperation, the Supreme Court complex. The magnificence of the Supreme Court supported by the Government of India will be unveiled, ushering in the



crowning glory of the majesty of law and implementation of comprehensive reforms to elevate justice. Its regal splendor, traditional elegance, modern comfort and human dignity;

g) Cases may be similar but never identical. The Bhutanese Courts follow the doctrine of stare decisis. However, it must be noted, that doctrine of precedence does not apply to courts at the same level. Therefore, the affected parties must move the High Court if there are any disparities in sentencing, and the precedent set by the appeal court is applicable to all the lower courts. Any move to review the sentencing structure must be approached with caution.

The sole objective of law is to "stamp out criminal proclivity". Punishment ought to fit the crime, however, in practice sentences are determined largely by mitigating and aggravating circumstances. His Majesty the Druk Gyalpo commented that Judges must apply their minds with rationality; otherwise computers will suffice, which may not render justice; and

h) Bhutan has reinstated the open air prison system. Parliament may therefore, consider revisiting the sentencing scheme. Amendments to the law are inevitable, but full scale amendment of the enlightened Penal Code may be detr mental to the overall administration of justice. Judiciary activities in 2013

(1) 299 Judges, Drangpon Rabjams, Bench Clerks were trained in Lekshey Nawai Dampa.
(2) 15 Judges, Drangpon Rabjams and Registrars were trained in Situ-delchhen.
(3) 28 number of Judicial personnel were awarded gold medal, 55 were awarded silver medal and 115 bronze medal were awarded and Dasho Tshering Wangchuk, Justice of Supreme Court was awarded Red Scarf by His Majesty the Druk Gyalpo on 17th December.

CONSENSUAL SEX : When consent becomes a crime

Sangay Chedup, Legal Officer,
Bhutan National Legal Institute

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 and 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 legal protection and that the welfare of its children and youth will be safeguarded and fostered.

The amended 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 highlights cases that create strong public opinion as to the fairness of these laws and their repercussion to 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 these issues remain 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, the penal code, one can argue that it does not address these issues.

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. This essentially takes on a dual function: protect minors from being taken advantage of sexually by adults, and helping to prevent teen pregnancies. The latter, however, may be a misguided attempt in light of additional research that shows these laws have little effect on issues such as teenage pregnancy.

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 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 Section 181 of the Penal Code.

However, the phrase **"whatever its nature"** seems necessary 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 increases the second degree felony to a 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.

> "The phrase "whatever its nature" seems necessary 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."

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 indicates 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 nonetheless 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 in the Penal Code (Amendment) Act of Bhutan 2011 denies the requirement of consent.

> 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.

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 tryst.

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 the country predominantly 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 is the states responsibility to protect young women because they were inherently weaker 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. Legislature presumes 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. Buddhism believes that indulgence in sexual activity for pleasure is not evil, but attachment to sexual pleasure is evil, wicked or sinful.

(iii) Prevent teen pregnancy

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 for both genders. These are measures to reduce teen pregnancy, and associated complications during child delivery.

(iv) Reduce welfare dependency

Welfare dependency is related to teenage pregnancy. Like America and the 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.

> 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.

DOES STATUTORY RAPE LAW WORK?

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 in enforcing morality has proven ineffective.

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, 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, does sex crime remain a menace to society.

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. 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, 0.5% has already had a live birth before the age of 15, 2.5% are pregnant with their first child, thus summing up to 11% having begun childbearing. 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.

These numbers are tellinjg of the detterence that the statutory rape laws provide in preventing or reducing teen pregnancy. As the young population multiplies, these figures may escalate phenomenally over a period of time.

> A key rationale for the statutory rape law is to prevent teenage pregnancy thereby ultimately reducing welfare dependency.

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 and engage in sex. According to the Bhutan Media Indicator Survey (BMIS) 2010, 4% of never-married women aged 15-24 had sex. Of all women 15-24 years old, 3.7% 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.

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 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 states 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 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 jurisdictions 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.

The law must incorporate the age of consent.

Minimum age limit

While considering the minimum age limit it is critical for Bhutanese legislators to study and draw from the best practices of other jurisdictions.

Given the fact that law is dynamic and not static, statutory rape provisions can find room to pre-emt and deter in principle, and in practice through considered study of statistics and realities.

> 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.

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. Experts define "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 vital for the schools and institutions to incorporate sex education.

Although Bhutan has initiated School Health Programmes in 1984 with WHO assistance, activities were primarily limited to de-worming and health education on multiple 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 are 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, children in conflict with law is an increasing phenomena. Many school children are accused and victimized of their own willful conduct, and often because of the ignorance of the law.

RIGHT TO INFORMATION (RTI)

Bhutan and Australia: a comparative analysis

Nima Dorji, Legal Officer,
Bhutan National Legal Institute

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.' In Australia it is 'the Freedom of Information Act 1982 (Cth). In the Bhutanese context it is a positive right, meaning the government is duty-bound to ensure 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 are 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 nature of this right, both the scope and purpose of protection will also be different. It is important 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 to 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 other 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. In Australia 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 decision-making processes and in the 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.

Bhutan is still a young democracy just as its judiciary. The judiciary was called upon to consider the validity of a legislation in The Government of Bhutan v the Opposition Party. Though the Supreme Court of Bhutan did not develop step-wise validity tests, the judgement 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 Constitution must be read in its entirety. 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.

"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 land."

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 many 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 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 wide in size, 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 compli-

"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."

ance 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 to the 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 to pass judgment into effect between the contending parties. In other 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'.

Photo: Bhutan Observer

Does the Ministry in Bhutan and 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 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 attribute indicates that the Ministry's decision was intended to be binding and conclusive, thereby, fulfilling 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 this judicial power.

The only possible defense of 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 to decide on Constitutional 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), and 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. That is to say, the validity of the Bill if enacted can be challenged on the grounds discussed. 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. This assumes 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.

"A 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"

MARRIAGES

Is Bhutanese Marriage Driven by Custom or Law?

Drangpon Tharchean,
Bhutan National Legal Institute.

Marriage as an integral institution of society existed since time immemorial. 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.

Marriages as such, by the law of nature and customary practices, is the union of two people who have entered into a marital relationship, with the objective to lead a family life.

The forms of marriage, and ways of legal recognition, and processes of formalization differ across cultures, and its customary practices have evolved over time.

In '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 in some cases, and if the boy moved into the girl's house. To an extent this system still exists though awareness of the law and its impact have made some difference.

While it may be different in other communities, in my village, Digala, in the absence of a formal marriage ceremony and ritual, the process of solemnization of a marriage was very simple. Essentially, it was done with the objective to make the community know the union of the two spouses as couple. In some cases, the bride's parents visit the groom's house and propose the formalization of the partnership of their children. The parents and relatives of both the parties assemble together at the girl's house to observe some kind of ceremony over which the marriage will be solemnized. During this time, both the parties will be present in person, and just at the function from both the sides and others will be served with ara and bangchhang-locally made drinks. In return, they offer their prayers, and some money to the couple and wish the couple a prosperous, healthy, and live long life. As is the practice, the husband, for most of the time, lives in the wife's house and seldom visits his parents. However, during the sowing and harvest seasons, the couple helps both their families.

To an extent, this system still exists, though awareness of the law, and its impact have made some difference.

The Marriage Act of 1980 does not prescribe a particular way of marriage to take place before a couple is legally recognized. It provides that a boy and a girl who has attained the age of 18 years, on their free will can contract a marriage. However, the types of marriages barred by the Act include under-age, 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 Certificate. Irrespective of the duration of cohabitation, the couple is considered legally wedded from the day of issuance of the Marriage Certificate by the Courts. The marriage certificate is thus the conclusive proof of the marriage of a couple, and is valid under law.

Hence a couple cannot mediate matrimonial disputes out of court, unless it was 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. 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 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. 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 of society, there is need to actually assess and aim to ensure that the new laws and the amendments in the existing laws will address the emerging issues and changing customary practices and societal values in the country.

While the customary practices and values are volatile, through legislative enactments, such practices and values that serve the need of the progressing society like ours can be preserved and promoted for the benefit of the future generations. This idea is not the first of its kind. The Marriage Act of 1980 has acknowledged the marriage contracted as per the customary practices of the partners and codified it. Codification of customary practices also helps in harmonizing the different practices that exist in different communities and they do not operate parallel to the law. Because ultimately, the law will prevail over all other things, as it is the collective will of the Bhutanese people that will govern and regulate the conduct of every citizen of this country.

Therefore, under the Act, 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 now is a 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 and rearing of children is an important aspect of human civilization. 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.

"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."

LEGAL Jokes

A plaintiff stands in front of the judge. As required, his Kabni is down, held by both hands. His head is bent, his eyes on the floor. On being questioned by the judge he says, ' your honour, I have the evidence but not the hands to produce it.'

