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The Bhutan Law Review would like to acknowledge the support of Swiss Agency for Development and Cooperation (SDC),

On the auspicious occasion of 60th Birth Anniversary of His Majesty the Fourth Druk Gyalpo Jigme Singye Wangchuck, the Bhutan National Legal Institute would like to take this opportunity to express and rededicate ourselves to the service of the nation - while we pay our heartfelt tribute to his profound and rich legacies.

Drukgyal Zhipa – The Visionary Dragon King: A True Patriot of the Kingdom of Bhutan

His Majesty the Druk Gyalpo Jigme Khesar Namgyel Wangchuck announcing the 60th Birth Anniversary Celebration while addressing third session of second Parliament, proclaimed that:

> *"…the celebration is to thank and pay tribute to His Majesty the Fourth Druk Gyalpo, and at the same time more importantly to remind ourselves of His Majesty's unparalleled wisdom of body, speech and mind, and to celebrate pledging of our commitment to serve the Tsa-Wa-Sum with utmost dedication without failure in our life time."*

Reminded of this proclamation, family of the Bhutan National Legal Institute join nation in celebrating this joyous occasion, and affirming our commitment to serve the nation with utmost diligence.

The legacy of His Majesty the 4th Druk Gyalpo Jigme Singye Wangchuck must be cherished and remembered in our country eternally. Every Bhutanese of both present and future generations must be able to hold him as an idol- a true patriot of Bhutan. His Majesty's achievements are timeless, and generations will stand to benefit from His Majesty's wisdom, policies and sacrifices.

Keeping ourselves abreast of this importance, this year, Bhutan National Legal Institute in collaboration with the Judiciary conducted the lecture series dedicated to *His Majesty the Fourth Druk Gyalpo Jigme Singye Wanghuck* in all the tertiary education and training institutes in the country, to commemorate His Majesty's 60th birth anniversary, a time of celebration and reflection for all Bhutanese. The lecture was prepared, and launched and delivered at Paro College of Education on 8th November 2014 by the Honourable President of BNLI, Her Royal Highess Ashi Sonam Dechan Wangchuck. The same lecture was delivered in all the institutions on the same day, and at the same time, by the judges of the twenty Dzongkhags.

With an objective of reaching out to the maximum population and to keep our people informed of His Majesty's selfless services, BNLI is proud to published the lecture in this issue of the Bhutan Law Review.

A country and its people are products of the past- an accumulation of experiences and circumstances, decisions and choices, and inherited traits and lessons. A country cannot be separated from its people- We are Bhutan, and Bhutan is Us.

When we think of Bhutan and how far we have come together as a people, as a nation, we look to His Majesty the Great Fourth, and we see the symbol of our country, **the reflection of our greatest selves**.

His Majesty Jigme Singye Wangchuck is a true patriot of the Kingdom of Bhutan- a leader that believed in country above all else. The story of the Great Fourth King is one that every Bhutanese will tell.

Today, we will remember His legacy, and we will reflect on all the lessons he has taught us.

His Majesty the Great Fourth King's *Kasho* issued on 9th December 2006 reads:

"As I hand over my responsibilities to my son, I repose my full faith and belief in the people of Bhutan to look after the future of our nation, for it is the Bhutanese people who are the true custodians of our tradition and culture and the ultimate guardians of the security, sovereignty and continued well-being of our country."

It was his faith in the people of Bhutan from the beginning of his reign, and his commitment to secure Bhutan's sovereignty and well-being that makes him Bhutan's Ultimate Patriot.

Resolute Strength and Wisdom

In 1972, Bhutan grieved for the loss of our Third King. Our Nation had lost a great leader, a son had lost his father, and in this moment of loss, a young King had to exhibit great strength and purpose to lead his country, and inspire confidence in his people. He promised to govern his country, and people with utmost dedication, as he took the throne at the age of 16, as the youngest monarch in the world.

In his coronation address, he made a pledge, which held true his entire reign. His words revealed this, when in his coronation speech he said:

> *"As far as you, my people are concerned, you should not adopt the attitude that whatever is required to be done for your welfare will be done entirely by the government. On the contrary, a little effort on your part will be much more effective than a great deal of effort on the part of the government. If the government and people can join hands and work with determination, our people will achieve prosperity and our nation will become strong and stable…If everyone of us consider ourselves Bhutanese, and think and act as one, and if we have faith in the triple gem, our glorious Kingdom of Bhutan will grow from strength to strength and achieve prosperity, peace, and happiness."*

If one thing can be said, is His Majesty is a man of his words. Right from His Coronation address to his last *Kasho* to the people, there is consistency in his words, his thoughts, and actions.

Bhutan in 1972 was very different from what we are now. Our country had just opened our doors to the outside world, we had a small population of educated citizens and bureaucracy, our economy was small, we were economically dependent, sovereignty was still an issue we had to tackle, and our national identity as united Bhutanese was yet to be forged.

His Majesty set out to overcome these many obstacles from the start. He looked at our greatest challenges and planned to fix and solve each one of them. In 2006, when he stepped down he had successfully achieved all that he set out to, and had cleared the path for Bhutan, ensuring our safe passage into the future.

The Government and People to Join Hands

It is generally said that, "*power corrupts*" or "with *power comes responsibility."* History has shown the nature of power. Yet our tiny Himalayan Kingdom possessed a leader who showed the world that power meant obligation and great responsibility. He is rare, for he desired to devolve his power to the people. He believed from the beginning that ultimately the successes of a country depended on the people, and that the people should hold the means to contributing to this end. His Majesty began devolving power starting with decentralizing administrative powers to local government in 1981, introducing the *Dzongkhag Yargay Tshogchun*g, and in 1991, the *Gewog Yargay Tshogchung*.

In 1998, the Cabinet was elected by the National Assembly, and executive powers of the King were handed over to them. His Majesty's proclamation to the National Assembly reads:

"I have been working hard to prepare the people to fully participate with alertness and commitment, in the system of deciding matters of our country. It is important to promote participation of people in the system of decision-making. It is my wish and prayer to amend the system of Cabinet Ministers and gradually transfer the executive powers to the elected Cabinet Ministers for the prosperity and welfare of our country….and it is my wish that the National Assembly will decide about the system of casting vote of no confidence against the Druk Gyalpo…"

At a time when some leaders in the world were refusing to devolve power, he made the final move in our evolution and journey to democracy. On 4th September 2001, he briefed government officials on the need to draft a Constitution for the Kingdom of Bhutan. He initiated the drafting of the Constitution, constituting a 39 member drafting committee, and revised and created the Constitution to introduce a system of democracy, and it's safeguards for our country and people.

He desired that the people take on the Constitution as our own and hold it as a reflection of our hopes, aspirations, and guiding light for the future. A public referendum took place, when His Majesty and His Majesty the Fifth King took the Constitution to the 20 dzongkhags where a member of each household was represented.

When we look back, we now know that what was happening to us was all part of a plan- we were being prepared and gradually transformed as a nation. Almost in cycles that came every decade, a meticulous plan was patiently charted out, that culminated in the introduction of democracy for our country.

He put in place almost everything that is required to make democracy vibrant. The grounds had been prepared. We were ready. Education was given highest priority, a well-experienced cabinet had been groomed, grassroots had been empowered, and the people had embraced a new order. The Judiciary had been strengthened. The Election Commission was established to ensure free and fair elections. The Anti-Corruption Commission to curb and root out corruption from the very beginning. Media was given autonomy and free press was introduced.

It was then that His Majesty relinquished his throne, and handed over a democratic constitutional monarchy to our able and prepared people, and under the leadership of a most capable heir.

In his Abdication *Kasho* (9 December 2006) he proclaimed:

"Whatever we have achieved so far is due to the merit of the people of Bhutan…I repose my full faith and belief in the people of Bhutan to look after the future of our nation, for it is the Bhutanese people who are the true custodians of our tradition and culture and ultimate guardians of the security, sovereignty and continued well-being of our country."

He stepped down praising the merit of the people of Bhutan and giving all credit to the people for our achievements. He showed us selflessness and wisdom all through his reign. He took nothing but gave his whole life to the people and the country. A life of example he led, setting the standard so high, that the Bhutanese people now demand nothing less of leadership in our country.

He took Bhutan to the greatest heights, and to our Golden Era, our renaissance, in just over three decades.

Security and Sovereignty

In our history whenever we have been faced with threat and challenges we have risen and overcome because of courage and resilience of the Bhutanese people. In the 1990s, Bhutan was challenged with a looming issue of citizenship and immigration. In a small country such as ours, our identity was a matter of survival, and unity the means to it. Self- reliance, Sovereignty and Security were challenges that had to be tackled during His Majesty's reign. It is important to know that Article 2 of the 1949 Treaty between

India and Bhutan was revised into a new treaty of 2007. This was significant for Bhutan. These were necessary obstacles to overcome for a sovereign nation moving ahead in the world.

In 1995 three groups of Indian militants set up camps in Bhutanese soil illegally. Over the years they had established 30 camps within the territory of Bhutan threatening the security and undermining the sovereignty of Bhutan. We negotiated for many years for peaceful dissolution of these camps. His Majesty himself took the lead in these negotiations, visiting each and every camp and talking to their leaders. These missions were dangerous, and were undertaken regardless of the risks. With eminent threat to our people and as peaceful negotiations did not materialize, a difficult decision was made to protect our country's sovereignty and security. On 15 December 2003 we went to battle a day that would decide the future of Bhutan.

His Majesty himself led the troops to battle to remove the militants from our country. His Majesty made sure that every strategy and plan was executed and that our troops remained courageous in daunting uncertainty, but ready to safeguard our nation as true sons of the *Pelden Drukpa*. Again, this was not luck, but the perfect execution of a brilliant strategy, and in less than 48 hours he had secured our country.

On return from the south to our capital after our victory, government officials and the people wanted to celebrate. However, His Majesty the King commanded that there would be no celebrations, instead we must pray for the lives lost from both sides in the battlefield. There was no need for applause and celebration, for this was ones duty, at a time when the nation needed it most. It was the ultimate test, and His Majesty was willing to put himself in harms way in order to protect our country and people. It was the ultimate self-sacrifice.

Identity and Unity

Bhutan's culture and traditions, our environment, and spirituality all define who we are. Our identity as a small nation depended on our ability to stand united and strong, unshaken by forces, and as a unique and proud nation. Environmentally, economically, culturally, and spiritually we had reached the peak during His Majesty's government due to the wise and strong policies that were in place. Our diplomatic relations with India was stronger than ever before, and in 2003 we had gained the respect of a great friend. Bhutan has within a short span of time gained respect, and repute for our unique way of doing things, and emerged as a source of inspiration to many.

Development for the People

Gross National Happiness was envisioned, as a policy for our government that was rooted in the belief that, development should be for the people. His Majesty believed that the ultimate goal was the contentment of the people, and that we should not compromise our environment, culture, and traditions for the sake of socio-economic development. We were to take a balanced approach- the 'middle path' in all our policies keeping in mind that all elements of our uniqueness and identity, beliefs and values, and security must never be forsaken, and that all must be nurtured in harmonious balance.

Prayers to the Triple Gem

The qualities of His Majesty are infinite, and his legacy unshakeable. Bhutan was destined to have a King like Jigme Singye Wangchuck, and his legacy will live on in our conscience, and in our spirits as long as there is Bhutan.
The Fifth Druk Gyalpo said:

> *"The Fourth Druk Gyalpo is our precious gem, the unfaltering parent and the god to whom we can rely and prostrate….In the history of Bhutan no King like him was ever born, and will not be born in the future. His actions are not historic just for Bhutan, but even for the world."*

His Majesty, Jigme Singye Wangchuck from the very beginning of his reign worked tirelessly towards entrusting responsibility to the people. We attribute Bhutan's masterstrokes, our golden era to him- the architect, master statesman, military commander, and selfless, wise and compassionate leader.

We now have a unique system of democracy in place to safeguard our people and country. We the people have the duty to serve our country to ensure a better and brighter future for Bhutan. We cannot fail now when we have been entrusted with the finest values, and fruits of countless sacrifice and hard work. As we celebrate as a Nation, and pay homage to Bhutan's most precious Jewel, it is also a time for reflection. The Fifth Druk Gyalpo is the finest manifestation of his father. He is the '*People's King'* and has all the qualities nurtured within him of a true patriot.

In his Coronation Address His Majesty reached out to the entire nation and connected with each and every citizen when he said:

> *"It is with immense gratitude and humility that at this young age, I assume the sacred duty to serve a special people and country. Throughout my reign I will never rule as a King. I will protect you as a parent, care for you as a brother and serve you as a son. I shall give you everything and keep nothing;…I have no personal goals other than to fulfill your hopes and aspirations. I shall always serve you, day and night, in the spirit of kindness, justice and equality."*

When we talk of visionary leaders, it is innate character that determines the right vision, but more so is knowledge of ones country and people, and unwavering discipline and conviction in working tirelessly, never giving up on bettering the lives of ones people. Their Majesties possess these qualities, and we can be proud today, and celebrate this.

The Anxiety between Free Expression and Law of Defamation

Sangay Chedup, Legal Officer, BNLI, LL.B, NALSAR University of Law, Hyderbad, India, PGDNL, RIM, Thimphu

"Good name in man and woman, dear my lord,
Is the immediate jewel of their souls.
Who steals my purse steals trash; 'tis something, nothing;
'Twas mine, 'tis his, and has been slave to thousands;
But he that filches from me my good name
Robs me of that which not enriches him,
And makes me poor indeed."

– Shakespeare in Othello Act 3, scene 3, 155–161

1. Introduction

Having Robbed The Country Blind – a controversial statement written by Dasho Paljor J. Dorji on his Facebook page, has become one of the bitter and contentious issues for court's consideration. DPT (Druk Phuensum Tsogpa), filing a libel suit against Dasho Paljor Dorji, stated that the provocative and slanderous accusation by a prominent serving public servant is a concern for the Opposition Party and that the defender should prove the court if DPT, during the tenure of ruling the country, has actually robbed the country. The plaintiff submitted that the statement *per se* is a reflecting actions, motive and character of DPT Government (2008-2013) to damage its reputation and image as a credible political party.[1]

This controversial issue can be fairly designated to be the starting point of new legal development pertaining to transnational internet defamation – a legal doctrine that imposes liability for statements adverse to the plaintiff's reputation.[2] As more and more human conduct appears online and social media and blogs becoming a popular source of information and commentary, defamation made online and offline would be complex issues for courts dealing to disintegrate. The Annual InfoComm and Transport Statistical Bulletin (March 2014) shows that total of 251,441 people have subscribed for internet as of 2013 which is 88.6% increase from 2012.[3] Similarly, 544,337 people have subscribed for Mobile Cellular Network in 2013.[4] This data is clearly evidencing how Bhutanese people consider this new information and communications technology as an integral medium not only in the public, but also the private sphere, as Fitzgerald suggests, "A space known as transnational space, epitomised by life in cyberspace, is an integral part of social existence in the 21st century."[5]

The growing number of internet users give license for everyone to become a publisher and allows anyone to bring their own unique perspective to an online debate, which author's termed it as citizen journalist. Predictably, all kinds of issues become a serious part of online debate: the recent surrendering of three Government Secretaries by the Office of the Prime Minister, the ongoing *Lhakhang Karpo* scam, recruitment process of the present Managing Director of Bhutan Broadcasting Service Corporation, and

1 The full text of the plaintiff's plaint is available at: http://www.bbs.bt/news/wp-content/uploads/2014/09/Court-Applicaion-English.pdf

2 Law Commission, *Defaming Politicians – A Response to Lange v. Atkinson*, Preliminary Paper 33. September 1998, p.1. Wellington, New Zealand.

3 *Annual Info Comm and Transport Statistical Bulletin*, 5th Edition, March 2014. Ministry of Information and Communications, Royal Government of Bhutan. Available at: http://www.moic.gov.bt/daden/uploads/2014/04/statistic2013.pdf (Accessed on 23/12/2014). Also see Kencho Tshering, *To Study the Internet Access and Usage Behavior in the Kingdom of Bhutan,* Volume 1, Issue 2 (2013) ISSN 2320–4028, International Journal of Computer Science and Electronics Engineering (IJCSEE). Available at http://www.isaet.org/images/extraimages/P413160.pdf (Accessed on 23/12/2014).

4 Ibid.

5 Brian Fitzgerald, *Dow Jones & Co Inc v Gutnick: Negotiating 'American legal hegemony' in the transnational world of cyberspace,* 2003. Melbourne University Law Review, as cited in Julie Dare, *Online Defamation: A Case Study in Competing Rights*, School of Communications and Multimedia, Edith Cowan University.

most importantly, almost all political ideology and issue becomes the serious part of online debate. While public debate remains greater importance, many debates and online writings are self-advertisement with the 'like-minded fanatics',[6] thereby lowering the quality of intellectual debate. The complete openness of the internet allowing people to publish their own opinion may be subject to little oversight or accountability, however.

Law of defamation is one of the most important areas of law for journalists, bloggers, and social networkers to know about and, for that reason, this article intends to provide the underlying principles and philosophies of the law of defamation. This article will begin by analyzing the basic principles of defamation, its essential elements and available defences. This article will then attempt to focus on the conceptuality of criminal and civil defamation in the Bhutanese context. While examining the online political defamation, reference shall be the present controversial case of Facebook libel suit filed by DPT against Dasho Paljor J. Dorji. However, this article will not delve into the facts of the case rather explore the surrounding issues that are likely to challenge the court of law.

2. Plaintiff's Feeling and Reputational Harm

To set the scenario in the context, it is helpful to have a basic understanding of the concept of defamation. In few jurisdictions, the Law of Defamation has been enacted in a separate legislation[7] allowing legal action to deter various kinds of false statement and retaliate against groundless criticism. The law of defamation rests on the value that people attach to the reputation of individuals.[8] In other words, the law of defamation protects a person's reputation and good name against communications that are false and derogatory. Personal reputation is considered to be as important as possessions of his personal property. VenkatIyer writes that "the reputation is treated as being on par with the right to property where the law provides for compensation when a person is wrongfully deprived of his property, so the law requires the payment of compensation when reputation is damaged."[9]

Although the law of defamation is to protect the reputation of the people, however, the concept of reputation itself remains relatively unexamined, and its meaning and importance are largely assumed.[10] However, the most accepted definition of reputation is, as Lord Denning said, depends on what other people think he is.[11] Therefore, reputation as it is used in the area of law, means the estimation of a person's character or worth in the eyes of the general public. What you are depends on what other see you are.

The law of defamation includes: libel and slander. If the false statement is made in writing, the defamation is called libel; and if the hate speech is made in spoken, the statement is called slander. While some legal systems provide special law for slander, but in general, the effects of both types of defamation are the same in law.[12]

3. Elements of Defamation

As stated, to prove that the statement is defamatory, the plaintiff must prove to the court that such statement damaged and lowered his reputation in the eyes of a general public;[13] and if proved, the defendants will be liable whether they acted intentionally or negligently in making and publishing a defamatory statement to a third person.[14] It has become settled principle of

6 See Alasdair Palmer, *I hardly dare say it: libel laws could save free speech*, 26 Jan 2013. The Telegraph. Available at http://www.telegraph.co.uk/technology/internet/9828434/I-hardly-dare-say-it-libel-laws-could-save-free-speech.html (Accessed on 23/12/2014), as cited in Mark A.B. Donald, *This Means War? Baglow v. Smith and online defamation in the blogosphere*, p.1, Student-At-Law. Thornton Grout Finnigan LL.P.

7 For example, New Zealand and the United Kingdom have enacted separate legislation with regard to the law of defamation. Many countries are yet to enact laws on cyber libel.

8 Venkat Iyer, *Defamation Law in Bhutan: Some Reflections*, June 2008, Vol. 18. Journal of Bhutan Studies. Available at http://www.bhutanstudies.org.bt/publicationFiles/JBS/JBS_Vol18/JBS18-3.pdf(Accessed on 23/12/2014). Also see Kathleen Ann Ruane, *Freedom of Speech and Press: Exceptions to the First Amendment,* September 8, 2014. Congressional Research Service**.** Available at http://fas.org/sgp/crs/misc/95-815.pdf?(Accessed on 22/12/2014).

9 Ibid.

10 David Rolph, *'Introduction' Reputation, Celebrity and Defamation Law,* Legal Studies Research Paper No. 09/41 May 2009, pp.2-4. The University of Sydney, Sydney Law School. Paper downloaded from: http://ssrn.com/abstract=1409933 (Accessed on 26/12/2014).

11 Ibid. Also See *Plato Films Ltd. v. Speidel* [1961] AC 1090.

12 Supra note 8.

13 The Center for First Amendment Studies, *White Papers – Libel, Slander, and Freedom of Speech*. California State University. Also, see Mark A.B. Donald, *This Means War? Baglow v. Smith and online defamation in the blogosphere*, p.1, Student-At-Law. Thornton Grout Finnigan LL.P.

14 Elizabeth (Betsy) Segal, *Tort - Internet Defamation Law: Update,* May 2013. Materials prepared for Continuing Legal Education Society of British Columbia. Available at:

law that the doctrine of defamation constitute three general elements:[15]

a) *That the statements were published towards third person* – The general rule is that the person is liable only when the defamatory matter is communicated to someone other than the person so defamed.
b) *That the statements refer to the plaintiff* – If the name of the plaintiff is not expressed in the defamatory statement, the plaintiff need to prove that the statements were made and directed towards the plaintiff.
c) *That they are defamatory* – In the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person.

Typically, the first two elements are easy to locate. However, it is generally difficult to prove that the defamatory words are capable of lowering the reputation of person about whom the statement is made. The settled principle is that the court would need to satisfy the above elements to constitute a defamation. To put it simple, the plaintiff needs to satisfy and prove to the court that the defendant's statements were made towards the third person, and that it is defamatory, and that it is published and refers to the plaintiff.

3. Defence to Defamation

The Penal Code of Bhutan has recognized seven exceptions to the provision of defamation. While knowing all of them is important, however, for the purpose of this article, focus will be on the following:

- ***Truth*** **–** In the law of defamation, truth is a complete defence. However, the burden of proof is on the defendant to establish that the words are accurate.
- ***Qualified Privilege*** **–** Similar to the defence of truth, the qualified privilege is a complete defence provided that the defendant can prove the court that the defendant has a duty or interest to communicate information to the recipient and the recipient has a corresponding legitimate interest to receive the information.
- ***Absolute Privilege*** **–** Absolute privilege is a complete defence that cannot be defeated by malice. This defence is available to the limited situations – where statements are made during the preceding of a legislative assembly or in the judicial proceedings.
- ***Fair Comment*** **–** Fair comment is an important defence in defamation suits. It generally safeguards freedom of expression on political and social issues and on any subject of public interest. Fair comment is also known as opinion where the words are recognizable as evaluation, critique or commentary on true facts. However, fair comment defence could be defeated if the comment is actuated by actual malice.

4. Defamation – A Crime or Tort?

The law of criminal libel is several centuries old and thus defamation is for the most part a strict liability tort. In many jurisdictions, including the United States and the United Kingdom, the two most widely respected legal jurisdictions in the world, have campaigned to disuse the criminal defamation. However, countries like India, Singapore, Malaysia and most of the Asian jurisdictions continue criminal sanction for the defamation.

Similarly, in Bhutanese legal system, "to place a black hat on a white countenance"[16] worked for centuries and, however, the law of tort has not given its birth. Negligence, one of the most important elements in the law of tort, is considered as a crime.[17] In the absence of tort law, defamation *per se* is construed as a crime and demand public prosecution. Section 317 of the Penal Code of Bhutan 2004 criminalizes the defendant for intentionally causing damage to the reputation of another person by communicating false or distorted information about that person's action, motive, character, or reputation. Section 320 of the Code distinctly criminalize the libel. In accordance

http://www.cle.bc.ca/practicepoints/TECH/14-Internet Defamation Law.pdf (Accessed on 22/12/2014)

15 Andrew T Kenyon, *Perfecting Polly Peck: Defences of Truth and Opinion in Australian Defamation Law and Practice,* 2007, [VOL 29: 651], p. 653.SYDNEY LAW REVIEW. Available at: http://sydney.edu.au/law/slr/slr29_4/Kenyon.pdf (Accessed on 25/12/2014). Also, see Matthew Lafferman, *Do Facebook and Twitter Make You a Public Figure?: How to Apply the Gertz Public Figure Doctrine to Social Media*, 29 Santa Clara High Tech. L.J. 199 (2012). Available at: http://digitalcommons.law.scu.edu/chtlj/vol29/iss1/4 (Accessed on 25/12/2014).

16 This translation is extracted from the article written by Kuensel, *Editorial: Losing Reputation or Face?* Available at: http://www.kuenselonline.com/editorial-losing-reputation-or-face/#.VKN5DMWSxIk (Accessed on 31/12/2014).

17 See Section 57 of the Penal Code of Bhutan, 2004.

with these provisions of the law, there was an instance wherein the Office of the Attorney General, as a Government arm of Prosecution, has prosecuted the defendant for making a controversial statement against the individual private person.[18] However, there are also several instances where the Courts had to decide the defamation suit instituted by the concerned parties to the case for compensatory damages.[19] This clearly indicate that the law of defamation in Bhutan is two-in-one choice available to every citizen to protect his reputation against defamatory publication made by the perpetrator.

Given the fact that the Bhutanese law provides for both criminal and civil defamation, the question remains: whether the plaintiff to the defamation law suit, when prayed for relief, can plead the court for conviction in accordance with the Penal Code? For instance, in the recent online libel case, DPT has prayed the court to charge the defendant in accordance with the Penal Code. It was also an issue wheather the courts should have dismissed the case during the miscellaneous hearing, reasoning that the case is of criminal nature. The issue of applicability of Penal Code is discussed in later part of the article.

5. Defamation and Facebook

Across the globe, social networking is on the rise, and Facebook remains the dominant player in the social networking space. As of the third quarter of 2014, Facebook had 1.35 billion monthly active users.[20]

Although no clear study has been conducted in Bhutan regarding the usage of Facebook,[21] however, Bhutan Information and Media Impact Study conducted in 2013 reports that the "social media (e.g. Facebook, Twitter, LinkedIn etc.) are picking up fast among the urban literate population and provides a unique platform for public discourse on governance and development issues, and the dissemination of real-time news and views".[22] The fact remains that many Bhutanese, from ordinary school-going children to the Prime Minister of Bhutan is on Facebook and Twitter. The number of Bhutanese bloggers is on the rise as well. Consequently, people's statements, opinions, and remarks have the capacity to disseminate information more widely, quickly and uncontrollably than before. This would raise a number of difficult questions in the area of defamation, - and often authors have raised a question concerning whether and how to apply the legal principles developed for the offline world to the Internet Defamation.[23] In other words, online defamation will challenge the applicability of law that has developed on the basis of more traditional means of communication. For instance, the Penal Code is the only statute that provides for defamation provisions which was enacted much before online defamation issues surfaced. The question as to whether the provisions of the Penal Code can be applied in online defamation is a serious task for the court. In such scenario, publishers and courts need to examine how to adapt defamation remedies to contemporary realities.[24]

Before examining the applicability of the Penal Code to online libel suit, let us examine the application of law itself in offline defamation suit. The application of defamation law is quite weird in Bhutanese defamation jurisprudence. In 2010, for instance, in the case of *Kinzang Dorji v. Zaykom*[25] the High

18 Infra note 27.

19 Infra note 25&26.

20 Data available at: http://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/ (Accessed on 24/12/2013).

21 The Global Customer Acquisition however reports that Bhutan has 35,000 Facebook daily visit. See http://www.mvfglobal.com/southern-asia (Accessed on 24/12/2014). Also, See Foad Hamidi & Melanie Baljko, *Facebook use in Bhutan: A Comparative Study*, Available at http://www.cse.yorku.ca/~fhamidi/resources/p1-hamidi-Bhutan.pdf (Accessed on 24/12/2014). The authors have conducted a survey with a total number of 58 students of Royal Thimphu College (RTC), and found out that more than 98% of the students who participated in the survey have Facebook membership and are active on the site.

22 *Bhutan Information and Media Impact Study 2013*, Department of Information and Media, Ministry of information and communications, Royal Government of Bhutan. Available at http://www.doim.gov.bt/wp-content/uploads/2014/09/media-impact-study-2013.pdf (Accessed on 24/12/2014).

23 *Application of Defamation Laws to the Internet,* October 2001, Global Internet Policy Initiative (GIPI). Available at http://www.internetpolicy.net/practices/libel_law.pdf (Accessed on 24/12/2014). Also see Paul Dacam et al., *Global: Defamation and Social Media*, Spring Issue 2013. Global Media and Communications Quarterly.

24 Rebecca Phillips, *Constitutional Protection for Nonmedia Defendants: Should There Be a Distinction Between You and Larry King?*, 33 CAMPBELL L. REV. 173, 178 (2010), as Cited in Ellyn M. Angelotti, *Twibel Law: What Defamation and its Remedies Look Like in the Age of Twitter,* 2013, 13 J. High Tech L. 430 Available at: https://www.suffolk.edu/documents/jhtl_publications/ANGELOTTI-MACROFINALFINAL.pdf (Accessed on 23/12/2014)

25 འཛུན་ཚོད་ཨང་ཀྲམ་-༡༠-༧༢ Available at http://www.judiciary.gov.bt/html/case/Judg/2010/10-72.pdf (Accessed on 24/12/2014).

Court of Bhutan was confronted with an issue whether the word “thief” and “prostitute” would constitute a defamation. Justice Lungten Dubgyur and Justice Tshering Namgyel, overruling the trial court verdict, convicted the respondent for one month as per Sections 317 and 319(b) of the Penal Code of Bhutan. Similar issue have been decided in *Wangmo v. Zangmo*[26] wherein the defendant was found guilty of offence of defamation under the penal provisions and convicted for petty misdemeanor and sentenced to one month period. If we clearly examine the nature of the case, the cases were not prosecuted, but litigated by the parties themselves. Nevertheless, the Court went onto applying the penal provisions thereby criminalizing the defendant for the “unlikely” defamatory statement thus made.