The judge is furious with the plaintiff for his conduct during the hearing. In a final ultimatum, he shouts, 'I could charge you with contempt and throw the whole book at you, but on second thought it could prove fatal given the number of Acts and amendments we have in the book.'

One day in Contract Law class, the professor asked one of his better students, "Now if you were to give someone an orange, how would you go about it?"
The student replied, "Here's an orange."
The professor was livid. "No! No! Think like a lawyer!"
The student then recited, "Okay, I'd tell him, 'I hereby give and convey to you all and singular, my estate and interests, rights, claim, title, claim and advantages of and in, said orange, together with all its rind, juice, pulp, and seeds, and all rights and advantages with full power to bite, cut, freeze and otherwise eat, the same, or give the same away with and without the pulp, juice, rind and seeds, anything herein before or hereinafter or in any deed, or deeds, instruments of whatever nature or kind whatsoever to the contrary in anywise notwithstanding..."

The lawyer says, "I have good and bad news" to his client. Excited client says, "give me the bad news first, I think I can handle it". The Lawyer says without hesitation, "Your blood matches the DNA found at the murder scene."
"Dammit!" cries the client. "What's the good news?"
"Well," the lawyer says, "Your cholesterol is down to 140."

A dog ran into a butcher shop and grabbed a roast off the counter. Fortunately, the butcher recognized the dog as belonging to a neighbor of his. The neighbor happened to be a lawyer.
Incensed at the theft, the butcher called up his neighbor and said, "Hey, if your dog stole a roast from my butcher shop, would you be liable for the cost of the meat?"
The lawyer replied, "Of course, how much was the roast?" Nu.100." said the butcher. A few days later the butcher received a check in the mail for Nu.100. Attached to it was an invoice that read: Legal Consultation Service: Nu.500

In the theft case
Judge: " Sit down, and see you will get justice".
Victim: "But your Honour, it is not justice, I want, I want my money".

Assessing Speed in an accident Case
Judge: What gear were you in at the moment of the impact?
Accused: Pangtsi Gho and black shoes

A man went to his lawyer and said, "I would like to make a will but I don't know exactly how to go about it." The lawyer said, "No problem, leave it all to me."
The man looked somewhat upset and said, "Well, I knew you were going to take the biggest slice, but I would like to leave a little to my children too!"

THE VALIDITY OF AN AGREEMENT :

Laws that govern an everyday undertaking

Justice Lungten Dubgyur,
High Court, Royal Court of Justice

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 constitutes an 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:

"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."

(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."

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' and 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.

"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 only the concerned parties are 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. 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."

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 Parliament and came into force on 14 March, 2013. The Act consolidates, codifies practices and regulates contracts and performances to ensure compliance, (in other words performance) and ensures 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.

"A party can raise an "objection to the validity" of the agreement. This means that only the concerned parties are permitted to raise objection and prove its validity."

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.

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* (what one has earned).

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 room for judges which otherwise are impeded through independent approaches of common law or civil law jurisdiction to contractual interpretation.

In the modern 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 commercial norms. The exponential growth in trade and development compounds capital market flow and an array of new investment ventures. This demands a legal environment that is conducive to business guarantees. As Bhutan ventures into the complexity of transnational jurisdictions, lawyers and the courts may not easily 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 system must be prepared to resolve commercial disputes of an international nature in court and also before international arbitration tribunals with skills available to interpret domestic, foreign or international laws.

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.

RIGHT TO LEGAL COUNSEL/JABMI:

A BHUTANESE PERSPECTIVE

Chimi Dorji, Registrar,
District Court, Thimphu

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,' - The 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.

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; it is clearly depicted in Karma Lingpa's fourteen Century text, introduced in the form of Raksha Mangcham. In the Raksha Mangcham, Lha Karpo is the defense counsel and Due Nagpo, the prosecutor.

The right to legal counsel is not clear under the Thrimzhung Chhenmo but 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 term Jabmi is not 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 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.

A 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.

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 are 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.

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 a must. There cannot be justice without a fair trial and there cannot be a fair trial without the right to legal counsel.

"In Bhutan, the right to legal counsel is not new; it is clearly depicted in Karma Lingpa's fourteen Century text, introduced in the form of Raksha Mangcham."

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.

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 the 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

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. 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, primarily in the capital, Thimphu, hiring a legal counsel can be expensive for the client located in other districts.

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 justice will not serve the poor and the disadvantaged.

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. Most often, the reason for people waiving the right of legal counsel is not because they are incompetent but because of their inability to afford legal counsel.

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 Opposition Party vs. the Government it was held that the opposition party cannot avail legal aid services from the government, and only persons unable to bear the costs for a trial can get 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 as there are so many clear provisions that guarantees right to legal counsel and other rights associated with right to legal counsel. The 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 at the moment but this is 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.

To ensure equal access to justice the government should establish legal aid centers with clearly defined standards and encourage legal counsels and law firms to provide pro bono legal services to the needy.

Quotes

> Add experience to capability and it's a complete package
>
> **Sangay Khandu, National Council**

> Such plans, like the economic stimulus plan should be the first and the last of its kind henceforth
>
> **Tashi Wangyal, Eminent Member of the National Council of Bhutan**

> If we continue with the ban of tobacco, Bhutan can one day do away with smoking from society
>
> **Merak gup, Gaydhen**

> Providing equal chance to people with different experience levels will not harm the democracy but there will be a natural composition of both young and old
>
> **A teacher and an aspiring lawmaker- Rinchen**

> It isn't just the continuity of composition of the house, but also continuity of experience, memory and knowledge
>
> **Dasho Sonam Kinga, Chairperson of the National Council of Bhutan**

> RTI is for the welfare of the citizens and also hold the government on account, especially the elected government , for transparency and effectiveness
>
> **Lyonchen Tshering Tobgay**

> RTI is not about hunting down bureaucrats or politicians but service delivery
>
> **Tenzin Lamzang, Editor-in-Chief of The Bhutanese**

> It would be really sad if there's a candidate people think is really capable but do not have ten years experience
>
> **Pema Tenzin, Member of the National Council of Bhutan**

PLEA BARGAINING

Dungay Tshering,
Registrar, District Court, Thimphu

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 a lesser charge in return for reduction in sentence. It is a pre-trial negotiation between the accused and 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 a binding contract between the prosecution and the defendant.

The object of plea bargaining is to reduce the risk of undesirable orders for either side. Another reason 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 spent on advocates. It always takes more time and effort to bring a case to trial than to negotiate and handle a plea-bargain.

Some of the salient features of plea bargaining are that it is applicable in respect of those offenses 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 committed against a woman or a child below the age of 14-years. Once the court passes an order in the case of plea bargaining, no appeal can be raised against that order.

The concept of plea bargaining originated in United States of America and 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 99% of cases are resolved through plea bargaining.

In Bhutan, the concept of plea bargaining found favour in courts only in the recent past. It was only in 2001, the concept found its place in the Bhutanese Legal System with an adoption of the Civil and Criminal Procedure Code of Bhutan, 2001.

PLEA BARGAINING UNDER SECTION 197 OF THE CIVIL AND CRIMINAL 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 follows:

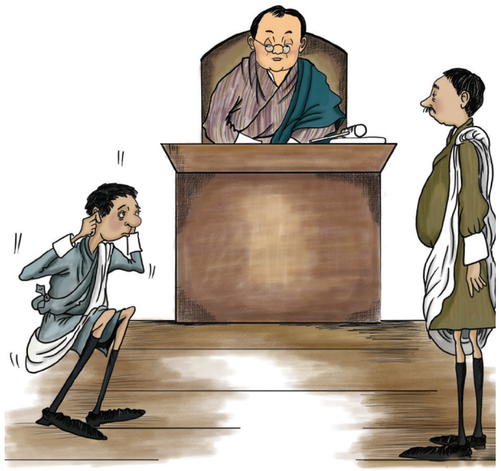
> 197. With agreement to provide information to the prosecution and in lieu of a full criminal trial, a suspect may choose to plead guilty to an offence lesser than the offence charged and be sentenced accordingly.
>
> 197.1.The prosecution may consider a plea bargain in exchange of evidence deemed critical 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.

"Thus, in Bhutan's legal setup, the defense need not necessarily plead guilty to lesser charge or few charges in lieu of reduction in sentence or dismissal of other charges."

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 contract of plea bargaining between the prosecution and the defense, 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, it 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 Bhutan's legal setup, the defense 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 the 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 offenses 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.

PROS AND CONS OF PLEA BARGAINING

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.

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 offenses 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.