However, there is also an instance wherein the Office of the Attorney General assumed the prosecution role in defamation case. For instance, in the infamous defamation case involving former Director of Revenue and Customs, Sangay Zam, former Finance Minister Lyonpo Wangdi Norbu, and former Minister of Work and Human Settlement Yeshey Zimba, were represented by the Office of the Attorney General against the former authorized agent of Play Win online lottery Sangay Dorji. The case however was dismissed both by the District Court and the High Court in 2008. The High Court ruled that such cases should not be represented by the OAG and left to the aggrieved individuals.[27]

These case laws are intuitive and need no further explanation – that the application of defamation law is strange in Bhutanese legal system. Although the judiciary has decided a plethora of defamation cases, however, those were raised out of traditional publication. Not many online defamation cases were adjudicated. With the increasing number of internet users, social media gives platform for every users to post their likes and dislikes which consequently will question the applicability of the present law enacted for the purpose of offline defamation. However, at least as a starting point for legal analysis, what is

26 འཁྲུན་ཆོད་ཡང་(༡༩༨༧)Available at: http://www.judiciary.gov.bt/html/case/Judg/1987.pdf (Accessed on 24/12/2014).

27 Kuensel,*Defamation suit comes unstuck*, December 31, 2008, p. 4. Cited in VenkatIyer, *Defamation Law in Bhutan: Some Reflections*, June 2008, Vol. 18. Journal of Bhutan Studies. Available at http://www.bhutanstudies.org.bt/publicationFiles/JBS/JBS_Vol18/JBS18-3.pdf (Accessed on 23/12/2014).

illegal or subject to civil/criminal liability offline remains illegal or subject to civil/criminal liability online.[28]

In order to examine the applicability of Penal Code in online libel suits, let us refer to the Facebook libel suit filed by DPT. Do we have adequate law that addresses online defamation? If the provision of the Penal Code is to be applied (as relief sought by the petitioner), the case is not prosecuted by the public prosecutor. If the Code is not applied, there is no separate law for online defamation. Can the court rely on equity principle?

There are two major problems in applying the Penal Code. The application of Penal Code does not necessarily provide adequate remedy for online libel. The maximum compensation payable for the aggrieved party is three years calculated in accordance with the daily minimum national wage rate.[29] Given the fact that online statement goes viral and cause more reputational harm, the plaintiff need to be adequately compensated. If one reputed company is defamed in the Facebook by another company, for instance, the compensation as provided in the Code cannot buy back the company’s reputation. However, it is very significant to note that for nearly all defamation law suits, plaintiff’s remedy is not the monetary compensation, but they want the defendant to stop defaming again. Instead of criminal sanction or monetary compensation, legislative framework also need to focus on alternative means to stop people from defaming.

Another problem with regard to the application of the Code is that it criminalizes the defendant. As we have seen, there are instances where the Court has convicted under the Code although the parties themselves have represented before the court of law. In the criminal proceedings, the plaintiff need to be represented by the State, and any criminalization means State’s interest to intervene. The compensation as mentioned in the Code however is the criminal, and not civil compensation. In this regard, there is a wider scope for Bhutan to have fundamental reform in law regarding the cyber defamation.

28 Supra Note 23.

29 Minimum National Wage Rate is Nu. 125 per day.

Arguing thus, the application of the penal provision is likely to provide major problems for the online libel suit. Then what could be done? Until the law is clear and specific, perhaps, the law of equity needs to be energized. Law of equity is a principle that gives judicial discretion in providing justice. In *Lhaden Pem Dorji v.Tobgyel Dorji and Wangchuck Dorji*[30] Thimphu District Court Judge Ugyen Tshering said that "discretion in equity is not the personal discretion of the judge. Rather is a sound judicial discretion that is governed by the settled principle of equity". The Court also said that:

In a broad jurisprudential sense, equity means the power to do justice in a particular case by exercising discretion to mitigate the rigidity of strict legal rules. Equity regards that as seen which ought to be seen, and having so seen, as done which ought to be done. In this broad sense, equity means the power to adapt the relief to the circumstances of the particular case. It is the power of the court to deliver "individualized justice."

In this aspect, equity principle would provide equitable remedy in online libel suit. This will neither criminalize the defendant nor provide adequate remedy to the plaintiff. However, the court should be governed by the settled principle of equity.

6. Political Defamation

Political defamation is not new around the globe. The South Korean Presidential Office filed a libel suit against the opposition party's Presidential candidate, Lee Myung-bal for trying to tarnish the government's reputation;[31] Singapore Prime Minister Lee Hsien Loong sued the Far Eastern Economic Review for defamation after it called the opposition leader a martyr for facing so many defamation suits brought by the governing party;[32] Spain Popular Party's general secretary Carlos Sáiz sued Spanish newspaper La Realidad for defamation,[33] and the list is numerous.

The story is not different in national jurisdiction. Since the start of democracy, television viewers, radio listeners, and internet users have been busy bombarding with an onslaught of negative attack on political ideology and statements. Many people opine that Monarchical regime is more reliable than the democratic regime, and that politicians certainly cannot represent the whole bunch of truth. Thus, in the regime of constitutional democracy, people become restless about the political issues and divisions. Criticism is inevitable and public noise ultimately become nuisance in the ears of politician. Thus, what is the legitimate rationale for politician to sue or being sued for any defamatory statements?

The truth remains that the law of defamation cannot stop people from gossiping. A study has shown that about two-thirds of all conservation involve gossip,[34] and that "what people talk about is mostly other people."[35] In the period of old fashioned media, whatever people gossip remained within a limited circle and does not leap outside. However, with the modern rise of social media, people keep writing even their personal resentment and feelings thereby hurting the sentiment of others. Today, the political debate and gossip has outpaced the subject matter of online post. Therefore, it is likely that the political party or politician may sue the defendant for defamatory comment or statement published in the public forum or social media.

That is exactly what happened in the present case of Opposition Party's libel suit; and several of these kinds were decided by the courts in other jurisdictions. When politicians are involved in defamation suit, there is always a mixed opinion as to whether the politician can have legal standing. Indian Supreme Court concurs that "the Government, local authority and other organs and institutions exercising power" are not entitled to sue for defamation.[36] Similarly, in the United States, the U.S. Supreme Court decision in *New York Times v. Sullivan*[37] made it very difficult for

30 འབྲུན་ཆོད་༼ཐིམ་ཕུ ༢༠༡༤/༡༢༤༣༽ I would like to thank Judge Ugyen Tshering for kindly sharing me the copy of the judgment.

31 Article 19, *Civil Defamation*: *Undermining Free Expression, December,* 2009. Global Campaign for Free Expression. Available at:http://www.article19.org/data/files/pdfs/publications/civil-defamation.pdf (Accessed on 23/12/2014).

32 Ibid.

33 Id.

34 KEITH DEVLIN, THE MATH GENE 255 (2000). Cited in Daniel J. Solove, *A Tale of Two Bloggers: Free Speech and Privacy in the Blogosphere,*2006, [VOL. 84:1195], p. 1197. WASHINGTON UNIVERSITY LAW REVIEW.

35 Ibid.

36 *Rajagopal v. State of Tamil Nadu*, 6 S.C.C. 632 (1994). Cited in Article 19, *Civil Defamation: Undermining Free Expression, December* 2009. Global Campaign for Free Expression. Available at: http://www.article19.org/data/files/pdfs/publications/civil-defamation.pdf(Accessed on 23/12/2014).

37 376 U.S. 254 (1964). Summary of the case is available at:

public officials to sue the press for libel. In this case, the Court held that:

A State cannot,…… award damages to a public officials for defamatory falsehood relating to his official conduct unless he proves "actual malice" – that the statement was made with knowledge of its falsity or with reckless disregard of whether it was true or false.

The Court went on to say that "factual error, content defamatory of official reputation, or both, are insufficient to warrant an award of damages for false statements unless "actual malice" – knowledge that statements are false or in reckless disregard of truth – is alleged and proved."38 The Court also noted that "every citizen has right to criticize an inefficient or corrupt government without fear of civil as well as criminal prosecution."39

In the United Kingdom, it has been held to be contrary to public interest for a government body to have standing in a defamation action because of the importance of government bodies being open to uninhibited public criticism.[40] In the case of *Hector v. Attorney-General of Antigua and Barbuda*,[41] Lord Bridge of the Privy Council stated that:

In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to censorship of the most insidious and objectionable kind.

Similarly, in *Lingens v. Austria*,[42] the European Court of Human Rights explained that:

Freedom of the press ….affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. The limits of acceptable criticism are accordingly wider as regards a politician as such than regards private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and must consequently display a greater degree of tolerance.

The Court also said that "the protection of reputation extends to politicians too even when they are not acting in their private capacity, but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues."[43] These case laws eventually tell us that any injury caused to reputation is a necessary sacrifice for politicians, and false speech itself does not gain protection under the democratic rationale.

Given these important rulings, the pertinent question is: where do our politician stand in the eye of the public? Whether Bhutanese politicians are public figures or not depends on how the public view them. The settled principle is that the politicians and those who hold the government offices are exposed to public criticism and that any suit for defamation amounts to restriction of free flow of information. Consequently, intention of any libel suit by the public figure is a "libel chill"[44] and the effect of libel chill is that the public do not have access to information that would have properly informed their decision-making on important topics.[45]

Thus, it can be generally summed up that in the context of political campaigns, public officials are often required to meet a higher standard of proof than ordinary citizens. The court would require public officials to prove that the defamatory statement was made with the person's actual knowledge of its falsehood or with reckless disregard of whether it was false or not.

https://supreme.justia.com/cases/federal/us/376/254/ (Accessed on 26/12/2014).

38 Ibid.

39 Id.

40 *See Derbyshire County Council v. Times Newspapers Ltd.,* [1993] A.C. 534 (U.K). Cited in Cameron Sim, *The Singapore Chill: Political Defamation and the Normalization of a Statist Rule of Law,* March 2011, VOL. 20 NO. 2, pp. 328-329. PACIFIC RIM LAW & POLICY JOURNAL.

41 [1990] 2 All E.R. 103, 106 (U.K). The case law is available here: http://www.eccourts.org/judgments/decisions/Older/COA/1987/AttorneyGeneralofAntiguaandBarbudaetal_v_LeonardHector.PDF (Accessed on 26/12/2014).

42 8 Eur. Ct. H.R. 407, 419 (1986). The summary of the case law is available at: http://www.article19.org/resources.php/resource/2586/en/lingens-v.-austria (Accessed on 26/12/2014)

43 Ibid.

44 See Allen Green, *Banish the libel chill*, 15 October 2009. theguardian. Available at:http://www.theguardian.com/commentisfree/libertycentral/2009/oct/15/simon-singh-libel-laws-chiropractic (Accessed on 26/12/2014).

45 Ibid.

7. Free Speech v. Defamation – A Dichotomy?

Rights to freedom of speech and expression is not only the most important aspects of the fundamental rights but also inalienable principle of human rights. Indeed, the Constitution of the Kingdom of Bhutan 2008[46] expressly provides for the protection of this right because of its importance and relevance in the maintenance of vibrant democracy. Free speech and expression facilitates the exchange of diverse opinion in the political decision making; and the protection is mostly essential for a democracy committed to personal autonomy and political pluralism.[47] The right to freedom of speech and expression is also provided in the Universal Declaration of the Human Rights (UDHR), International Convention on Civil and Political Rights (ICCPR), and in various international legal instruments.

However, unlike freedom from torture and other cruel, inhuman or degrading treatment or punishment, freedom of speech and expression is not absolute right.[48] Right to freedom of expression as envisages in Article 7(2) of the Constitution of Bhutan is subject to reasonable restrictions as provided under Article 7(22) of the Constitution, and perhaps one reasonable restriction could be the law of defamation. There is anxiety between the application of defamation law and the free expression. Constitutional guarantee of free speech cannot halt people from expressing false statement about another which would damage their hard earned personal reputation. In such situations, where two human rights conflict with one another, the principle of the indivisibility of human rights require that both rights carry equal weight.[49] Some scholars have attempted hierarchical list of core rights, but there is no consensus exists on the subject, and therefore there is no possibility of determining priority rules for conflicting human rights in the abstract.[50] There is no hierarchy between these two conflicting rights, and no eternally perfect balance can be found because a shift in attitudes and social values necessarily influences developments in defamation law.[51] However, the balancing must take place in accordance with a clearly-defined set national and international rules.[52]

The general feeling is that the conception of defamation law often frustrate the general public to exercise their fundamental right to freedom of speech and expression. However, when free expression appears to be in crisis, it is never to blame the mere existence of law of defamation. The law of defamation certainly serve a legitimate purpose to protect the reputation of a person. However, unreasonably broad restriction on freedom of expression would undermine the principle of democracy. Thus, the enjoyment of the right to free speech and expression must take into account the right of other citizens ensuring that their personal reputation and feeling is protected.

There is also an emerging opportunity for the legislative body and the courts to bring a much-needed fundamental reform. For example, media, journalist, publisher, and social networker know that the publication of false statement is not protected under free expression, however, the law of defamation does not explain the propensity to prioritise other interests over that of free expression. It will be fascinating to see our courts balancing the private right to reputation against any countervailing public interest. Such fundamental reforms would probably require statutory intervention. Although defamation is derived from common law, and it is widely practiced under the canopy of the Penal Code, however, criminal sanction on defamation would challenge the doctrine of free expression.

8. Conclusion

Throughout this article, we have seen the concept of defamation law is to protect the reputation of others.

46 Article 7 (2) of the Constitution of the Kingdom of Bhutan states: "A Bhutanese citizen shall have the right to freedom of speech, opinion and expression."

47 Alexander Tsesis, *Dignity and Speech: the Regulation of Hate Speech in a Democracy*, 2009, [Vol. 44], p.498. WAKE FOREST LAW REVIEW.

48 See Imo J. Udofa*, Right to Freedom of Expression and the law of Defamation in Nigeria*, April 2011, Vol.2, No.1, p. 75. International Journal of Advanced Legal Studies and Governance.

49 Stijnsmet, *Freedom of Expression and the Right to Reputation: Human Rights in Conflict*, 2010, [Vol.26:1] p.185. AM. U. INT'L L. REV. Available at http://www.auilr.org/pdf/26/26.1.8.pdf(Accessed on 25/12/2014).

50 Article 19, *Defamation ABC: A simple Introduction to Key Concepts of Defamation Law*, November 2006, p. 7. Global Campaign for Free Expression. Available at: http://www.article19.org/data/files/pdfs/tools/defamation-abc.pdf (Accessed on 25/12/20014).

51 Michael McHugh AC, *Dancing In the Streets – The Defamation Tango*. Australian Bar Association Conference, Dublin, 29 - 2 July 2005 Available at: http://www.hcourt.gov.au/assets/publications/speeches/former-justices/mchughj/mchughj_2july05.pdf (Accessed on 26/12/2014).