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 as the touchstone of fundamental rights rests on the premise that it jeopardises fundamental rights of an individual which is otherwise celebrated as upholding the dignity of an individual. Therefore, the implementation of plea bargaining in Bhutan should be discouraged.

CONCLUSION

Plea bargaining as we see is often used as a judicial machinery to speed up adjudication and save public money. In doing so, an individual's right is seemingly forgone for a speedy trial. The jurisprudential analysis points to how an individual's right 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 the key upholder of an individual's dignity and respect, and existence needs extreme protection. 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. 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.

The evaluation of plea bargaining as the touchstone of fundamental rights rests on the premise that it jeopardises fundamental rights of an individual which is otherwise celebrated as upholding the dignity of an individual.

RULE OF LAW :
For the benefit of the people

Karma Rinzin, Senior Attorney,
Office of the Attorney General

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.

What is rule of law?

Let us analyze and simplify the statement beginning with its main component word, "rule".
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.

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 limits set by law for the greater good and in the interest of the 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 the general public is the source of law, this source is what gives power to the government.

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 human nature, the rule of law is the remedy against its vagaries. 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.

“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.”

TREATY LAW AND PRACTICE UNDER THE CONSTITUTION:

Problems and Perspectives

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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 (Iyer, Constitutional Miscellany 2003)

Over the last century, one of the greatest legal phenomena is the unprecedented growth in the premise of international law. Interconnectedness of countries today 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 its fair share of laws. 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 in assessing 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 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 by 2013, the number of countries with whom Bhutan established formal diplomatic ties increased to 52.

The entry by the Government into treaties and diplomatic relations, especially with some countries, without wider consultation and even contrary to popular opposition, was criticized both within and outside the country.

Treaties com with conditions. Unless their legal and political implications are given importance, the practice can be vague, vagarious and liable to be abused.

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 law relating to the relationship of international and municipal law is contained in Article 10 (25) of the Constitution of Bhutan 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

"Interconnectedness of countries today has had tremendous impact on national legal systems, leading to international law acquiring a significant space in most national Constitutions around the world."

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 treaties, 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?

One basic conclusion is that there are sound policy reasons for a young democratic nation like Bhutan to avoid direct application of treaties. It is argued that it will serve the country well for the Executive, Parliament and the Judiciary to interpret the constitutional provisions through the dualist lens. The approach and conclusion of this paper may be controversial to those who argue that there is a global trend toward monism or that there is an international obligation to apply treaties directly. The conclusion has been reached because of our lack of understanding and ambiguity in treaty law and practice, the experience and public criticism of the previous Government's foreign policy, and democracy being in its nascent stage in Bhutan.

“It is argued that it will serve the country well for the Executive, Parliament and the Judiciary to interpret the constitutional provisions through the dualist lens.”

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 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 in 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. (George Slyz, 28 N.Y.U. J. Int'l L. & Pol.1996).

The monist theory supposes that international law and national law are simply two components of a single body of knowledge called law. (Ian Brownlie, Principles of Public International Law 2003). 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. (Louis Henkin, 100 Harv. L. Rev. 1987). 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. (Brownlie 32–33). 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. (John H. Jackson, 86 Am. J. Int'l L. 1992). 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.

“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.”

Arguments Favoring Monism

Giving direct application to treaties increases the importance and effectiveness of international law. (Henkin, 82 Mich.L.Rev.1984). 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. (Alexander Somek, 18 Eur. J. Int'l L. 2007).

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. (Friedlander, 18 Case W. Res. J. Intl 1986).

"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."

Conclusion

The approach a state adopts for the application of international instruments, particularly the multilateral treaties concerning trade, investments, agriculture and services have pervasive and significant implications for the country's sovereignty, its political and legal system, its economy and on the individual rights of the citizens. It is important that both treaty law and practice must be clear, unambiguous and dovetailed to meet the needs and challenges of that country.

As pointed out, the treaty law of Bhutan as contained in Article 1 (10) and Article 10 (25) of the Constitution of Bhutan is murky and open to three conflicting interpretations. Although Article 9 (25) impose a duty on the State to foster respect for international law and treaty obligations, the provision falls within the realm of Principles of State Policy that are non-justiciable in character. The treaty practice of the Government and Parliament has only added confusion to the incongruity. For some treaties, Parliament has enacted legislations incorporating the provisions of the treaties, while for others Parliament has only passed resolutions ratifying the treaties, thereby making it the law of the land. The Government has also signed treaties without consulting or without taking into confidence either the Parliament or the public. The National Assembly has given more importance to the Ministerial signatory and ratified treaties without any deliberation in the House. Therefore, there is an urgent need to democratize the process of treaty making to ensure accountability and transparency.

TO REPRESENT IS TO BE

responsible to the people

Nima Dorji, Legal Officer,
Bhutan National Legal Institute

"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.

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.

> 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?

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 labeled 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 requirement 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.

“GETTING IT RIGHT FOR EVERY CHILD,”

the Scottish way

Fiona Swift,
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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 centered 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 child 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.

> 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.

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 families.

> 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.

LEGAL PROVISIONS TO IMPLEMENT CLIMATE CHANGE

Requirements in Bhutan

Honourable Ritu Raj Chhetri,
Member of Parliament of Bhutan

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 gases.

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 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.

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.

"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."

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, at least 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.

FREQUENTLY Asked Legal Questions

Justice Sangay Khandu
Chief Justice of High Court

In a legal case, is there a time frame set for the conclusion of the case as this causes great inconvenience to litigators? For a trial is it mandatory to go through the procedural court?

Procedural requirement in the court of law is an integral part of rule of law in Bhutan. Legal Process is a mandatory requirement in the court of law and if the procedural requirements are not fulfilled, it deprives the parties from exercising their procedural rights. No trial can commence without adhering to the procedural requirements as set out in the law.

Presently all cases are done in Dzongkha. Given that less and less people are fluent in Dzongkha, can this be sustained in the long term? Are there any future plans to develop the language in the context of the law?

Dzongkha is the National Language of Bhutan. In pursuant to promote Dzongkha as the medium of language in the country, the Royal Court of Justice has adopted Dzongkha as the language of the Court. In this line, Dzongkha is used widely in the courts and they are well adapted to it. As a matter of practice in any policy matters, even if the audiences are non Dzongkha speaking, Dzongkha is used as an introductory note, whereon English is used. The Constitution of Bhutan gives Dzongkha as the authoritative text for interpretation should any difference arise between English and Dzongkha. And there cannot be a question of Dzongkha being unsustainable in the future. For the benefit of the parties to the case, aside Dzongkha, English is also used as a medium of language in the Court of Law.

While a marriage certificate is mandatory in Bhutan, it can be obtained at any time after the marriage. Would it not be simpler to make people get the certificate at the time of marriage?

All marriages takes place at their own homes and places of their choice. The Court of law cannot handle the Marriage Certificates to every couple who are married unless they approach the Court of Law asking for the same. If the couple report to the court of law asking for a Marriage Certificate to be granted, the court, beside enabling easy access, grants them the Certificate in a short span of time.

There was a time when people offered legal services by people working in the courts as in applications, legal advice outside the court premises. Why has this been stopped?

The Court of law does not have any say on the legal advice that any people may give outside the Court premises. Within the premise of the courts, the judicial decorum does not allow people working in the court to give any legal advice in the case. Legal advice by other personnel, who comes with the clients, in their support are not stopped. In the contrast, it has been rather enhanced for the benefit of the people who access justice.

There are instances when it is clear to all that a person has committed a crime. However, he or she is not guilty because of the lack of evidence. What measures are there to ensure that justice is served in such a situation?

Answer: Justice is based on evidence. Justice cannot be based on premises of the judges. The Burden of proof lies with the parties. Innocents are never punished and the defendants get the benefit of doubt.

In a situation when a person defaults on a loan but has no means whatsoever to repay it, what is the standard legal approach towards the person?

If the person is bankrupt, he has to file a case of bankruptcy through a petition. If the case is found to be genuine, the due process of the law are followed and exhausted before he gets the benefit of the law.

WILDLIFE JUSTICE:

The plaintive call of the wild

Sangay,
Attorney, 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 for these crimes.

This was highlighted as 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 with compassion and love for all sentient beings. Killing or slaughter is considered taboo. 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.