52 Supra note 50.

We have also seen the elements of law of defamation and whether the law of defamation is tort or crime in Bhutan. Further, we have also seen political defamation and Facebook defamation– whether Penal Code of Bhutan can adequately address the issue concerning online libel suit.[53]

As we have seen, the existing conflict between two most important human rights doctrine – free speech and reputation – need to be balanced. There is a certain need for public protection from the operation of libel law, and on the other hand, public figures need to protect their hard earned reputation as well. When exercising one's rights, due consideration needs to be taken to respect the rights of the others. As said in Lake Shore & M.S. R. Co. v. Kurtz, "duty and right are correlative terms. When a right is invaded, a duty is violated." Thus, free expression should not be invaded so that other's reputation remains not violated. These conflicting rights need to reconcile in accordance with the established national and international norms. In the absence of precise domestic cyber law, it certainly challenge the court to reconcile with the existing penal provisions that was enacted for offline defamations. However, what we know is that the freedom of press is not absolute and every citizen has right to free speech, and on the other hand, personal reputation and plaintiff's feelings cannot be doubted at all. But the chilling judgment will certainly bring tremendous cold in the history of defamation jurisprudence.

53 (1894) 10 Ind. App. 60; 37 N.E., 303, 304. Cited in Walter Wheeler Cook (ed.), *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* by Wesley Newcomb Hohfeld, *Introduction,* by W.W. Cook, pp. 1 -15 (1919).

Can Bhutan Make Voting Compulsory?

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Democratic form of government is most sought after in the world. Universal suffrage or voting is essential part of democracy. The decreasing trend in voter turnout is seen as challenging concerned by many countries as it undermines the legitimacy of a government. Therefore, compulsory voting is explored as a means to resolve this evolving problem. Bhutan is no exception, in two cycles of elections it has seen drastic drop in voter turnout. Various scholars in the literature debate the validity of compulsory voting. There are compelling and significant justification proposed both for and against compulsory voting. However, justification for compulsory voting is more convincing. Further, these justifications are found relevant for examining the constitutional validity of the compulsory voting in Bhutan.

1. Introduction

Universal suffrage is a product of centuries of political evolution. For example, even upon the formation of the liberal, democratic United States of America (US), the concept of universal suffrage was unknown; it was left for the states to decide.[1] In some states, the right to vote was limited to those who owned property or paid taxes of certain value.[2] African Americans and Native Americans were expressly excluded from voting in some states.[3] Women were denied the vote.[4] It was more of a 'privilege' than a 'right', and only certain privileged individuals were conferred with this right.[5] It took many struggles and 26 constitutional amendments to reach the present state.[6] However, in Bhutan right to vote has been granted from above by the Great Fourth, His Majesty the King Jigme Singye

1 Alexander Keyssar,*The Right To Vote The Contested History Of Democracy In The United States* (A Member of the Perseus Books Group, 1st ed., 2000) 885.
2 Ibid.
3 Ibid.
4 Ibid.
5 Ibid 854.
6 Alexander Keyssar, 'What Struggles Over the Right to Vote Reveal About American Democracy' (May 2012) <http://www.scholarsstrategynetwork.org/sites/default/files/ssn_key_findings_keyssar_on_right_to_vote_0.pdf>

Wangchuck by initiating democracy and devolving his power to the people.

Today, low turnouts in elections have become an issue of concern in many jurisdictions, including Bhutan, which has seen a drastic decline in voter turnout over just two electoral cycles. As a result, many countries are considering compulsory voting as a means to resolve this problem. This follows the example of countries like Australia, where compulsory voting has helped in keeping the issue of low turnout at bay. However, despite witnessing its advantages many countries and their citizens are reluctant to adopt compulsory voting. Many have argued that though turnout may be increased by compulsory voting, it is still not proven that it will maximize the outcome or the performance of the democratic system.

Similarly, many have argued the opposite and said that a good turnout ensures the legitimacy of the government, and it directly or indirectly contributes to the performance of the government. In contrast, others accept that compulsory voting is justified if it contributes to the functioning of democracy.

2. Arguments for and against Compulsory Voting

2.1 Arguments For Compulsory Voting

There is a significant divide in opinions of scholars advocating for and against compulsory voting. Both sides make strong points, and it is difficult to refute their justifications. There are many theories and principles that justify compulsory voting, and the following are some of the important ones.

2.1.1 Social Contract Theory

The social contract is a theory propounded by Hobbes, and further developed by Locke and Rousseau. This theory rejects the notion of the divine rights of kings, and makes an attempt to provide a justification for the authority of the sovereign power over the people.[7] The theory advocates that people choose to submit to the authority of the sovereign in order to avoid anarchy and live peaceful lives.[8] As per John Locke, a political society comes into being when individual men come together and agree to each give up their power to the sovereign to protect their personal property.[9] By partially abdicating their power, the people then become subject to the will of the sovereign.[10] This is the theory to which we can relate the historical development of the political system.

This theory is still applicable in the current day. Though the authority might have changed from kings to governments, the social contract still remains between the governed and government. In a democratic polity, the government is elected through voting. Through elections, people choose their representatives. This process can be equated with the process of entering into a contract with their representatives and government formed by those representatives. The candidate obtaining the majority of votes formally becomes the representative of that group. Therefore, people are agreeing to his or her representations. The nation as a whole is agreeing to the authority or the decisions of the government formed by their representatives. As a result, it can be said that voting is modern way of entering into social contract. Since it is a means of entering into a contract between the government and the people, it follows that every enfranchised citizen should be made to vote compulsorily.

2.1.2 Utilitarianism and Compulsory Voting

A stable democratic government is seen as a means for promoting both the common good and the individual good.[11] Voting therefore is one of the most important means of ensuring the stability of democratic government. It is the important tool given to all citizens, which in turn enables them to participate in democratic governance; to participate in same level without any distinction made on the basis of their status. It ensures a sense of equality and trust amongst people. It is also possible that higher voter turnout, and an electorate that is more representative of the country's population, would actually change 'electoral and policy outcomes in ways that better reflect aggregate preferences.'[12] Advocates of utilitarianism argue that government action is acceptable if it is geared towards achieving the happiness of the greatest number. When policy

7 James, Nickolas and Rachael Field, The New Lawyer (John Wiley & Sons Australia Ltd, 2013) 94.
8 Ibid.
9 Ibid.
10 Ibid.
11 Brennan, above n 7, 21.
12 Harvard Law Review Association, 'The Case for Compulsory Voting in the United States' (2007) 121 Harvard Law Review 597.

outcomes reflect aggregate preferences, it can be said that it is achieving to a certain extent the so called common good.

It is said that democratic government is a public good.[13] The expression 'public good' could mean two different things, although in principle the distinction may not matter. It would signify a means for ensuring or promoting the public good. On the other hand, it can be said that democratic government is like a public good, akin to a road, from which people can derive benefits out of it. Democratic governance is seen as the best form of governance, and it will remain so until people find a better governance system in the future. In the present day, democratic governance is a system widely fought for and sought by the people. Voting is therefore part of this governance system, which can ensure both the stability, and legitimacy of the democratically elected government. Most who favour compulsory voting argue that by compelling citizens to vote, the legitimacy of the ruling government can be ensured.[14] Legitimacy would mean the likelihood of greater acceptance of decisions made by the government. People would be willing to support and take responsibility for decisions made by the government and act accordingly.

2.1.3 Fairness and Compulsory Voting

Democratic government is the outcome of a transaction or decision made amongst people by virtue of voting. The fairness principle suggests that a 'political community is a cooperative scheme that is geared towards the production of benefits for its members'.[15] The benefit people get from democratic government is because those participating have given up their liberty or subjected themselves to certain restrictions.[16] The people who vote in elections sacrifice their money, time, and to certain extent their liberty. Therefore, people who enjoy benefits from the government without submitting themselves to obligation of voting are 'free-riding on the sacrifices of others, which is unfair...the demand of fairness implies an obligation. Therefore, it might be justifiable for the government to make voting compulsory to achieve this demand of fairness.'[17]

13 Ibid 600.
14 Ibid 602.
15 Ned Dobos, 'Political Obligation', Internet Encyclopedia of Philosophy (Online), 16 June 2007 <www.iep.utm.edu/poli-obl/>.
16 Ibid.
17 Ibid.

2.1.4 Democracy and Compulsory Voting

Some believe that there is no other right that is more important than the right to vote in a democratic manner.[18] Conferring the right to vote to all adults, male and female, is a critical feature of democracy.[19] However, if we are to make democracy meaningful, citizens should actively exercise the right conferred upon them. Voting will keep democracy alive. It is the citizen's opportunity to shape government policy by exercising his or her right to vote. If democracy as the most favoured form of government is to succeed, people will have to exercise their right to vote. One of the important features of democracy is people's participation. However, direct participation of all is practically impossible. That is where voting comes in, enabling us to resort to some type of representation and insist that policy decisions should be made by a publicly elected government.[20]

Engelen proposes that having universal suffrage is not enough; the concept should be taken further and be made universal participation. This statement is made based on the argument that 'where few take part in decisions there is little democracy; the more participation there is in decisions, more democracy there is.'[21] Similarly, when more citizens abstain from voting, the less representative the electoral outcome becomes.[22] As per Lijphart, low voter turnout means unequal and socio-economically biased turnout.[23] More importantly, turnout and inequality are closely linked, that is, if turnout falls the more unequal it becomes.[24] This ultimately defeats the democratic principles of equality. Thus compulsory voting can ensure equality in both participation and representation. A democracy can be made more democratic.

18 Anthony Ciccone,'Constitutional Right to Vote is Not a Duty' (2001) 23 Hamline Journal of Public Law and Policy 325, 325.
19 Bruce E. Moon & et al., 'Voting Counts: Participation in the Measurement of Democracy' (2006) <http://www.lehigh.edu/~bm05/democracy/SCIDactual.pdf>.
20 Bart Engelen, 'Why Compulsory Voting Can Enhance Democracy' (2007) 42 Acta Politica 23 [24].
21 Verba, S. and Nie, N.H., Participation in America: Political Democracy and Social Equality (University of Chicago Press, 1st ed, 1972) 1.
22 Engelen, above n 41.
23 A. Lijphart, 'Unequal Participation: Democracy's Unresolved Dilemma', (1997) 91(1) American Political
Science Review 1.
24 Keaney, E. and Rogers, B., 'A Citizen's Duty: Voter Inequality and the Case for Compulsory
Turnout, Institute for Public Policy Research' (2006), <http://www.ippr.org.uk/ecomm/files/a_citizens_duty.pdf.

With an ever decreasing turnout, there is always a risk of non-acceptance of the legitimacy of the government. There is a risk that people may not accept the decisions made by the government, and this is when democracy fails. If no one votes then the nation may lose its nationhood, as nationhood is defined in part by its government system. Therefore, voting is the lifeblood of a democracy.

2.1.5 No Inverse Right not to Vote

Not all rights imply an inverse right. Similarly, the notion that the right to vote confers an inverse right not to vote is a very questionable proposition. Lardy argues that the main function of a right to vote is to guarantee an entitlement to all qualified individuals to cast a vote.[25] It is different from other rights, which are available to all individuals irrespective of their abilities and qualifications.[26] The right to vote is conferred only to citizens 18 years and above. Therefore, this signifies that it is not an absolute right; rather it can be subjected to certain restraints. For this reason alone, it may be enough to say that the right to vote does not imply an inverse right, and therefore compulsory voting is justifiable. If this reason falls short of justification, it can be further argued that a right does not imply its inverse, as there are competing interests at stake. A right may serve both a public and private interest. When it serves a public interest, its exercise may be made compulsory. There is no evidence to show that voting will serve direct private interests - the interest of an individual voter. But it helps in strengthening and promoting the democratic regime and serves the public interest, which in turn serves private interests.

Creating an absolute individual right of waiver would risk the public interest that the right serves. To say that the right entails absolute status is notional. One cannot waive all the rights conferred to him or her. For instance, though one may have right to life, he or she cannot waive that right and decide to end their life. A waiver is rejected for the reason that this right serve the public interest directly or indirectly. When it cannot be waived, it shows that there is no inverse right attached to that particular right. When it relates to the right to vote, it is prevented from becoming an inverse right not to vote as the right to vote serves the public interest.[27] An individual cannot claim that compulsory voting forces them to waive their right, as there is no inverse right available in the first place. Compulsory voting requires right holders to exercise the right already conferred to them. There is no taking away their right to vote; therefore, it is not inconsistent with any known legal principles.

2.2 Arguments against Compulsory Voting

There are equally compelling arguments made by various scholars and persons against compulsory voting. The following are some of the important examples.

2.2.1 Liberty or Democratic Principles

Many argue that the ultimate end of democracy is liberty. To impose a limitation or restriction on freedom would be undemocratic. In other words, the liberty of citizens is one of the key principles of any democratic institution.[28] Mill argues that the individual has sovereignty over himself, his body, and mind.[29] Therefore, no one is justified in imposing any restriction against his or her will. Blomberg argues that statutes, which make voting compulsory, are untenable as it invades the liberty of citizens.[30] 'Exercising the right to vote requires more than going to the polls on election and casting a ballot.'[31] An election involves a series of processes including the burden of registering to vote.[32] This can be considered one of the highest degrees of encroachment on citizens' liberty. As it involves series of actions, a voter must be given the option to abstain if he or she supports no candidates.[33] In addition, Blomberg believes that the right to vote deserves even higher tier constitutional protection because abstention involves a freedom of speech and expression.[34]

Lever[35] proposes another liberal defence against compulsory voting. She argues that the legal compulsion of voting will result in imprisoning

25 Heather Lardy, 'Is there a Right Not to Vote?' (2004) 24(2) Oxford Journal of Legal Studies 303, 309.
26 Ibid.
27 Brennan, above n 35.
28 John Stuart Mill, On Liberty (The Pennsylvania State University, 1998) 13.
29 Ibid.
30 Jeffrey A. Blomberg, 'Protecting the Right Not to Vote from Voter Purge Statutes' (1995) 64 Fordham L. Rev. 1015.
31 Ibid.
32 Ibid.
33 Bid.
34 Ibid.
35 Annabelle Lever, 'A Liberal Defence of Compulsory Voting: Some Reasons for Scepticism' (2008) 28(1) Politics 61–64.

otherwise law-abiding citizens while sanctioning a failure to vote.[36] According to Lever, another problem with compulsory voting is that political parties take elections lightly. She argues that in Australia compulsory voting has resulted in a situation where parties do not care to compete for votes of the poor, the weak and the marginalised.[37] Politicians do not compete for votes as the vote is compulsory and therefore everyone is going to show up for the election.

2.2.2 Correlativity of Rights and Duties

As per Hohfeld, rights and duties are correlative to one another.[38] A right is an enforceable claim to performance, that is, either to act or forbear from actions by another. For instance, it is the legal relation of 'A' to 'B' when the state through law commands action or forbearance by 'B' and will at the instance of 'A' in some manner penalize disobedience.[39] Duty is the legal relation of 'B' who is commanded by the state to act or to forbear for the benefit of 'A', and will be penalised by the state for disobedience.[40] From this the conclusion drawn is that there are three actors when it concerns rights and duties. A right holder, a duty holder, and sanction imposer. In the right to vote, it is the citizen who owns the right, and the state owes a duty to citizens to ensure that the right is not infringed. In the present context, the state is also the sanction imposer. However, the question is can a citizen who has a right to vote also have an obligation or a duty to vote. From the Hohfeld's conception it seems that rights and obligations are almost opposites. Therefore, it may be theoretically justified to say that right holder may not at the same time owe duty to himself or herself, and hence compulsory voting is flawed.

2.2.3 A Right to Vote includes a Right not to Vote

Those arguing against compulsory voting say that it is wrong to say that the right to vote is not right at all.[41] It is said that a person has the right to free speech, and he or she also has the right to say nothing at all when he or she doesn't want to do so. A person has a right to assembly, and at the same time he or she has right to stay at home alone. As simple as that, a person has a right to vote, and at the same time right not to vote. This argument is relied on judicial interpretation of other rights and freedoms. In Australian case of *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth*,[42] it was held that freedom of religion also protect right of man to have no religion. Similarly, Blackshield and Williams are of the opinion that the implied right to vote conferred by Constitution can be interpreted to include inverse right not to vote.[43] Therefore, it may be said that within every constitutional right, there is an inherent and implied inverse right.[44] As discussed earlier, right and duty seem almost to be opposites. Rights entail choices, decisions, that is, every right provide a choice to citizen to exercise it at his or her free will. If right holders are forced to exercise their rights, those rights will not be rights anymore. Compulsory voting may be therefore, refuted on the basis of right to vote as including inverse right not to vote.

The reliance on this argument can be made on Hohfeld's privilege right. If a person has privilege to vote, then that also means that he or she doesn't have duty to vote. The privilege as per Hohfeld is, the person holding it is at his will to act as he or she pleases. For instance, the owner of a house is at his or her will to colour it in whatever way he or she wants it. To sell or not to sell a car is an owner's choice. In other words, no third party has right to stop him or her. Privilege and no-right is jural correlative, meaning, if person 'A' has a privilege, a person 'B' does not have right to interfere. When voting is made compulsory, it implies that state is interfering with a person's privilege not to vote. This is wrong as per Hohfeld's conception, as mentioned, if one has privilege, others cannot have right. Therefore, it can be argued that compulsory voting is flawed.

2.2.4 The Ethics of Voting and Duty not to Vote

Supposedly, the ethics involve in voting is the

36 Ibid.
37 Ibid.
38 Hohfeld, Wesley N., 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) Faculty Scholarship Series, Paper 4378, 710.
39 Corbin, 'Legal Analysis and Terminology' (1919)29 Yale Law Journal 167.
40 Ibid.
41 Trent Sandusky, 'The Right NOT to Vote: An Important and Constitutionally-Implied Right', Yahoo Contributor Network, <http://voices.yahoo.com/the-right-not-vote-important-constitutionally-98040.html>
42 (1943) 67 CLR 116.
43 Blackshield and Williams, Australian Constitutional Law and Theory Commentary and Materials (The Federation Press, 5th ed, 2010) 368.
44 Sandusky, above n 67.

strongest argument against making it compulsory, or imposing duty to vote. Brennan argues that the voting involves highest degree of ethical values.[45] Voting involves highest possible standard of care than that of ordering food in a menu. When a person orders certain food, it is that person alone who bears the consequences. But in voting, when people vote, then they are imposing one meal on everybody. It could go as bad as forcing diabetics to take more sugar, and vegetarians eat meat.[46] Therefore, voting involves greatest responsibility. If citizens exercise their right to vote, then they must vote well.[47] A vote must be based on sound evidence for what is likely to promote the common good. He argues that citizens who lack the motive, knowledge, rationality, or ability to vote well should abstain from voting.[48] Relying on his argument, there is no guarantee that high turnout in voting will ensure the legitimacy of government. This end cannot be achieved unless people exercising their right to vote do so on genuine and justifiable reasons. If it is based on self interest, the purpose of common good would be defeated. Vote should not be driven by cultural, religious, or any other beliefs, but must be solely based on factors that would ensure and promote common good. This basically demands all exercising vote to be well informed of party portfolios, programs, character of candidates, and more importantly to decide what is good for general public unfazed by any self-interest.

Piero argues that forcing everyone to vote means that the voice of those with no interest in politics will influence the decision about who rules.[49] This he says is one of the main causes of the actual crisis of democracy worldwide.[50] Therefore, those who do not care about politics should not vote.[51] Piero goes to the extent of saying that it would be easier to justify preventing them from voting than of forcing them into voting.[52] He argues that people who genuinely make efforts to follow politics to develop an informed idea could be cancelled out by the vote of someone who does not care, but still is given the power to vote.[53] Graeme argues that the right to cast a ballot that expresses only sincerely held preferences between the candidates on offer is as fundamental as the right to vote.[54] It implies that if the preference made is not genuine then one should abstain from voting.

2.3 Evaluation of Arguments

Firstly, we have looked at social contract as justification for making vote compulsory. The argument was that voting is a modern way of entering into social contract. As the contract entered into is between government and citizens, everyone ought to vote. However, any contract so made should be voluntary. Making it compulsory for all to vote is one way or other forcing them to enter into contract. In ordinary contract, which can be challenged on the ground of coercion. Therefore, social contract theory is not one of the arguments that can be relied on. Second, will utilitarianism justifications hold? Compulsory voting is seen as means for promoting common good, ensuring equal and universal representation. It is seen more as saviour of democracy, which in turn results in common good. There is no figure to prove that compulsory voting in turn can maximise common good. The argument is made based on assumptions. However, it is also true that if less or no people turnout to vote, the outcome would be catastrophic. On assuming that democracy itself is common good, utilitarianism can still be valuable defence for making vote compulsory.

Third, is compulsory voting justified as means to ensure fairness or to address free-riders? It is argued that it is unfair for a person to enjoy benefits from the action of others who have given up their right or liberty; who have submitted themselves to certain restrictions or limitations. People who vote are directly or indirectly sacrificing their liberty. People who don't vote are free-riding. Logically, it would be very unfair to free-ride. Though democracy is for securing liberty, it also advocates fairness. Therefore, fairness can still be a valid justification for compulsory voting, it would mean bringing everyone onto equal footing, requiring strong and weak, and rich and power to

45 Above n 7.
46 Ibid.
47 Ibid.
48 Ibid.
49 Moraro, Piero, 'Why compulsory voting undermines democracy' [online]. Living Ethics: Newsletter of the St. James Ethics Centre, No. 88, Winter 2012: 11, <http://search.informit.com.au/documentSummary;dn=808846891086553;res=IELHSS> ISSN: 1444-6545. [cited 26 Apr 14].
50 Ibid.
51 Ibid.
52 Ibid.
53 Ibid.
54 Graeme Orr, 'The Choice Not to Choose: Commonwealth Electoral Law and the Withholding of Preferences' (1997) 23(2) Monash University Law Review 285.

vote. Fourth, the democracy principle sees voting as lifeblood of democracy. Without voting, democracy is not possible. If all the people decide to quit voting, the system will crumble.[55] Most of the time this would be true, however, voting if exercised wrongly would also result in crumbling the system. Still, it is very true that assumption of benefits outweighs negative assumption.

Fifth is the debate of the right to vote as including an inverse right not to vote on one part, and conversely arguing there is no inverse right not to vote on another part. This is one of the most interesting and insightful ongoing discussions in the literature. As seen in earlier discussion, it seems that many make their argument based on other rights. It is argued that if right to religion has inverse right not to have religious believe, why can't similar construction be applied in right to vote as well. It is also shown that some rights do not have inverse rights. For instance, though person has right to life, he or she cannot end life. Therefore, rights may or may not have inverse right. Similarly, right to vote may fall in either category. The best possible way to look at is, determine why do some rights have inverse right when some do not. Taking an example of right to religion, it depends on one's belief. More importantly, it is right which has no causal connection to others. Whether one choose to be religious or not, it has no bearing either to others around that person, or to the state. Whereas in case of right to life, if inverse right to end life is conferred, then there is possibility that many might find ways to end their lives. This practice would then be very disturbing in the society. It can be understood from this that right, which serve social, or public interest may not usually have inverse right. Now in which category does right to vote fall? As right to vote serves public interest, it is justified to say that it entails no inverse right, and therefore, compulsory voting is justifiable. Another way of looking at it is a waiver of a right point of view. Literally, a waiver of right and inverse right may be different but functionally these two phrases are the same.[56] The refusal to exercise right to vote, or claiming that there is inverse right not to vote is as good as waiving the right to vote. In most of the cases, rights cannot be waived. This then indicates that there can't be right not to vote.[57] Therefore, as Lardy puts it, 'there may be convincing arguments against compulsory voting but arguing that there is a right not to vote is not one of them.'[58]

Sixth, it is argued that the compulsory voting invades citizens' liberty, therefore, compulsion is undemocratic and against democratic principles. More strongly put, voting as per them is not just casting of vote, but it involves series of actions including registering to vote, collecting information on parties and candidates, going to polling booth. This involves series of encroachment on citizens' liberty. John Stuart Mill one of the advocates of liberalism, suggested that 'the only purpose for which power can be rightfully exercised over any member of a civilized community against his or her will is to prevent harm to others.'[59] He argues that the individual has sovereignty over himself, his body, and mind, and it should not be invaded unless it is for preventing harm to others.[60] From this, we can understand that liberty is not absolute, it can be limited if it harms others. Therefore, if it can be shown that individual's failure to vote can harm others, compulsory voting can be justifiable. Though there may not be direct harm, voting is seen as a means to serve the wider community. Mill who is strong supporter of individual liberty has accepted that the minor burden on autonomy that serves community at large is perfectly fine. Mill stated that 'His vote is not a thing in which he has an option. It is strictly a matter of duty; he is bound to give it according to his best and most conscientious option of the public good.'[61] Therefore, from this it can be understood that voting helps in sustaining the good of a democratic and just society.[62]

The liberal defence against compulsory voting argues that the legal compulsion of vote will result in imprisoning of otherwise law-abiding citizens while sanctioning for failure to vote.[63] It is also being argued

55 Sandusky, above n 67.
56 Above n 35.
57 Ibid.
58 Lardy, above n 48.
59 John Stuart Mill, On Liberty (The Pennsylvania State University, 1998) 13.
60 Ibid.
61 Mill, J. S., Considerations on Representative Government (The Serenity Publisher, An Arc Manor Company, 20080 121.
62 Amy Pracilio, 'Compulsory voting – Does it keep the community at large more connected? Have First World countries forgotten the value of the vote?' (Nov, 2012) <http://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/3815429c61cd31f136c4c5ae48257ac5000a65c7/$file/5429.pdf>.
63 Ibid.

that the compulsory voting results in situation where parties don't care to compete for the votes of the poor, the weak and the marginalised.[64] Politicians think that whether they compete for vote through campaign or not, as the vote is compulsory everyone is going to show up for election. This ultimately, is not in line with democratic principles. It may be true, that it may result in imprisoning of otherwise law-abiding citizen if vote is made compulsory. However, it is also true that when vote is made legally compulsory, if he or she fails to do so, then he or she is no more law-abiding citizen. Latter argument that the compulsory voting will result in politician taking competition lightly seems false. When the vote is made compulsory, it means everyone irrespective of status is going to turnout for voting. When that is the case, politicians have rather everything to worry about and will have to compete to win every vote. Compulsory voting will promote competition amongst political parties, pressing them to give their best to win everyone's vote. This is good for democracy. More importantly, at the end, it is clear that invasion on liberty is legal when it concerns public interest, so is compulsory voting.[65] It can be further justified on the ground that the right to vote does not share same status as other rights.[66] The right to vote is conferred to qualified individuals, and not to everyone as in other rights, which are conferred to everyone irrespective of their qualifications. This very nature of the right to vote shows that the right is not absolute and it can be subjected to reasonable limitations. Therefore, compulsory voting as imposing duty is valid, because it can be seen as parallel to other duties required by society of its citizens.[67] The compulsory voting is not very different from imposing taxes, and other ordinary duties.[68] Therefore, imposing minor burden of voting is justifiable.

Seventh, we have seen that rights and duties are correlative, and they being almost opposites cannot go hand in hand. In other words, rights may not be duty at the same time. As per Hohfeld's conception, when 'A' has a right, it is 'B' who owes 'A', a duty to do or forbear from doing something. It may be justified to say that it is not possible for 'A' to hold right, and owe duty to do or forbear from doing something in relation to that right. That would basically mean there is no right at all. However, this conception is still true in case of voting too, and is very much applicable. The citizens have right to vote against the state. Therefore, state has duty to ensure that right to vote is guaranteed. When we claim that the citizens have duty to vote, it signifies that there is someone who has corresponding right. In voting, it is state that has right to claim that everyone cast vote. Therefore, in right to vote, 'A' has right to vote, 'B' that is the state has duty to ensure everyone equal right to vote, and not to infringe it. It is not that, 'A' owns right to vote, and 'A' also owes duty to vote or forbear from voting. 'A' owes duty to vote, because 'B' has right to claim that 'A' should cast his or her vote. Therefore, the argument that right and duty cannot go hand in hand fails.

Eighth, one of the strongest arguments against compulsory voting is the ethics of voting. Jason Brennan has countered all the possible arguments made justifying vote as a duty. As already discussed, he argues that no one has duty to vote, and if he or she decides to vote, he or she then has duty to vote in good faith. Any person deciding to vote must do so keeping in mind the public interest or common good. If their decision to vote is influenced by self-interest, they should refrain from voting. He also argues that, individuals votes do not count in saving democracy; it is collective vote that makes difference. Therefore, vote as a duty is untenable. It is true that it will be very difficult for people to determine which political parties are going to promote the common good. However, it is also true that the right to vote was the result of continuous struggles in many countries. Therefore, this indicates that voting indeed plays a vital role in promoting the public interest. If the collective vote makes the difference, individuals will make a difference too. It is individual votes that make the vote collective. It doesn't matter whether the decision to vote is guided by personal interest or not. Even if everyone's vote is guided by personal interest, collectively that personal interest becomes the common good when reflected by the outcome of an election. Democracy itself is based on voting, and it is an accepted fact that democracy is a better governance system than other forms of government. Therefore, it is justifiable to say that voting one way

64 Ibid.
65 Above n 35.
66 Lardy, above n 48.
67 Above n 88.
68 Ibid.

or another is for the common good. If this is the case, then it would be ethical to say that everyone has a duty to vote. Compulsory voting, therefore, can be justified on this ground.

3. Validity of Compulsory Voting in Bhutan

'The one person, one vote system' was new to Bhutan in 2008, and therefore a nation-wide awareness program was conducted. The first parliamentary election saw 79.45% voter turnout for the National Assembly.[69] However, in 2013, the second election of the National Assembly voter turnout dropped to 66.13%.[70] We saw a decrease of 13.32% in just two cycles of elections. In 2013, voter turnout for the election of the National Council hit a record low of only 45.16%.[71] Therefore, not even 50% of the Bhutanese people are represented in the National Council. As Bhutanese electoral laws do not provide for compulsory voting, it may be time to consider this issue.

3.1 Interpretation of the 'Right to Vote' in Bhutan

The right to vote is not merely a right but power - a sovereign power conferred to citizens. As per Article 1 of the Constitution, sovereign power belongs to the people of Bhutan. Article 23(1) provides that the general will of the people shall be the basis of government. And this general will shall be expressed through periodic elections. As per Article 23(2), all persons who are citizens of Bhutan and not less than 18 years of age, have the right to vote by direct adult suffrage through secret ballot. This right is recognised as a basic fundamental right under Article 7(6) of the Constitution. These provisions are closely linked. Sovereign power is not a power given to individual citizens to impose individual decisions, but to citizens as a whole. Therefore, it cannot be exercised individually; it has to be done collectively. It is done by electing a party to the government through the casting of votes. Therefore, voting collectively plays a very important role in democratic society.