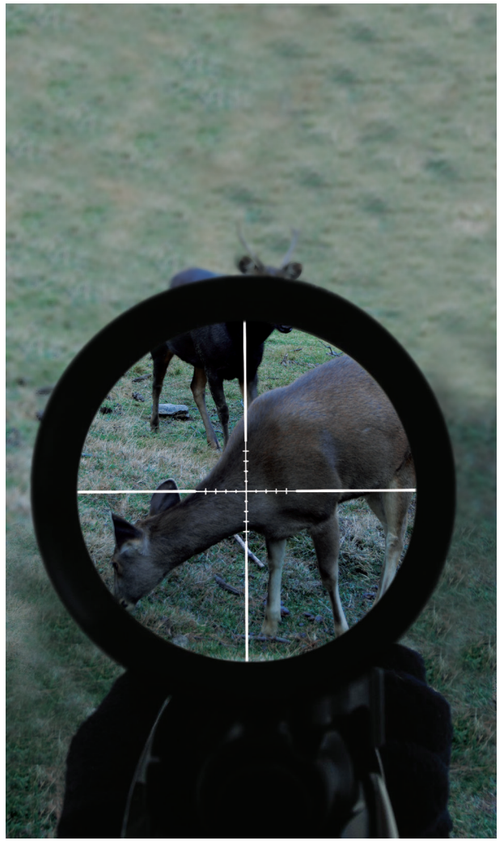
Body parts of some of the animals are also considered very valuable in Bhutanese traditional medicine resulting in illegal poaching. The bile of a bear and of musk deer are considered to be medicinally potent and fetch handsome returns.

Although, Bhutan does not have records showing illegal syndicates or illicit wildlife trade, it is a known fact that we share a small piece 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 country as well.

So what causes wildlife crime? The first and the foremost reason is 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 steady demand. Yet, the bigger reason being the gaps in the protection mechanisms, such as 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 resources.

In the last four decades there have been major developments in 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 wildlife, 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 offenses 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 offenses 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 the 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 offenses, compoundable. In other words, anyone apprehended for offenses 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 offenses 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 punishment and an advanced regulatory system. For the same end it is also recommended that the penalties imposed and restitutions made shall be commensurate with the offenses committed, and make it non-bailable. It is indispensable to make the illegal trade in endangered species a very risky job.

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.

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-problems it will be difficult for them to address the issues rightly.

At the outset it is our moral duty to take care of our natural resources for the present and future generations. The message that accompanies images of indiscriminate wild life consumption today is clearly 'when the buying stops the killing can too'.

THE NEED FOR ACCESS TO JUSTICE

for the Disadvantaged

Sangay Khandu,
Acting Chief Justice, High Court, Royal Court of Justice

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 settlements 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 being another.

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

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 in providing information.

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 ambiance 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 embedded at the entrance to ensure safety. There are no ramps for physically disabled litigants. The ambiance 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. 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.

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

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.

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.

BAIL AND NOT JAIL,
if you please

Tshokey Dorji, Legal Officer,
Bhutan National Legal Institute

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 condi tion, 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;
(b) an offence of or above felony of the second degree Section 199.8A
(a) gives blanket discre tionary 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 offenses can be categorized as offenses against the security and sovereignty of the country.

> People are of the view that if it is during the preliminary hearing, then the liberty of the person is taken from the date of arrest till the preliminary hearing.

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 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.

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.

A GLIMPSE AT INTELLECTUAL PROPERTY

Scenario in Bhutan and its Challenges

Drangpon Pema Needup,
Punakha District Court

Bhutan is still new to the concept of intellectual property rights and faces huge challenges in fostering a culture of intellectual property (IP) rights. This is because of the lack of public awareness despite the Intellectual Property Division (IPD) conducting various trainings, seminars and workshops.

Bhutan's Policies of Intellectual Property

Bhutan's intellectual property policy aims to establish a comprehensive well-balanced and effective system for the protection and enforcement of intellectual property rights thereby stimulating social, cultural, technological and economic growth. The main thrust of the government to achieve the effective protection and promotion of intellectual property is detailed as:

Further, Article 7(13) of the Constitution of Bhutan guarantees to every person the fundamental right to material interests resulting from any scientific, literary or artistic production of which he is the author or creator. This right is available to both citizens and non-citizens.

Establishment of IPD

The government established the Intellectual Property Division (IPD) in 1997 under the erstwhile Ministry of Trade and Industry (now the Ministry of Economic Affairs).

National Legislations concerning the Enforcement of IP Rights

Internationally, Bhutan is a member of the World Intellectual Property Organization (WIPO) Convention and a signatory to the Paris Convention, the Berne Convention, the Madrid Agreement, and the Protocol to the Madrid Agreement.
The rights to the national protection of intellectual property are stipulated in the *Industrial Property Act of the Kingdom of Bhutan, 2001,* and the *Copyright Act of the Kingdom of Bhutan, 2001.*

The Industrial Property Act provides protection of patents, industrial designs, trademarks, collective marks, trade names and acts of unfair competition.

> Inadequate system of protection for indigenous knowledge, expertise, arts and crafts is a grave challenge. The awareness of the importance, and the need for finding appropriate means of protection is being increasingly felt.

Under the ***Copyright Act***, original works under protection include literary, dramatic, musical, artistic and photographic works, audiovisual works, computer programmes, databases, sound recordings, performances of artistic and programmes of broadcasting organizations. The Copyright Voluntary and Deposit Registration System were launched in Thimphu on December 18, 2008.

Challenges

- Intellectual property plays an important role in the sustainable development of Bhutan. Strengthening IP related industries will provide a steady income and contribute to the economic wealth of the country. However, the success will depend on the effectiveness of the IP protection system.
- Copyright piracy is a big problem and the copyright laws lack proper enforcement policies.
- Lack of awareness on the part of the right holders of the intellectual property as to what constitutes IP and which rights are to be protected from infringement.
- Inadequate system of protection for indigenous knowledge, expertise, arts and crafts is a grave challenge. The awareness of the importance, and the need for finding appropriate means of protection is being increasingly felt.
- Lack of protection for our rich traditional textile designs and patterns from the onslaught of machine-made fabrics is a major challenge. This not only dilutes the intrinsic values of our textile designs but is inevitably shifting the local weaving practice which is mostly prevalent among women in villages.
- Inadequate protection for performing arts (e.g. folk tales, folk songs, instrumental music, mask dances and festivals) poses another challenge.
- Other forms of literary piracy are mass photocopying of books and journals for educational institutions, huge reprinting of text and educational books and unauthorized translations and adaptations.
- The music industry faces a huge problem of piracy in the country. With advent of Compatible Dics (CDs) and other gadgets, sound recording piracy has become even more common.
- Another challenge is that a performer's right is violated by recording and broadcasting without the author's knowledge.
- The film industry has also suffered largely because of video piracy. Unauthorized reproductions of cinematographic works take place through video and cable distribution.
- Computer software is pirated by simply copying on desktop computers and personal laptops without express consent from the right holders.
- Internet and mobile piracy is another serious issue. Material is freely uploaded and downloaded and shared with peers via internet.

Conclusion

The importance of IP in Bhutan is strongly embedded in the Buddhist philosophical principle that "*Do not take or steal what does not belong to you.*" As Thomas Moriaty once said, "*Laws not enforced cease to be laws, and rights not defended may wither away.*" Therefore, merely having legislations in place would not be effective unless IPD and the relevant stakeholders are truly committed to protect the rights of the owners of IP and strictly enforce IP laws.

LANDMARK Supreme Court Cases

The Government of Bhutan Vs. Opposition Party

The first Opposition Party, People's Democratic Party (PDP) filed a writ petition in the High Court seeking the constitutional validity of the revision of vehicle tax by the elected government, Druk Phunsuem Tshogpa (DPT). The petitioner alleged that the revision of tax rates violates Article 14(1) of the Constitution which provides that "taxes, fees and other forms of levies shall not be imposed or altered except by law".

The Constitutional Bench of the High Court held that the Government shall "approve" the fixation and revision of sales tax, customs duty and excise duty on any range of commodities as per the Sales Tax Act, and further submitted to the National Assembly the authorization of Parliament as per the provision of the Public Finance Act, and Article 13 of the Constitution in the form of a Bill. The judgment stated that the raising of revenue and introducing taxation measures merely along with the budget violates the constitutional mandate of introducing it as a Bill. The Court also ruled that "except by law" as enshrined in Article 14(1) of the Constitution, no taxes, fees and levies shall be imposed or altered except as provided by the "existing laws" or based on the new laws.

Aggrieved by this, the matter reached to the Constitutional Bench of the Supreme Court. Upholding the High Court Judgment, the Supreme Court stated that taxes can be imposed or altered only by the Parliament except under the authority of the law, and that all taxes are to be imposed by statutes, and that no one can be forced to pay a single ngultrum by way of taxation which cannot be shown to the satisfaction of the Court to be due or altered under an Act of Parliament as provided under Article 14(1) of the Constitution. The requirement of raising taxes or alteration except by law implies that it must follow the normal bill passing process and hence, will become applicable as law only after grant of Royal Assent. The Court held that the raising of taxes by merely incorporating it in the budget report being presented to and deemed adopted by the National Assembly alone without completing the normal legislative process is inconsistent with constitutional requirements and the democratic system of governance. Tax authority has been vested in Parliament to ensure adequate checks and balances, avoid arbitrariness, limit discretion, and to ensure compliance with due process in a democratic system of governance.