Given the important role it plays, the right to vote is given a basic or fundamental rights status. Such a status is not given in all democracies. The Chief Justice Lyonpo Sonam Tobgye, who was the Chairperson of the Constitution Drafting Committee, wrote that rights, liberties and freedoms are the precious jewels of an individual, and these jewels are guaranteed by the Constitution under Article 7.[72] The principles enshrined under fundamental rights were incorporated from various Royal Edicts and Speeches of the Kings in conjunction with various documents.[73] Further, these rights were incorporated based on the philosophy of historical documents such as the Magna Carta of 1215 AD, the Declaration of the Rights of Man and of the Citizen, and many more. Therefore, the right to vote as part of this provision has its foundation in these historical documents. The Chief Justice further wrote that Bhutan has many provisions implementing the Universal Declaration of Human Rights (UDHR) and International Covenant on Civil and Political Rights (ICCPR).[74] The United Nations High Commissioner of Human Rights (UNHCR) commented that the Constitution is well drafted, and it appears to draw considerably on the civil and political rights that are set out in the UDHR.[75] Therefore, the right to vote as a fundamental right can be understood as conferred with a human right status in Bhutan. Therefore, the right to vote may be interpreted in line with human rights documents.

It is now established that the right to vote is a fundamental or basic human right in Bhutan. But what does this right include? There is no discussion in the literature related to the Bhutanese perspective. Therefore, it is imperative to rely on practices of other jurisdictions. In Australia, although the definition of a vote is not expressly mentioned in law, it can be construed from the majority judgment in the case of *Judd v. McKeon*:[76] 'choice meant simply making a selection between different things or alternatives submitted, to take by preference out of all that was available.'[77]

Therefore, the right to vote guarantees freedom for an individual citizen to select from the alternatives

69 Gross National Happiness Commission, 'Keeping Promises: A Report on the Status of Implementation of the Brussels Programme of Action in Bhutan for the Decade [2001-10]' http://www.un.org/wcm/webdav/site/ldc/shared/Bhutan.pdf>, 12.

70 Election Commission of Bhutan (ECB), 'Result of the Parliamentary Elections 2013, National Assembly Elections: General Elections' http://www.election-bhutan.org.bt NAGResult2013/

71 ECB, 'Notification on the National Council Elections Result' http://www.election-bhutan.org.bt/NCResult2013/24042013_NotiEng.pdf>.

72 Above n 95.

73 Ibid.

74 Ibid.

75 Ibid.

76 Judd v McKeon (1926) 38 CLR 380.

77 Ibid, 383.

given to them. The right to vote enables citizens to choose between the parties or candidates available in an election by making a preference. However, is it possible to make no preference at all? Is there a right not to choose? If we look at the definition alone, it is very clear that a choice should be made from the alternatives available. The implication is that a citizen has to compulsorily exercise his or her right to choose from the choices available. However, in practice compulsory voting in Australia means compulsory registration and compulsory attendance.[78] Voters have freedom whether to make a choice or not, or may just cast an invalid vote. Therefore, it can be said that even in Australia, in a strict sense there is a right not to vote. In India it is explicitly held that there is inverse right not to vote, and therefore the Supreme Court ordered that there should be a 'none of the above' button made available in the Electronic Voting Machine (EVM).[79] The US's stand is similar; the right to vote basically includes the inverse right not to vote.

Can Bhutan take the same stand? Can it be said that the right to vote includes an inverse right not to vote? What kind of protections does right to vote in Bhutan cover? As in other jurisdictions, the right to vote in Bhutan covers the whole process of voting, including from participating in an election, casting of a vote and the counting of his or her vote. However, the right to vote as including an inverse right not to vote is subjective. Bhutan is a very small nation with a population of around 0.7 million. Not all of the population are eligible to vote. Bhutan cannot take chances in making a choice, which might endanger the democratic governance system. More importantly, Bhutan is a community and values-based nation. Therefore, social values or principles can be used to justify compulsory voting.

3.2 Constitutional Validity of the Compulsion to vote

Fundamental rights are intended to limit the power of the government, and to secure individual liberty from arbitrary action of the government. Can the right to vote as a fundamental right be made compulsory? Would compulsion amount to arbitrary action? There has been only one occasion where the judiciary in Bhutan was called upon to consider the constitutional validity of legislation: *The Opposition Party v. the Government of Bhutan*.[80] Though the Supreme Court of Bhutan did not develop principled validity tests, the result is that provisions of any law, which are inconsistent with the Constitution, shall be null and void.[81]

The test however is to apply Article 1(10),[82] and see if compulsory voting violates or is inconsistent with the provisions of the Constitution. Therefore, this takes us back to an earlier discussion, that is, whether the right to vote includes an inverse right not to vote, and whether compulsion would violate the right to liberty. As already seen, the right to vote in Bhutan is a fundamental right, which can be equated with basic human rights. Does this status mean it entails the inverse right? Does it mean there is no duty to vote at all? To claim that there is an inverse right not to vote is to say that there is no duty to vote. Therefore, it is imperative to see whether Bhutanese citizens owe the duty to vote under the Constitution. If a duty is established, then it can be also established that there is no inverse right not to vote. If this is established, then it would mean that compulsory voting will not violate Article 7(6), which is the right to vote.

Despite the arguments of merit, logic and policy presented above, whether there is a duty in a particular jurisdiction to vote or not depends on the specific institutional setting. In Bhutan, the question might therefore be assisted by letters of the provisions of the Constitution and other external aids to interpretation such as the Drafting Committee's debates, and most importantly visionary aspirations of their Majesties, particularly of the Great Fourth. The Bhutanese democracy and the Constitution is his brainchild. The Constitution of Bhutan before its adoption went through three stages. The first was discussion within the Drafting Committee. The second, more important, stage was public discussions. The Draft Constitution was available to everyone and their Majesties,the Fourth and the Fifth Kings visited all the Districts and discussed provisions of the Constitution in depth with the people. It is rightly proclaimed by His Majesty

78 AEC, Compulsory Voting' <http://www.aec.gov.au/Voting/Compulsory_Voting.htm.>.
79 People's Union of Civil Liberties & Anr. v Union of India & Anr (2003) 4 SCC 399.
80 (2011) Hung 11-1 SC, <http://www.judiciary.gov.bt/html/case/Judg/2011/englishj.pdf>.
81 The Constitution of the Kingdom of Bhutan 2008 Article 1(10).
82 Ibid.

the Fourth King that, "They accepted ownership and responsibility for the Constitution through their involvement and participation, just as they have acknowledged that democracy is a better alternative for the future and voted in a Government of their choice."[83] Therefore, each and every citizen owned the process of the adoption of the Constitution. Further, it went through debates and discussions in the first ever democratically elected Parliament through people's representatives. These consultative processes further the argument that it is now every citizen's duty to ensure that the spirit and words of the Constitution are held high, and make democracy vibrant.

The form of government as enshrined in the Constitution is a Democratic Constitutional Monarchy.[84] As per the Chief Justice Lyonpo Sonam Tobgye, this is an immutable principle or basic structure of the Constitution, and it cannot be abrogated or amended through any ordinary process.[85] The Constitution, in its Preamble begins with the expression, "WE, the people of Bhutan…"Similarly, while adopting the Constitution on 18th July 2008, His Majesty proclaimed, "…this Constitution was placed before the people of the twenty Dzongkhags by the King. Each word has earned its sacred place with the blessings of every citizen in our nation. This is the people's Constitution."[86] This indicates that people have agreed to the form of government and stand by it. This implies that each and every citizen of Bhutan is mandated to act for enhancement and promotion of the democracy. Therefore, the Constitution is a contract entered into by all the citizens of Bhutan. Every citizen has a duty to protect the Constitution. This duty can be executed only by expressing their general will in periodic elections. Therefore, the concept of social contract theory is a relevant justification in the Bhutanese context. Its relevance can be categorised into two. First, as the Constitution symbolises social contract amongst citizens, and between citizens and government, voting is one of the important terms of this social contract. This implies a duty for all citizens to vote, and to ensure that democracy as a form of government is protected and promoted. Second, the relevance of voting as means of entering into a social contract, as discussed earlier. That is, voting as a means of entering into a contract between the representatives and the people, and ultimately the people and the government. Representation of people in good faith, and for the common good, is an important term of this contract. The government agrees to represent people well in exchange for giving up their individual power of representing themselves. Therefore, voting in relation to a social contract implies a duty.

The Preamble further reads, '…solemnly pledging ourselves to strengthen the sovereignty of Bhutan, to secure the blessings of liberty…" This entails that sovereignty comes first and then the liberty. It also implies that Bhutanese citizens have a duty to strengthen the sovereignty of Bhutan, which would in turn foster liberty. This further implies that liberty or freedom will not materialise if the nation loses its sovereignty. The form of government, a Democratic Constitutional Monarchy as provided for by the Constitution, is the identity of the nation, and recognises Bhutan as a sovereign country. The Bhutanese Constitution is a source of its legal and rightful existence as an independent nation.[87] Voting is a means to ensure that the Constitution is protected to further ensure its sovereignty if we are to enjoy liberty. Therefore, voting serves a utilitarian purpose, as discussed earlier. The philosophy of utilitarianism is relevant for interpreting the Constitution in this context. Moreover, as the Chief Justice pointed out, the basis of the Constitution is philosophy derived from historical documents, and therefore utilitarianism as a philosophical principle has relevance in aiding the interpretation. Originalists argue that the Constitution should be interpreted to give original meaning.[88] Utilitarianism as a philosophy can be used to determine the intention of adopting the Constitution to a certain extent. Even if this justification fails, the purposive theory,[89] also known as Heydon's rule[90] of interpretation, can be used to justify the

83 Lyonpo Sonam Tobgye, "Making of the Constitution of the Kingdom of Bhutan, (Online) http://www.judiciary.gov.bt/html/education/publication/constitution1.pdf>, 101.

84 The Constitution of the Kingdom of Bhutan 2008, Article 1(2).

85 Above n 95.

86 Lyonpo Sonam Tobgye, "Making of the Constitution of the Kingdom of Bhutan, (Online) http://www.judiciary.gov.bt/html/education/publication/constitution1.pdf>, 101.

87 HRH Princess Sonam Dechan Wangchuck, The Raven Tells a Story (1st ed., 2011) 12.

88 Karen M. Gebbia-Pinetti, 'Statutory Interpretation, Democratic Legitimacy and Legal-System Values' (1997) 21 Seton Hall Legislative Journal 280.

89 Aharon Barak, Purposive Interpretation in Law, (Princeton University Press, 1st ed., 2005) 89.

90 Heydon's Case (1584) 3 Co Rep 7a at 7b; 76 ER 637 at 638.

relevance of utilitarianism. This would entail looking at the purpose for adopting the Constitution or the democratic form of government. Why do we need the Constitution? What was the purpose of transforming from a Monarchy to Democracy? It is to give power to the people, and also to confer the collective duty to the people to guard the sovereignty of the nation. It enables citizens to participate in decision-making. Therefore, the reason or purpose is very transparent; it is to ensure good governance that secures liberty and promotes happiness. Voting as an integral part of the Constitutional Democracy plays a utilitarian role. As discussed earlier, Mill, a strong advocate of liberty, suggested that voting is a duty.[91] His Majesty the Fourth King said that. *"…Once we start the democratic form of Government in future, it will be the responsibility of the people to elect our ruling party who are capable, sincere and who could best serve the country. If we do not take this responsibility of electing very good Government to power, thinking that anybody will do, and place those people who cannot serve the people and the country to power, there is danger that we might face the same problem that some of the countries are facing now."*[92] This indicates that making informed choice is for the good of a nation. Therefore, when a right serves a utilitarian purpose(s), there is a duty to exercise it.

As per Article 8(1), the citizens of Bhutan have a fundamental duty to preserve, protect and defend sovereignty…security and unity of Bhutan and render national service when called upon to do so by the Parliament. Therefore, if voting is made compulsory, it would mean that the individual is rendering national service for the public good; in preceding discussions we have seen that democracy itself is public good. The right to vote is more than a right; it is the lifeblood of democracy. Therefore, in the Bhutanese context every citizen has a duty to vote. This therefore implies that there is no inverse right not to vote. As discussed earlier, the right to vote can be accorded a similar status to that of the right to life. In the Bhutanese context, though law does not prohibit the taking of one's own life or committing suicide explicitly, it prohibits abetting or aiding suicide, and use of force to stop the commission of suicide is accepted as a legitimate defence.[93] Therefore, reference can be drawn to the Indian case where the right to life is held not to have an inverse right to end one's life.[94] The argument that the right to vote includes the right not to vote has important relevance in this context. We have seen while evaluating arguments for and against compulsory voting, that as voting serves the public interest, it cannot be said to include an inverse right. Therefore, both generally and contextually, voting imposes a duty upon citizens. Compulsory voting as a means for imposing duty is therefore well justified.

If one were to accept the argument that the right to vote includes an inverse right, would making voting compulsory violate Article 7(6) or Article 7(1) of the Constitution? Article 7(1) states that every person has the right to life, liberty and security of person. Will compulsion amount to infringement of the right not to vote or right to liberty? The state can, as per Article 7(22), impose reasonable restrictions to fundamental rights by law. When it concerns the interest of the sovereignty, security, unity, integrity, peace, stability, and well-being of the nation, the state can impose restrictions by enacting laws. As already discussed, voting sustains the good of a democratic and just society.[95] As per Article 29(1) of the UDHR,[96] freedoms are subject to duties to the community in which the free and full development of his or her personality is possible. It implies that without community, development of a personality is not possible. Therefore, without democracy, or for that matter a sovereign nation, freedom will not be possible. Voting collectively can directly or indirectly contribute to the peace, stability and well-being of the nation. Article 29(2) of the UDHR allows restrictions on freedom in order to meet the just requirement of morality, public order and general welfare in a democratic society.[97] Voting in Bhutan can be both a moral and legal duty as we have seen; therefore, compulsory voting can be justified under reasonability principles enshrined in Article 7(22) of the Constitution. There is no reason why Bhutan cannot make voting compulsory, when compulsory

91 Mill, J. S. (1861). Considerations on representative government. Rockville: Arc Manor. (p.121).

92 Lyonpo Sonam Tobgye, "Making of the Constitution of the Kingdom of Bhutan, (Online) http://www.judiciary.gov.bt/html/education/publication/constitution1.pdf>, 44.

93 The Penal Code of Bhutan 2004 s108 and 150.

94 Gyan Kaur v. Uninon of India (1996)2 SCC 648.

95 Above n 88.

96 Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, 3rd session, 183 plen mtg, UN Doc A/810 (10 December 1948).