Mr. Sangay Gyaltshen Vs Office of the Attorney General

Brief facts of the Case:
Sangay Gyeltshen, the Head of the Mining Division, Department of Geology and Mines, with the purpose to defraud the government applied for the lower Saureni Talc mine misrepresenting his uncle Rinzin Wangchuk without his knowledge. In the case stated, he was charged for various offenses ranging from forgery, bribery, illegal misrepresentation, deceptive practice, tampering with public records, official misconduct, false declaration of assets, unjust enrichment and other offenses under the Penal Code of Bhutan. The defendant appealed to the Supreme Court of Bhutan. The trial court of First Instance had discharged the appellant on two counts of official misconduct and the charge of tampering with the public records. However, the High Court re-adjudicated the case on its own motion. The appellant moved the court to decide the case as it was adjudicate to the case in the Trial Court of first Instance. In the High Court, the appellant was discharged on the counts of forgery and other charges. However, the High Court charged the appellant on the various charges that were upheld by the Trial Court of First Instance. The Appellant, aggrieved by the charges, appealed to the Supreme Court for a thorough deliberation on both the issues on facts and law on various grounds stating that he was unjustly and wrongfully convicted.

Judgment:
On careful examinations of the case by the Supreme Court, the appellant, Sangay Gyaltshen was made to restitute a total sum of Nu.436,56,427.00 within a period of six months from the day of the Judgment.

> The trial court of First Instance had discharged the appellant on two counts of official misconduct.

Ex Home Minister Vs Anti Corruption Commission

Brief facts of the Case:
On 16th May, 2013, the High Court upheld the conviction of former Lyonpo Minjur Dorji and 13 other Appellants on charges of official misconduct under section 294 of the Penal Code of Bhutan as rendered by the Mongar Dzongkhag Court in the Gyalpoishing land allotment Case. They were sentenced to one year imprisonment subject to Thrimthue vide judgment no High Court 13- 172 dated 16/5/13.The High Court adjudged that the allotment of plots by the Mongar Municipal Committee was authorized under the Municipal Act, 1999 and the appellants contended that the case of official misconduct should not arise. The appellants appealed to the Supreme Court against the judgment of the High Court stating that the charge under section 294(a) and (b) was against the fundamental principal of criminal liability. And cited the case of OAG Vs Dorji Sangay judgment no 2252 of the Hon'ble High Court dated 4/9/2008 in their defense. Hence, in keeping with the aforementioned argument an official misconduct in public office in its penal sense is not merely error in judgment or departure from sound discretion, but the act, omission, or neglect must be willful and corrupt.

Judgment:
After a careful scrutiny of the case, the Supreme Court stated that it is an established fact that the Land had been allotted unlawfully and the case was dismissed without any further hearings as per section 32.1 (c) and section 111 (a) of the Civil and Criminal Procedure Code, 2004 and ordered the respective parties in the case to abide by the judgment of the High Court.

Legal developments and Newsmakers of Bhutan:2013

January

a) ACC submits 23 charges against the Speaker: Anti-Corruption Commission officials on January 16 submitted their evidences of the 23 charges against National Assembly Speaker Jigme Tshultim at the Mongar district court.
b) Gaytongpa burglars and abettors sentenced: Wangdue District Court sentenced three man to fifteen years imprisonment each and another two to five years imprisonment for stealing an age old Gaytongpa from Ula Lakhang in Rubesa Gewog in Wangdue Phodrang.
c) Two sentenced for smuggling tobacco: Thimphu district court sentenced two men for smuggling tobacco into the country. A 22 year-old man was imprisoned to three years for trying to smuggle in tobacco while his acquaintance, a 37 year-old man, was sentenced to a year and six months for aiding and abetting the crime.

March

a) Mongar court passes guilty verdict on Gyelpoizhing land case: The Speaker Jigme Tshultim, Home Minister Lyonpo Minjur Dorji and 14 plot members were convicted by the Mongar District Court on charges filed by the Anti Corruption Commission in the Gyelpoizhing land case.
b) Committee members appeal: The defendants of the Gyalpoishing Land Case appealed to the High Court on the ground that their voices were not heard and taken into consideration.
d) Committee members found guilty: Mongar District sentenced three defendants to a year and two and half years in prison in connection to Gyalpoishing land allotment case.

April

a) A case was filed against Paro Bondey's ponzi schemer: About 16 people filed a case in the Paro District Court against a woman in Bondey, Paro for not paying the money she borrowed.
b) The silent crimes that cries out: Just as fists were used in physical violence, so is sexual violence which broke the myth that the absence of bodily injuries does not mean that a woman is not raped. Talk by Katherine Cross at YDF auditorium.
c) Project employee gets three years for smuggling cigarettes: Gelephu Dungkhag court sentenced a 27 year old man to three years in prison for bringing cigarettes four times the permissible limit.

May

a) High Court affirms district court verdict on Gyelpoizhing Land Scam: The High Court affirmed or upheld the Mongar District Court's verdict on the Gyelpoizhing Land Scam case.

June

a) HC reduces prison terms for Gelephu BNB embezzlement Case: The High Court reduced the sentence of five appellants in connection with the Gelephu BNB embezzlement case involving Nu.11.95 M

July

a) Gyalpoishing case appeal dismissed: The Supreme Court dismissed the appeal and upheld the lower court judgment in the Gyalpoishing Land allotment Case.

b) Drangpon awarded doctorate in law: Sarpang District Drangpon awarded PhD Degree of Law from National legal Studies and Research University in Hyderabad

August

a) One man on a quest to legalize gambling: Although, gambling is not allowed in Bhutan, one man is determined to propose the art of gambling on the ground that it has the capacity to earn 273.5 million per Month if 70% permits is issued.

b) 14 year for the Kulagangri murder: The High Court overruled the trial court's verdict of life imprisonment and sentenced the 34 year old man to 14 years in prison.

September

a)Bhutanese women held in Bangkok airport: Authorities in Bangkok detained a woman after a significant amount of a controlled substance called Kant amine was found in her possesion.

b) OAG seeks clarification on the consensual sex provision: lawyers from the Office of the Attorney General appealed to the Supreme Court seeking the interpretation on the consensual sex between minor and 16 years and those above it.

c) Two more people held in Bangkok drug bust: Police in Paro has held two people in connection with drug smuggling case in Bangkok

October

a) Tokay Gecko Fine Case in Court: Wildlife: The Gelephu range office has put up a petition to the Dungkhag court against a 41-year old man, who has refused to pay the fine of Nu 100,000 for catching a tokay gecko in October last year.

b) OAG finds no case against three suspects: The OAG found no case and legal basis to prosecute three suspects who were arrested in connection with the drug smuggling incident that occurred in Thailand.

c) Police Officer convicted of Child Abuse: The Gelephu Dungkhag Court convicted a police officer for child abuse.

November

a) Rapist sentenced to nine years impris onment by the Wangduephodrang Dzongkhag Court. The court ordered convict to pay a compensation of Nu.360,000 to the family members of the victim, in addition to Nu. 34,300 to perform final rituals for the deceased.

c) Second episode of the Gyelpoishing Drama Begins: The Gyalpoishing land allotment case took the center stage as hearings on 70 pending civil cases for the land recipients began on November 26 at the Mongar District Court.

d) High Court reverses VTI corruption Verdict: The High Court reversed the Trashigang District court's verdict which had dismissed the charges in connection with the construction of Nu.66.13 M Vocational Institute in Buna, Rangjung in Trashigang.

e) 70 more female Mediators in line: Bhutan will have seventy more female mediators at the end of two weeks consultative mediation program in Phuentsholing

f) Tougher penalties to poachers: In the move against poaching and illegal wild life trade, the penalties for poaching has been made more severe.

i) Without Child friendly ambiance, Child Justice is incomplete: The BNLI conducted a three day National Child justice Conference to draw a road map on child Justice in Bhutan;

December

a) RTI Bill makes a comeback: A much hyped Bill was unanimously tabled for the winter session of the Parliament.

e) Regional seminar on Intellectual Property for Journalists in the Asian Region: Singapore hosted the seminar titled " IP is big news" to raise awareness among the journalists on key issues of IP and its importance.

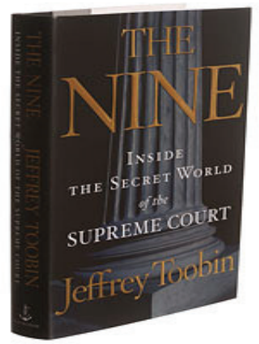
f) Harsher penalties for drug peddlers: A support campaign held a signature drive for a petition to call for harsher penalties for drug trafficking and peddling to curb the growing problem in the country.

g) Verdict on kidnappers upheld: The High Court dismissed the appeal petitions of the three defendants. The lower Court's judgment was upheld and the defendants were sentenced between seven to 9 years in prison.

JUDGES Book Club

The Judges Book Club comprises of Justices of the Supreme Court, Justices of the High Court, Attorney General, and lawyers from different ministries and agencies. The membership is open and any person irrespective of the profession is invited to participate and be a member. A presenter is identified to read and present the gist of the book. After the presentation is over, the participants discuss the book in detail giving the perceptions and opinions of the book by the participants. The Judges Book Club brings out a comparative dialogue based on shared beliefs and experiences. The Judges Book Club was started in August 2011 and since then it is carried on the first Friday of every month at 3 PM. As of now the Judges Book Club has discussed books, and the following books are in line of discussion:

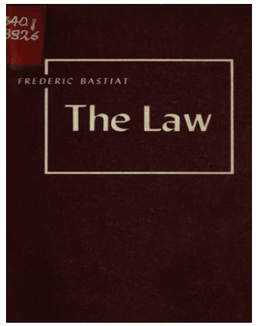
The Nine



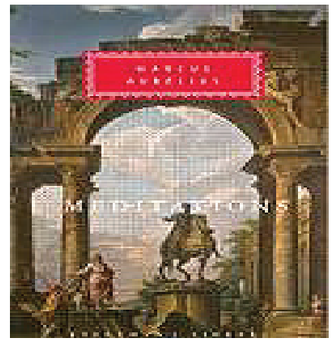
The Nine: Inside the Secret World of the Supreme Court is a 2007 non-fiction book by legal analyst Jeffrey Toobin. Based in part on exclusive interviews with the justices and former law clerks, Toobin profiles the justices of the United States Supreme Court, the functioning of that institution, and how it has changed over the years.

The Law

The Law, original French title La Loi, is an 1850 book by Frédéric Bastiat. It was written at Mugron two years after the third French Revolution and a few months before his death of tuberculosis at age 49. The essay was influenced by John Locke's Second Treatise on Government and in turn influenced Henry Hazlitt's Economics in One Lesson.[1] It is the work for which Bastiat is most famous along with The candle maker's petition and the Parable of the broken window.



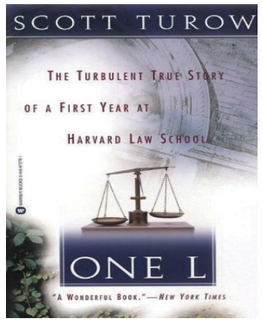
Meditation



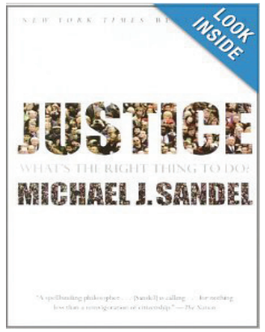
Meditation- Marcus Aurelius: Written in Greek by the only Roman emperor who was also a philosopher, without any intention of publication, the Meditations of Marcus Aurelius (AD 121-180) offer a remarkable series of challenging spiritual reflections and exercises developed as the emperor struggled to understand himself and make sense of the universe. Ranging from doubt and despair to conviction and exaltation, they cover such diverse topics as the nature of moral virtue, human rationality, divine providence and Marcus' own emotions. But while the Meditations were composed to provide personal consolation and encouragement, in developing his beliefs Marcus Aurelius also created one of the greatest of all works of philosophy: a timeless collection of extended meditations and short aphorisms that has been consulted and admired by statesmen, thinkers and readers through the centuries.

One L

One L: The Turbulent True Story of a First Year at Harvard Law School- Scott Turow: Becoming a first-year law student--a "One L"--at the oldest, most esteemed law school in the U. S. threw Scott Turow into a physical, emotional, and intellectual combat zone. An ultimate test by fire of his honesty and principles, in a time of hazings, betrayals, challenges and triumphs--a law school primer. Becoming a first-year law student--a "One L"--at the oldest, most esteemed law school in the U. S. threw Scott Turow into a physical, emotional, and intellectual combat zone.



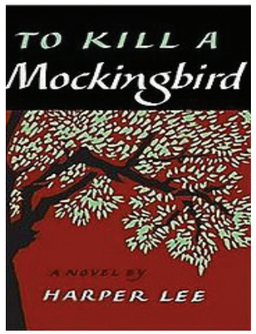
Justice



Justice: What's the Right Thing to Do- Michael J. Sandal: Justice: What's the right thing to do? is a work on political philosophy by Michael J. Sandel. The book was written to accompany Sandel's famous "Justice" course at Harvard University which he has taught for more than thirty years and which has been offered online and in various TV summary versions. The book address a series of alternative theories of justice. The utilitarianism of Jeremy Bentham is outlined and criticised and then John Stuart Mill's refinements are discussed. The libertarians, in particular Robert Nozick, and their arguments are discussed. Then Sandel discusses Immanual Kant and his 'categorical imperative'. The discussion then goes on to John Rawls's work. Then Aristotle and the concept of 'telos' is discussed. It is here that Sandel begins to make clear his own perspective. He argues that justice, rather than being or autonomous (as Kantians or Rawlsians might have it), has a goal. A form of communitarianism. Sandel quotes Alasdair MacIntyre and his characterisation of humans as being 'storytelling beings' who live their lives with narrative quests. There is also an accompanying sourcebook of readings:

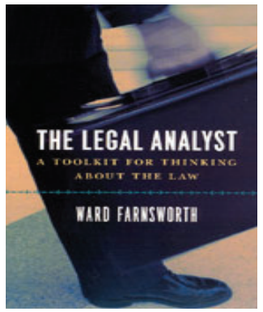
To Kill a Mocking Bird

To Kill a Mocking Bird- Harper Lee: To Kill a Mockingbird is a novel by Harper Lee published in 1960. It was immediately successful, winning the Pulitzer Prize, and has become a classic of modern American literature. The plot and characters are loosely based on the author's observations of her family and neighbors, as well as on an event that occurred near her hometown in 1936, when she was 10 years old. The novel is renowned for its warmth and humor, despite dealing with the serious issues of rape and racial inequality. The narrator's father, Atticus Finch, has served as a moral hero for many readers and as a model of integrity for lawyers. One critic explains the novel's impact by writing, "In the twentieth century, To Kill a Mockingbird is probably the most widely read book dealing with race in America, and its protagonist, Atticus Finch, the most enduring fictional image of racial heroism.



The Legal Analyst

The Legal Analyst: The Toolkit for Thinking about the Law- Wards Fansworth:
There are two kinds of knowledge law school teaches: legal rules on the one hand, and tools for thinking about legal problems on the other. Although the tools are far more interesting and useful than the rules, they tend to be neglected in favor of other aspects of the curriculum. In The Legal Analyst, Ward Farnsworth brings together in one place all of the most powerful of those tools for thinking about the law.
From classic ideas in game theory such as the "Prisoner's Dilemma" and the "Stag Hunt" to psychological principles such as hindsight bias and framing effects, from ideas in jurisprudence such as the slippery slope to more than two dozen other such principles, Farnsworth's guide leads readers through the fascinating world of legal thought. Each chapter introduces a single tool and shows how it can be used to solve different types of problems. The explanations are written in clear, lively language and illustrated with a wide range of examples.
The Legal Analyst is an indispensable user's manual for law students, experienced practitioners seeking a one-stop guide to legal principles, or anyone else with an interest in the law.

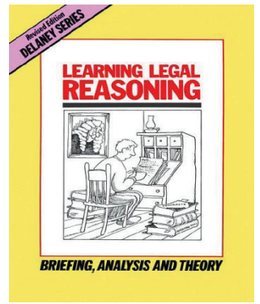


Economic

Economic Analysis of the Law- Richard Posner:
Economic Analysis of Law, Eighth Edition, written by the pioneer in law and economics analysis, Richard A. Posner, remains the classic text in its field. This lucid, comprehensive casebook covers every aspect of the economic analysis of the law, including the common law, public regulation of the market, business organizations and financial markets, the distribution of income and wealth, the legal process, and the Constitution and the federal system.

Learning Legal Reasoning

Learning Legal reasoning: Logic for lawyers written by John Delaney. This book is written for the first year law students. It teaches them how to brief cases, pointing out the cosmos of legal reasoning. From the technical point of view the book sets out, in systematic and progressive manner. From the scholarly point of the view the book is based upon distinctive philosophical assumptions imparting a theoretical vision to what appears to be simple and practical strategies for briefing the cases.