97 Ibid.

voting has been held not to be violative of human rights by the human rights courts around the world. The European Court of Human Rights, for example, in the case of *X v. Austria* ruled that, provided there was no compulsion to mark the ballot formally, compulsory voting is acceptable.[98]

Even if compulsorily marking of the ballot is mandated, it may not amount to an infringement of the right to liberty or an assumed inverse right not to vote. As long his or her choice remains secret, compulsory voting will not be arbitrary or excessive. Voting is the most important civic duty and the burden is extremely light,[99] therefore, the limitation imposed on right to liberty guaranteed by Article 7(1) is reasonable. This can be attributed to republican liberty concepts.[100] There are two concepts: freedom as self-government and freedom as non-domination. As per freedom as self-government, one is free only to the extent that one has effectively determined oneself and the shape of one's life.[101] If our freedom depends on the society and culture we live, then we exercise a fuller freedom if we can help determine the same of this society and culture.[102] As per freedom as non-domination, the mere knowledge that we are living in dependence on the goodwill of others restricts liberty.[103] Therefore, it is not interference as such that violated liberty, but only arbitrary interference.[104] Voting is seen as a means of connecting the community; compulsory voting would connect the wider community, equalizing the electorate through near universal representation at the polls.[105]

The above argument has its basis in utilitarianism. Utilitarianism in the context of voting serves two purposes. First as discussed, it justifies the imposition of duty, and the second, it can be used as justification for limiting or restraining freedom or liberty. As voting serves a public purpose, it imposes a duty on individuals conferred with right to vote in elections. Similarly, even if the right to vote includes an inverse right not to vote, the utility voting has in furthering the public good allows the state to limit that freedom or the inverse right not to vote. The fairness principle as discussed previously is relevant. Compulsory voting ensures equality, allowing everyone to vote so that no one free rides. Fairness as a ground for imposing limitation or restriction on freedom of liberty is rational. Therefore, all justifications evaluated for compulsory voting are relevant in aiding the interpretation of the Bhutanese Constitution to justify compulsory voting in Bhutan.

3. Conclusion

The idea of compulsory voting is widely debated. The advantages and disadvantages of compulsory voting have been explored in many jurisdictions. Similarly, as Bhutan saw unprecedented drop in the turnout over just two election cycles, it is equally important for Bhutan to explore the possibility of making voting compulsory. We have witnessed that there are compelling counter arguments made against the compulsory voting. As discussed earlier, many arguments are made on the presumption that there is no evidence to show that compulsory voting results in better policy outcomes. It is also argued that voting involves an aspect of a legal right not to vote, and an ethical duty not to vote if it is guided by mere self-interest. However, there are equally important and persuasive reasons for instituting compulsory voting. As discussed, the democratic form of government is accepted internationally and it is a good in itself. Voting is integral part of the democratic governance system and its exercise should be capable of compulsion.

All reasons discussed, that is for and against, are equally applicable to Bhutan. In Bhutan, most of the existing legal instruments and policies were developed after making careful comparative studies. For example, as discussed earlier, the Constitution of the Kingdom of Bhutan 2008 itself was adopted after referring to many historical, philosophical, and legal documents outside Bhutan. The legal and institutional context of Bhutan is one shared by other jurisdictions

98 'X against Austria' (1972) 15 Yearbook of the European Convention on Human Rights 468, 472-4.

99 M. Mackerras and I. McAllister, Mackerras, M. and I. McAllister, 'Compulsory Voting, Party Stability and Electoral Advantage in Australia' (1999) 18 Electoral Studies 217.

100 Armin Schafer, 'Republican Liberty and Compulsory Voting', MPIfG Discussion Paper (Online), 1 November 2011 http://www.mpifg.de/pu/mpifg_dp/dp11-17.pdf..

101 Ibid.

102 Ibid.

103 Ibid.

104 Ibid.

105 Amy Pracilio 'Compulsory Voting-Does it Keep the Community at large more Connected? Have First World Countries Forgotten the Value of the Vote?' <http://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/3815429c61cd31f136c4c5ae48257ac5000a65c7/$file/5429.pdf>.

and any reasoning that is relevant for considering the issue of compulsory voting is also applicable to Bhutan. More importantly, it was demonstrated that compulsory voting would be compatible with the Bhutanese constitutional framework. Furthermore, as a communitarian society instituting liberal democratic reforms, the reasons for compulsory voting as discussed may have further weight in validating the compulsory voting under the Bhutanese Constitution. Voting is an essential means to ensuring a vibrant democracy. Participation in voting enables citizens to stay informed, develop rational faculties, and stay connected to the community. Therefore, the institution of compulsory voting in Bhutan is recognition of the fact that the restriction imposed by the compulsion to vote is not unreasonably burdensome and it does not inhibit personal development, and rather compulsion outweighs associated disadvantages.

No Marriage Certificate, No Honey Moon

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"The test of a country's justice is not the blunders which are sometimes made, but the zeal with which they are put right.[1] *"*

1. Introduction

On 27/11/2014, the Bench V of the Thimphu District Court delivered its 2673 paged judgment in a very high profile case which, in terms of the value of the properties involved, was of the highest monetary value in the history of court litigation in Bhutan.[2] In terms of the various conflicting legal issues and provisions of law involved in the dispute, the case is also one of the most complex court litigations. The arguments of the parties on the issues of marriage and divorce had opened up explosive questions about the concept and meaning of marriage under the Marriage Act of Bhutan, 1980. The author was the judge in the case and has chosen one of the contentious issues of the case as a topic of this paper. The views reflected in this paper are mostly the excerpts from the judgment rendered by the author.

The applicability of the Marriage Act of 1980 and the procedure for acquiring the Marriage Certificate is prescribed in Chapter One of the Act. According to Section Kha-1.3 of the Act, whenever a marriage is contracted according to the customary rites and rituals or following an engagement or a love marriage, a Marriage Certificate (*Nyentham*) will have to be acquired from a Court of law to make such a marriage valid. Section Kha – 1.8 provides that not withstanding the number of years that have elapsed since a marriage has been contracted, a couple is recognized as legally married only from the date of acquiring a Marriage Certificate from a court of law. However, Section Kha 9.1 of the Act provides that in case of divorce proceedings, a couple who does not possess Marriage Certificate can retrospectively validate their marriage by paying fines to the government. The notion of a void but retrospectively validated marriage is very odd and may lead to difficulties. The interpretation of the courts have also not been consistent. While some courts consider the marriage as valid from the day the couple had consummated their marriage, some courts validate the marriage only from the day the fine is paid. Even if the couple has lived together as husband and wife for decades, the marriage is as though it had never occurred. In addition to the logistical repercussions, it also has a lot of bearings on the matrimonial compensation and division of properties and liabilities.[3] It may lead to absurd decision or even

1 *The Sunday Times,* 15 January 1961, Singapore, quoted in Bhaskaran Sivasamy, "The Criminal Appellate System in Singapore, *Singapore Law Review, 1995, 319.*

2 *Lhaden Pem Dorji* vs. *Wangchuk Dorji & Topgyel Dorji* (2014).

3 The computation of alimony, maintenance and compensation and their mode of payment is provided in of the Marriage Act of Bhutan.

miscarriage of justice. The problem is complicated by Section 9.4 of the Act which provides that for a couple who does not possess Marriage Certificate, the courts must determine the couples' period of "stay together" or marriage from three independent witnesses or from a member of the National Assembly. How should the courts interpret these conflicting provisions? Is Marriage Certificate the *prerequisite* for recognition of marriages as valid? The following examples best illustrate the complexity of the issue:

(a) **Scenario 1**:Tenzin and Zam have been married for 30 years but they did not solemnize their marriage by acquiring a Marriage Certificate from a court of law. During their marriage, they have acquired huge properties as well as liabilities. In order to process for passport, the couple decides to acquire a Marriage Certificate. After two months of solemnizing their marriage, the husband commits adultery and the wife files for divorce. Which provision will the court apply for the calculation of her matrimonial compensations? If the court is to apply Section Kha 1.8 and consider the marriage as valid only from the day they acquired the Marriage Certificate, what will happen to the properties acquired before the solemnization of the marriage? What will happen to children born out of wedlock but before the marriage was solemnized by the Court?

(b) **Scenario 2:** Tenzin and wife Zam have been married for 30 years but do not possess a Marriage Certificate. Tenzin has committed adultery with Bidha and intends to leave Zam for Bidha. Zam has no knowledge of the fact that Tenzin has committed adultery. Tenzin is aware of the provisions of Marriage Act and induces Zam to go to the court to obtain the Marriage Certificate. Zam will lose so much if the Court applies Section Kha 1.8. Can Zam invoke Section Kha 9.4 to determine the "period of stay together"? Will it not conflict with Section Kha 1.8?

(c) **Scenario 3:** Tenzin and wife Zam have been married for 30 years but do not possess a Marriage Certificate. They mutually agree to end their marriage through the court. They pay fines to the government and validate their marriage. Will the court consider the marriage as valid from the date of payment of fine, or will the court invoke Section Kha - 9.4 to determine the "period of stay" together? Is there a conflict between Sections Kha 9.1 and Kha 9.4?

2. The Provisions in Question

Section Kha- 1.8 provides: "*Notwithstanding the number of years that have elapsed since a marriage has been contracted, a couple shall only be recognized as a legally married couple from the date of acquiring a Marriage Certificate from a court of law".*[4]

Section Kha – 9.1 provides: "*If a couple who does not possess a Marriage Certificate intend to seek a divorce, then they shall have to submit an application to the Court in the form and manner "Ta" set forth in the Schedule. And, the partition of the properties and other settlements between them shall only be undertaken after paying the fines stipulated in the sub-section.*"[5]

Section Kha – 9.4 provides: "*In order to determine the period of their stay together, a couple who does not possess a Marriage Certificate shall have to present before a Court of law either the village headman or a member of the Assembly or three witnesses who are not related to them and the period so determined by such persons shall be accepted thereof."*[6]

3. Validity of Marriage

Under Section-Kha 1.8 of the Act, a person is said to be legally married to another only from the date of acquiring a Marriage Certificate from a court of law. Hence, the marriage is not valid until the couple obtains the Marriage Certificate. What is 'marriage' and is Marriage Certificate a prerequisite for legal recognition of marriages?

What has been true at least since the beginning of recorded history, in all the flourishing varieties of human cultures, is true in Bhutan. Marriage is a universal human institution where two adults dwell together continuously and habitually in a private heterosexual relationship, even if this relationship is not solemnized through elaborate religious ritual, an extravagant ceremony or by a Court with the issuance of the Marriage Certificate. Marriage is the spiritual

4 The Marriage Act, 1980
5 Ibid.
6 Ibid.

union of two people who wish to declare their love for each other before the rest of the world. It is a symbolic gesture of life-long commitment to each other. William Blackstone (Commentaries on the Laws of England, 1915) noted that "*By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything; and is therefore called in our law-French, a feme covert, and is said to be under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture."*[7] According to Black's Law Dictionary, marriage takes effect without license or ceremony, when a couple lives together as husband and wife, intend to be married, and hold themselves out to others as a married couple.[8] Without legal encumbrance or third party interference if a couple lived together continuously and habitually, held themselves out to others as married couple, the Courts must hold the marriage as valid and legal even without a highly public celebration of the couple's mutual love and commitment, a publicized ritualization, or even without acquiring a Marriage Certificate. Although Marriage Certificate may act as an official confirmation of the unique sentiment, it does not add anything of spiritual or moral significance to the feelings already in existence. On the other hand, the requirement of Marriage Certificate makes it a part of a legal obligation on the parties and hence undermines the free will, and the spiritual and moral balance of their relationship. This may well be the reason why people fear to come to court to settle matrimonial disputes.

As mentioned above, according to Section Kha-1.8, a marriage is invalid without the acquisition of a Marriage Certificate from a court of law. However, for the purpose of divorce, Section-Kha 9.1 (a, b &c) provides for retrospective validation of a marriage contracted without obtaining a Marriage Certificate by depositing fines for the procedural lapse. The marriage is retained *hinc inde* to its former state, and the rights and obligations of the married couple are not affected by the absence of Marriage Certificate.

7 Barbara A. Atwood, "Marital Contracts and the Meaning of Marriage", *54 Ariz. L. Rev. 11,* 2012, p.23

8 Blacks Law Dicitionary

The post-divorce settlements such as matrimonial compensation and child maintenance including the division of properties and liabilities are carried out in the same manner as is applicable to a marriage evidenced by the Marriage Certificate. Seen in this light, the Marriage Certificate is only to give a formal recognition to the marriage, to facilitate administrative arrangements and to encourage the transmission of belief in the value of marriage to future generations. Therefore, courts should not allow a couple's years of togetherness, their merging of selves into one identity and decades of dream building to be nullified by the stroke of a pen based merely on the non-existence of a Marriage Certificate. Such a ruling would weaken people's commitment to marriage and would make people loose faith in the institution of marriage. Section-Kha 1.8 of the Act technically requires Marriage Certificate to be interpreted in a progressive way. This technicality should be tampered by pragmatism if substantive justice is to be done to the parties. The courts must preserve this valuable institution of marriage and must protect the society's belief in the ideals and the practice of matrimony.

More than 70% of Bhutan's population live in rural areas where personal matters of marriage, birth, death, and inheritance are handled within the community with support of civil authorities. Most of the rural population who are married do not possess a Marriage Certificate. In most of these cases, the parties, mediators and village headman who resolve the matrimonial disputes are not concerned about the documentary evidence of a Marriage Certificate.

The perceptions on marriage of the Bhutanese society in the towns and cities are also undergoing a change. The society is increasingly seeing matrimonial instability, single parenthood, children born outside wedlock, increased divorce rates, increased levels of cohabitation and the steadily inexorable decline of marriage as a social institution. At such times, the concept and understanding of marriage cannot and should not be determined merely by the existence of the Marriage Certificate. Moreover, emphasizing on the requirement of the Marriage Certificate for a union to be considered as marriage would lead to seeing marriages in contractual terms or as mere contracts (a trend which has already been seen in other parts of the world) rather than the intrinsic

value of the status of marriage or family. Institutions like marriage are about socially embodied meanings and practices. They are not just contracts that one can rescind as one likes.

In other parts of the world too, the traditional rule of the requirement of a Marriage Certificate or other public ceremonies as evidence is also changing. To cite an example from another jurisdiction, the Madras High Court decided a case in 2013, where the court ruled that if a couple, in the right legal age indulge in sexual gratification, it will be considered a valid marriage and they could be termed as husband and wife.[9] The Court termed the traditional marriage customs of tying a *mangalsutra*, garlands and rings as mere formalities, and said that they were only for the satisfaction of society. According to the Court, if both partners are of legal age, they have acquired the freedom of choice guaranteed by the Constitution. The couple in question, though not legally married, had been living together, with their relationship resulting in two children. The woman had filed a petition in 2000, asking the man to pay monthly maintenance.[10]

4. Ending the Love: Bitter Court Case or by Contract

The Hollywood actor Clint Eastwood rightly said that "*all marriages are made in heaven, but so are thunder and lightning*." Acrimonious divorce suits and counter-suits can arise from the ashes of a union once marked by the deepest form of love. Given the human sentiments, emotions, and frailties, this abrupt shift from love to hate is not surprising. When someone has wounded you so deeply, it seems only natural that you would try to devastate your attacker, to recoup your lost pride, and to exact revenge for a badly crushed heart. The courts in Bhutan are flooded with ugly divorce cases consisting of ugly child custody battles, revelations of torrid details of infidelities, and ruthlessly contested possessions.