ANNUAL LECTURE SERIES DEDICATED TO THE **MONARCHS OF BHUTAN**

Justice Tshering Wangchuk
Supreme Court of Bhutan, Royal Court of Justice

CONSTITUTIONALISM AND THE RULE OF LAW

Introduction

The idea that "constitutionalism and rule of law" is the foundation of modern states and civilizations has recently become, even more talismanic than that of democracy. The rule of law is not an arid legal doctrine but is the foundations of a fair and just society, a guarantee of responsible government, and an important contributor to economic growth, as well as offering the best means of securing peace and co-operation. Democracy is a political system that provides regular constitutional opportunities for changing the governing officials or endorsing their continuance. It provides for a political formula with one set of political leaders in office and one or more set of leaders out of office, who act as a legitimate opposition attempting to gain office. In a democracy, enduring institutions depend upon the enduring support of ordinary citizens and citizens are more likely to support those institutions they understand.

Defining Constitutionalism

Constitutionalism has often been defined as the struggle for sovereignty and fundamental rights, and as is the case in most countries forged in the fire of bloodshed and violence. In the context of Bhutan, the political transition from Monarchy to a Democratic Government was formalized in a unique ceremony on 18 July 2008 when His Majesty the King and the representatives of the people signed the country's first written constitution. At the ceremony His Majesty the King said, "The highest achievement of 100 years of Monarchy has been the constant nurturing of Democracy…….. I hereby return to our People the powers that had been vested in our Kings by our forefathers 100 years ago". His Majesty also added that, "As King, henceforth, it is my sacred duty to ensure the success of our new democracy so that it fulfills the aspirations of our people always". In a gracious gesture His Majesty the King descended from the Throne and shook hands with the Prime Minister, Ministers and the Parliamentarians. It was recognition of the origin of the Monarchy in a democratic manner in 1907 and continuity in its new avatar of a Democratic Constitutional Monarchy. Therefore, the authority to govern offered to our first Monarch in 1907 by our ancestors (historic Genja – oath of allegiance) was graciously and voluntarily handed back to the people by our benevolent Kings after 100 years – a century of benevolent Monarchy, which itself originated by a democratic process. The Bhutanese democracy is thus, truly a gift from our monarchs.

Reforms initiated by the Monarchy

The Monarchy's love for the people and conviction that peace and happiness is crucial to people which must depend on law and order. There is a saying in Bhutanese that it is the good fortune of the people to be blessed with benevolent monarchs – Bhutan has been blessed with progressive and democratic kings. Their Majesties worked tirelessly to establish very important democratic institutions and initiated timely reforms to strengthen the judicial system in the country to create a "fair and just society", on the basis of which all the people of Bhutan stand equal before the law today.

Origins of the Constitution of Bhutan

His Majesty the Fourth Druk Gyalpo has prepared the people of Bhutan steadily to embrace a democratic form of governance by instituting new mechanism/ institutions in the govern of the Kingdom in addition to the already existing democratic institutions established by His Late Majesty the Third King. In 2001 His Majesty the Fourth King commanded the drafting of the Constitution with the conviction that "Monarchy is good as long as the monarch is good". The Constitution of Bhutan is the embodiment of the most gracious and benevolent testimony of handing back power to the people by an absolute, enlightened Monarch. It hence, embodies the vision of His Majesty to ensure rule of law, encourage sound political morality and give the country a political system that will provide good governance and fulfill the aspirations of the Bhutanese people. The constitution embodies the pursuit of peace, economic progress and political transformation in the Kingdom.

> "Democracy is a political system that provides regular constitutional opportunities for changing the governing officials or endorsing their continuance."

Rule of Law

The rule of law protects the citizen from an arbitrary government. The rule of law is a political ideal that demands that government and its officials shall be ruled by law and be subject to it. The ideal is often expressed in the phrase "government by law and not by men". The Rule of law entails the actions of government officials, ministers, judges, bureaucrats and police to be governed by a duly enacted general law, and not guided by personal whims and fancies. It is the undisputed supremacy of law, that envisages a state of things in which everyone, respects the law; where law is to be followed by everyone collectively and individually by the citizens as well as the state; decisions must be made by the application of the established principles and rules. "Howsoever high you may be the law is above you". The only exception being His Majesty the King as provided under Article 2 section 15 "the Druk Gyalpo shall not be answerable in a court of law for His actions and His person shall be sacrosanct". The criminal justice system, comprising, chiefly, the police, the prosecution and the judiciary, is the arm of the state closest to the citizen. This proximity should not empower the organs of State to violate the rule of law. If a police officer wrongly arrests or tortures a citizen, if a rich or powerful person escapes punishment for a crime by bribing the prosecution, or if a minister interferes in the criminal justice machinery to secure partisan goals, the ideal is compromised. An independent and easily accessible judiciary which fearlessly tries people, irrespective of power, wealth, status or political affiliations is a sine qua non for the rule of law. The rule of law also demands an independent police organization and an independent prosecution service, which are free from political interference in their day to day functioning while being accountable for their actions. In this respect, the design of public institutions should be informed by the rule of law. "Rule of Law" refers to a rules-based system of self-government with a strong and accessible legal process. It features a system based on fair, publicized, broadly understood and stable

laws; and diverse, competent and independent lawyers and judges. The rule of law is the foundation for sustainable communities as it provides opportunities based on equality and equity. Rule of law embodies the basic principles of equal treatment of all people before the law, fairness, and both constitutional and actual guarantees of basic human rights. Today everybody professes to the rule of law as a solution to any trouble.

Role of the Judiciary in promoting the Rule of Law

The role of the judiciary is central to the concepts of justice and the rule of law. Therefore, the Judiciary of Bhutan must evolve into an effective branch of social service, and strive to maintain confidence of the Bhutanese people in the legal and judicial process. The Judiciary must uphold and protect the freedom and rights of the citizens against the power of the state, the wealthy and the powerful. The Rule of Law administered by the Courts must effect a reconciliation of individual liberty commensurate with the socio-economic progress achieved by Bhutan. To achieve this aim, the machinery and administration, infrastructure and facilities of the Courts must evolve, adapt and keep pace with the changing times.

A predictable legal system with fair, transparent and effective judicial institutions is essential. The judicial branch after all, is the final arbiter of the constitution (Article 1, section 11). Ideally, through the application of judicial or constitutional review, judges can, not only mediate conflicts between political actors but also prevent the arbitrary exercise of government power. In fulfilling this role, the weakest branch of government assumes an important role in ensuring the submission of state to the laws of the land. Nevertheless, the ability of the courts to fulfill this role is by no means automatic. Regular and timely reforms are necessary for its success.

Role of Courts

> There must be flexibility in understanding the constitution with the ability to adjust and adapt to the existing/changed circumstances.

Judicial review affirms the role of the Supreme Court as guardian of the constitution, conflict between Courts and the other branches of government is inevitable – with the courts established for the purpose of setting limits on what government can do and cannot do. Interpretation of the constitution may not always be efficient if based on the intent of the drafters. There must be flexibility in understanding the constitution with the ability to adjust and adapt to the existing/changed circumstances so that it may be more prudent. Humanity has been reduced almost to the state of a spectator. Everywhere man has been reduced from being an active participant, to a spectator. Such a dispensation will not be helpful for democracy – you are avoiding participation. It is better to compose your own music, it may not be great – it does not matter. Similarly, democracy is not a spectator sport – Inclusive democracy requires active participation by the people. People must be deprogrammed and participate meaningfully in the democratic process – voting in elections is a moral responsibility of every citizen. In conclusion, if democracy fails, the people of Bhutan must jointly assume responsibility. Inclusive democracy entails public participation and not exclusion – everybody is accountable in a democracy. Ultimately the will of the people is unstoppable and is responsible for shaping the destiny of the nation and its history.

QUESTIONS & ANSWERS

Lyonpo Damcho Dorji
Minister of Home and Cultural Affairs

Lyonpo Damcho Dorji has served as a judge in many districts and as the Attorney General of the Office of the Attorney General prior to joining Politics as a People's Democratic Party(PDP) from Gasa Dzongkhag. He completed his LLB from Government Law College, Mumbai and LLM on International Law from George Town Law Center, Georgtown University in the United States. Presently, he is the Minister of Home and Cultural Affairs.

What are the differences between 'law and order' and the rule of law that exists to protect the citizens of Bhutan?

Law and Order means a situation in which people normally respect the rule of law and are therefore, law abiding. It also means that those people and agencies who enforce laws not only respect the laws but act within the limits of powers granted to them. Law and Order is maintained by ensuring that people obey and follow the law and refrain or abstain from committing wrongs or offenses through various methods prescribed by law so as to ensure peace within the society.

The rule of law is a system in which everyone is equal under the law and no one is above the law; where laws protect basic fundamental rights even if such rights are not expressly given by law; and where access to justice is readily and easily available. In a sense, it means supremacy of laws, access to courts, accountability to laws including the State itself, due process, and impartial adjudication and enforcement.

When does the interest of the sovereignty and security of the nation overrule the fundamental rights of a citizen?

Sovereignty in a nutshell means the independent authority of a country to govern itself. In political terms it is also interpreted as the final authority of a country in the process of decision-making and maintenance of law and order. Fundamental rights on the other hand refer to certain inalienable rights that have been derived from the principles of natural law and justice. As such, these rights are accorded special protection in our constitution and by our courts and therefore, cannot be taken away by the Government.

In Bhutan, our Constitution grants numerous Fundamental rights under Article 7. While these rights are generally absolute in nature, in the interest of the sovereignty and security of Bhutan, the Constitution grants the State the power to subject these rights to reasonable restriction by law. Here, the words 'State' and 'reasonable' are important in the sense that this power is granted to the State only and not the Government; and such powers given must be reasonable and not arbitrary. Therefore, our Constitution like others calls for a reasonable compromise between fundamental rights and interests of sovereignty when it comes to matters specifically provided for under Article 7(22), and the rationale behind it is that fundamental rights become unenforceable when sovereignty of a country is lost

Having served as the Attorney General and now as the Home Minister would you agree that there is a conflict of interest on the role of the Attorney General?

The role of the Attorney General under the Constitution is to give legal advice to the Government and also to represent it before a Court of law. Accordingly, the AG can institute, initiate, or withdraw any case in accordance with the law. However, we must also know that the AG is not a Constitutional post-holder in the sense that he/she is appointed by His Majesty the King on the recommendation of the Prime Minister alone, unlike constitutional post holders . Further, as per Section 20 of the Office of the Attorney General Act, 2006 the AG is accountable to the Prime Minister and can be removed from office by the Prime

Minister unlike constitutional post-holders who can be removed from office only by way of impeachment. All these provisions render the office of the AG very vulnerable to the ruling Government. Therefore, it would amount to a conflict of interest if the AG undertakes or is made to prosecute any member of the Cabinet or in cases which involves the Prime Minister or Cabinet members. Moreover, under Section 48 (d) of the OAG Act, 2006 it states that the AG "shall not appear, advise or represent any party against the Government. This makes it very clear that even under its own Act, the OAG cannot prosecute cases against the Government, which must be understood to mean Cabinet in our context and exclude the civil servants.

Given the pace at which laws and Acts are being amended, would you think that at least two years should be given before any amendment?

We cannot have such a hard and fast rule whereby, the Parliament subjects itself to such a rule, although in theory it can; the reason being that sometimes the exigency of the matter may call for urgent enactment or amendment of acts failing which it would cause grave danger or damage to life and property or to implement an emergency policy. However, we must be aware that enactment of too many laws can also cause legal fatigue and lack of awareness among the general public. Therefore, I personally do not advocate such a proposal.

Also, the rate of amendments seems to indicate that there were serious lapses in the enactment of the laws in the first place, what is Lyonpo's view on this?

It may be partly true but many of the times it is also due to changing circumstances or policies. Further, lack of practical experience and over enthusiastic legislators could also push through a defective piece of legislation that could cause unwarranted or unforeseen implementation problems. Therefore, as a safety measure all new laws are thoroughly discussed with the relevant stakeholders before a law is tabled before the Cabinet. The Cabinet must endorse the new law before it is sent to Parliament. Further, the Legislative Committee of the Parliament reviews the draft before being deliberated upon by Parliament.

Further, the fact that any act or amendment that is passed by one House must be passed by the other House or sometimes deliberated in a Joint Sitting of Parliament before being submitted to His Majesty the King, is also a filtering process to prevent any foreseeable deficiencies in the law that finally passes through Parliament. However, certain defects and shortcomings do escape the notice of the Parliamentarians.

There are two laws that are not just ambiguous but also causing suffering to those affected, what is Lyonpo's view on this?

a) The cut of age of 16 years under the Penal Code, and consensual sex Vs rape.

Under the original Section 183 of the Penal Code, any act of sexual intercourse against a child between the ages of 12 to 18-years constitutes rape of a minor and is punishable with felony of Second Degree under Section 184. However, Section 183 was amended with a new proviso that reads, "However, consensual sex between children of 16-years and above shall not be deemed to be rape." This new proviso was deliberated extensively in both Houses of Parliament as well as in the Joint Sitting. The justification given for this new insertion was that many children, especially school children between the ages of 16 to 18 get into conflict with the law not knowing sexual intercourse between children below 18 constitutes an offense even if there is consensus between the parties. As a result many school children get mandatory imprisonment for long durations. However, while this new proviso must have saved a lot of children from stiff prison sentences, it has also caused many young girls to become pregnant and leave school, thereby depriving her the opportunity to continue her studies. Moreover, technically it would be wrong to have this amendment, since the age of majority in this act for all purposes is 18. For instance, if a youth of 17-years has sex with a girl of 17-years it would be consensual sex, but if the same girl has sex with an 18-year old it would be rape. Therefore, this is an anomaly we will take a while to understand and accept.

b) The tobacco Act.

The requirement of the Tobacco Act is a matter of national policy. If the general consensus of the people is that tobacco is injurious to health and therefore, needs to be banned or controlled, the Government may pass a law to control its use. This policy may be implemented either through legislation or through taxation or through a combination of both. Therefore, the Parliament having decided to control tobacco through legislation and make smuggling a crime, any person violating the law commits a crime and there is nothing illegal in enforcing that law. What is desirable is that the degree of offense and the severity of punishment must be proportionate. Therefore, legally I do not see any ambiguity in the Tobacco Act. However, there is no doubt that a lot of people who smuggled tobacco have been imprisoned, which has caused sufferings to their families. But the state has a duty to protect the life and liberty of its citizens, and recognizing that there is overwhelming evidence to prove that tobacco consumption is injurious to health, the state can take measures to protect not only smokers but also non-smokers who may become passive smokers against their will. Therefore, I would term the Tobacco Act a necessary evil.

How does the law reconcile existing social norms and what is enacted, as in age of sex, marriage in rural Bhutan? Is enough consideration given to social norms?

While social norms form an important source of law, all social norms are not necessarily good and some of them may even violate a persons fundamental right or violate certain provisions of law. Age of sexual consent is a very tricky issue for the fact that human beings have varying levels of mental capacity to judge or make a decision for oneself. Therefore, most legal systems have devised what is legally known as the age of majority which distinguishes that person from a minor. The rationale behind this principle is that because human beings have varying levels of intellect or mental capacity to judge what is good or bad and what is right or wrong, the state sets the age of majority through the laws so that its citizen are aware or supposed to be aware about the age of majority, which in our case is 18. Marriage of minors may be a social norm in rural Bhutan and ought to be respected. But the state has a duty to protect minors from the ill effects of a marriage which was entered into for them by other people without their consent. Even if it was entered into with their consent, the minor may not know the full consequences of their action or must have been misinformed by others. Therefore, the state must intervene to protect the interests of minors through enactment of laws prohibiting child marriages, and it is the duty of the state to adequately inform the people on the super-cession of such practices by enacted laws.

What is the impact of the trainings provided on internal mediation conducted for local government units? How is it progressing and what is the feedback?

Bhutan Legal Institute under the patronage of Her Royal Highness Ashi Sonam Dechan Wangchuck has initiated a nationwide conduct of legal awareness, and trained local government leaders on alternative dispute resolution. This training has not only equipped the local leaders with the necessary skills of basic dispute settlement procedures but also given ordinary people a forum for settling disputes before resorting to formal litigation which most can ill afford. I have no doubt whatsoever that it has benefited the rural people and the feedback so far is more than encouraging. However, such an important initiation should not be left only to the Bhutan Legal Institute but must be the responsibility of all law enforcement agencies, including the Judiciary.

What is Lyonpo's opinion on the access to law for those people in the periphery of distant Dzongkhags? What can be done for them to have easy access?

Access to law could mean either access to courts or access to information about various laws, rules and regulations passed by Parliament. Access to courts is generally easy and our courts have a good system of case procedure and management. However, access to information on various laws is still a daunting challenge due to low literacy rate among the general populace, and consequent ignorance of law.

Both legislators who represent the people in Parliament and courts who deal with litigants everyday, have the responsibility as well as the opportunity to create legal awareness among the people, and must therefore, disseminate awareness at every available opportunity. However, ultimately it is the responsibility of the Government to create awareness. This can be done both before and after the enactment of a law. In this age of ICT, we can make use of all forms of media including social media to disseminate legal awareness.

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