Given that divorces arise from the deepest kind of pain; both bitterness and brutality seem to be unavoidable consequences of it. While the law cannot eliminate such harrowing consequences, perhaps it can mitigate them. One of the means employed by the courts in Bhutan to smother divorces is by encouraging the parties to do *Nangkha Nangdrik*[11] or to enter into post nuptial agreements. Just as contracts are necessary for fairness and dependability in agreements between parties, so too are contracts necessary to preserve such features in marital bonds. Negotiated contracts not only help to attenuate the ugly aspect of divorce and facilitate peaceful dissolution of marriages but also save marriages that are on the brink of collapse. Matrimonial contracts gives the parties the right to order their own affairs and gives them the means to privately order the terms of their separation rather than leaving it in the hands of divorce laws. Matrimonial contracts fit the personal needs of a couple better than standard divorce proceedings. When these contracts are endorsed by the courts in the form of judgments, the parties take the contracts seriously and uphold them. Therefore, courts in Bhutan must encourage or favor *Nangkha Nangdrik* or settlement of matrimonial disputes through contracting. Although there are dangers of distortion of bargaining power, fraud or duress, separation agreements in future must become the norm rather than exception. It will not only reduce the backlog of cases and time for resolution of disputes but also encourage the parties to end their marriage in an amicable manner. As Murray aptly remarked, "*No deed, known in practice, plays a more important part in the affairs of modern life than the ante-nuptial contract of marriage*".[12]

5. Conclusion

The institution of marriage is one of the most fundamental elements of human relationships, and an immense valuable cultural resource and a social resource of irreplaceable value. It is a distinct mode of association and commitment that carries centuries and volumes of social and personal meaning. We can no more create an alternative mode of commitment carrying a parallel intensity of meaning than we can create a substitute for poetry or for love. Marriage does not merely reflect individual desire, it shapes and channels those desires, aspirations and shared ideals. It embodies fidelity, sacramental unity and the procreative and companionate ideals. It enables

9 Sonal Bhadoria, "Couples Who Indulge in Premarital Sex to be Considered Married: Madras High court", *India Times,* June 18, 2013.

10 Ibid.

11 The courts are required, by law, to give the parties the opportunity to settle the cases mutually during the Preliminary Hearing. The right to end the dispute through negotiated settlement or mediation stands till the case is disposed of.

12 D. Murray, The Law Relating to the Property of Married Persons, 1891.

two people together to create value in their lives that they could not create if that institution had never existed. Therefore, the institution of marriage cannot be determined merely by the existence of a paper called the Marriage Certificate. The provision which technically requires Marriage Certificate should be interpreted in a progressive way. The technicality should be tampered by pragmatism if substantive justice is to be done to the parties. The need to simplify the process of acquiring Marriage Certificate and the need to give a liberal interpretation to the legal provisions in question has become more compelling today. Although, there are no authentic statistics, it is evident that rate of marriage is declining and that people living together without married are on increase. The number of births outside marriage is also increasing. These developing social trends should prompt us to reassess our notion of marriage and our interpretations of the conflicting provisions of the Marriage Act.

Civil Servants: No Political Strings Attached

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The law requires every civil servant to be non-partisan, but on the other hand, the Constitution guarantees Bhutanese citizens a fundamental right to vote. In reality, as Bhutanese citizens, civil servants have equal right to vote, and to exercise such right diligently like any other electorates. In doing so, they may be tempted to attend political meetings and dinners discreetly to know more about political parties and their ideologies. Such acts of civil servants which constitute so called political affiliation may have adverse impact on good governance. Therefore, considering these situations, the author attempts to highlight on how good governance is ensured by maintaining civil servants apolitical.

1. Background

There is neither a specific and exhaustive definition of the phrase 'good governance' nor a delimitation of its scope that commands universal acceptance.[1] According to the Canadian International Development Agency (CIDA), good governance is the exercise of power by various levels of government that is effective, honest, equitable, transparent and accountable.[2] Similarly, the United Nations Economic and Social Commission for Asia and Pacific (UNESCAP) identifies eight dimensions of good governance, namely, the participation, rule of law, transparency, accountability, consensus oriented, effectiveness and efficiency, responsiveness, equity and inclusiveness.[3] However, in general, the common dimensions of governance that most of the literature agree are participation, rule of law, transparency, accountability, effective delivery of services and equity.[4]

Even in Bhutan the issue of governance has been an integral part of our government. The existence of such concept in the Bhutanese system can be traced back to as early as the Zhabdrung's[5] time. However, the governance as a concept of good governance has gained popularity in Bhutan only with the inception of the development philosophy of Gross National Happiness (GNH) in 1974 by His Majesty the Fourth King. Ever since, the good governance as one of the pillars of GNH, it was considered to be an important pre-requisite for happiness. Although, there are many dimensions of good governance, for the purpose of GNH, they are mostly limited to efficiency, transparency and accountability. These

1 United Nations Human Rights "Good Governance and Human Rights". Accessed on 3/8/2014 from http://www.ohchr.org/en/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx.

2 Phuntsho Rapten" Good Governance and GNH". Accessed on 3/8/2014 from http://www.gnhusa.org/wp-content/uploads/2013/02/Good-Governance1.pdf

3 UNESCAP "What is governance". Accessed on 2/8/2014 from http://www.unescap.org/pdd at /prs/Project Activities/Ongoing/gg/governance.asp.

4 Ibid

5 Zhabdrung Ngawang Namgyel (1594–1651) was a Tibetan Buddhist lama and the unifier of Bhutan as a nation-state.

three dimensions are the main touchstone of good governance exercise carried out in 1999 and revised in 2006 to enhance good governance in the country.[6]

All these characteristics of good governance are enshrined in the 'mission and vision'[7] of the Royal Civil Service Commission (RCSC) and the Code of Conduct of Civil Servants.[8] The civil servants and good governance are inter-connected. The civil servants are the permanent actors in good governance and they are the bedrock of good governance. The achievement of good governance depends on the civil servants and the RCSC, as the latter is the central personnel agency in the country. With the institution of the Democratic Constitutional Monarchy in 2008, RCSC has become one of the constitutional bodies which is independent and apolitical, to manage the civil service without fear and favor to ensure good governance. As an independent body, one of the main functions of the RCSC is to manage the civil service as absolutely non-partisan or apolitical. Although the laws prohibit civil servants from having political affiliations, it is not certain whether our civil servants are really apolitical and should they remain apolitical to ensure good governance? What are the consequences, if the civil servants are not apolitical? Therefore, in light of the aforementioned background of good governance and civil service, the author will argue on whether the civil servants should remain apolitical to ensure good governance in a democratic system of government.

2. The Importance of Upholding an Apolitical Status of Civil Servants

With the transitioned of Bhutan into a Democratic Constitutional Monarchy, the role of civil servants has become very important. They are the permanent bureaucrats who support and advise the government in power irrespective of which political party comes to power. The civil servants should remain neutral to implement plans, policies and programs of the government professionally and impartially. The civil servants are the core administrators of the government and they should be apolitical to provide stability and continuity in the administration of the government and also to preserve institutional memory. In the democratic governance, civil servants are characterized by attributes such as permanence, anonymity and neutrality.[9] Permanence means that civil servants are career employees and therefore ordinarily expect them to remain in the service for their entire working lives, while political governments come and go. This permanence ensures continuity and stability in governance. Further, civil servants are recruited and promoted based on merits while political masters are elected leaders. Anonymity means that civil servants work behind the scenes and they place their skills and energies at the disposal of their political masters. It is the masters who make the final decisions and applause civil servants for good work and jeers for bad work. According to the principle of neutrality, civil servants are prohibited from having political affiliations; they are expected to faithfully and impartially serve any government in power. These features are well illustrated in the British Civil Service where the same set of officials were responsible for the implementation of the nationalization of the iron and steel industry under the Labor Party government of Lord Clement Attlee in 1949 and the subsequent denationalization of the industry under the Conservative Party government of Sir Winston Churchill in 1951, in both cases to the satisfaction of the government of the day.[10]

The need for civil servants to remain apolitical in democracy can be further substantiated by the writing of Political Scientist Kenneth Kernaghan in 1976. He outlined a model of political neutrality in a parliamentary system of government as follows[11]:

- Politics and policy are separated from administration. Thus, politicians make policy decisions; public servants execute these decisions.
- Public servants are appointed and promoted on the basis of merit, rather than on the basis of

6 Id.

7 Vision of the RCSC; A dynamic and professional civil service committed to promoting Good Governance in pursuit of Gross National Happiness, and one of the mission of RCSC is to ensure an independent and apolitical civil service that will discharge its public duties and services in an efficient, transparent and accountable manner

8 Sections 37-39 of Civil Service Act of Bhutan 2010, which deals with code of conduct of civil servants, included the dimensions of good governance like accountability, honesty, etc.

9 *Colin Padfield, "* British Constitution Made Simple" *London: W.H. Allen, 1977 , pp.145-147.*

10 Emeka Ihemeؙ "The Prohibition of Nigerian Civil Servants from Political Activities: A Necessary Derogation from Freedom of Association". Accessed on 4/08/2014 from http://www.icnl.org/research/journal/vol6iss1/art_2.htm

11 Kenneth Kernaghan, "Politics, policy and public servants: political neutrality revisited" *Canadian Public Administration,* vol .19, No.3 (1976), p. 433.

party affiliation or contributions.

- Public servants do not engage in partisan political activities.
- Public servants do not publicly express their personal views on government policies or administration.
- Public servants provide forthright and objective advice to their political masters in private and in confidence. In return, political executive protects the anonymity of public servants by publicly accepting responsibility for departmental decisions.
- Public servants execute policy decisions loyally and zealously, irrespective of the philosophy and programs of the party in power and regardless of their personal opinions. As a result, public servants enjoy security of tenure during good behavior and satisfactory performance.

All the models of political neutrality are strongly in place and practice in our parliamentary system of government. Although our Constitution does not cover the above models of political neutrality explicitly, having realized the importance of civil servants to remain apolitical, there is a general provision under our Constitution which requires the civil servants to be apolitical. For instance under Article 26(1),[12] the civil servants in order to discharge the public duties in an efficient, transparent and accountable manner, the RCSC is required to maintain independent and apolitical civil service. In a democratic government, as civil servants, it is their duty as well as constitutional requirement which must be strictly implemented at all times. Whilst the Constitution provides general requirements of civil servants to be apolitical, the details of the models of political neutrality laid down by political scientist Kenneth Kernaghan to some extent are expressly covered under the Civil Service Act of Bhutan, 2010 and its Rules and Regulations 2012(Bhutan Civil Service Rules, 2012).[13] Further, in most western countries, civil servants are always kept apolitical with exception to France, where many civil servants are openly affiliated to political parties.[14]

3. Consequences of Politicizing the Civil Servants

If civil servants are politicized, it will lead to unpleasant consequences in a young democracy like ours. As the civil servants are the core administrators of the government, the Constitution enjoins them to discharge their services in an efficient, transparent and accountable manner. The politicians will come and go, but civil servants remain to give unbiased advice to the political masters and implement the policies, plans and decisions of the political masters impartially and professionally. If civil servants are allowed to have political affiliations, the permanent tenure of the civil servants will be at stake as every new political party in power will change the civil servants based on their party affiliations. As a result, there will be no career employees, competent enough to advice the political masters. Even if there are competent civil servants, they cannot advise them without fear and favor. When the very core administrators of the government keep changing based on the political leaders' whims and fancies, the permanent bureaucracy of the government will be weakened, as a result of which, the functioning of the government will be disturbed.

In such circumstances, the civil servants will be tempted to trade their votes for political patronage resulting in problems of nepotism, favoritism, and political corruption. If competent and capable civil servants are not affiliated to the ruling party, they may be denied career and professional advancements. It may be otherwise, in case of civil servants who are affiliated to the ruling party. As the role of the civil servants is to provide services to the people uniformly and equally but if they are politically affiliated they may provide service based on the party affiliations. As a result, the communities that voted against the ruling government will be neglected. Even the dzongkhags and gewogs may be subjected to differential treatment depending on the party they supported during the elections. It might lead to political corruption and destabilize the foundation of bureaucracy through political allies. With political affiliation, the tenure of civil servants will be subjected to the will of politicians. Hence, the smooth functioning of the civil service will be disturbed.

12 Article 26 (1), the Constitution of the Kingdom of Bhutan, there shall be a Royal Civil Service Commission, which shall promote and ensure an independent and apolitical civil service that will discharge its public duties in an efficient, transparent and accountable manner.

13 Section 28 of Civil Service Act of Bhutan, 2010 and Rule 3.2.14.1 and Rule 3.1.14.2 of BCSR, 2012 clearly provides as civil servant what all things they are prohibited to do with regard to politics.

14 Supra n.16.

Article 26(1) of the Constitution requires civil servants to remain apolitical to ensure efficient, transparent and accountable in discharging their duties. Article 26(4)[15] also requires civil servants to ensure professional service to promote good governance and social justice in implementing the policies and programs of the government. The efficiency, accountability and transparency are the dimensions of good governance which can be achieved only if civil servants remain apolitical. If they are politicized, their services will be based on political affiliations at the cost of good governance and may trade the public resources for political patronage during elections.

4. Right to Vote, Right to Freedom of Expression Vis-a-vis Right to Express Political Views and Opinions

As Article 7(6)[16] of the Constitution provides equal right for all Bhutanese citizens to vote, they also have equal right to freedom of speech, opinion and expression under Article 7(2)[17] of the Constitution. Therefore, civil servants may exercise this right which includes right to express political views and opinions. The State may impose reasonable restriction on the right to freedom of expression only under Article 7(22), although in this article, the politics is not stated as ground for imposing the reasonable restriction on the right to freedom of speech. They may also argue that like any other citizen, they also have right to participate in the election process. To exercise their franchise they have the right to know the parties' ideologies and manifestos. To elect the right candidate, they should also know who represent them based on what ideologies from their constituency, and they also have right to clear their doubts on parties' ideologies. The civil servants may argue that these ends can be met only if they are allowed to attend party meetings. Further, they may also contend that the expression "party's affiliations" can be construed to mean political membership. Therefore, simply attending a party meeting would not amount to political affiliations rather he/she is exercising his/her right to participate in the election process. However, Article 26 of the Constitution and Section 38 of the Civil Service Act, 2010, Rule 3.2.14.2(iii) of BCSR 2012 completely bar civil servants from attending the political party meetings. Article 26 and BCSR 2012 bar the registered political members from entering into civil service until cooling period of three years is expired. All these provisions can be challenged under Article 7(15)[18] of the Constitution which guarantees equality and equal protection of laws without discrimination based on race, sex, and politics. Article 7(8)[19] vests every Bhutanese citizen with right to join public service. Nonetheless, since the restriction is just a temporary restriction to get the members dissociated from political parties and to fulfill the requirements under Article 26, such temporary restriction would not violate Articles 7(8) and 7(15). These two articles can be harmoniously reconciled with Article 26. Moreover, the provisions of the constitution should not be read in isolation but it should be read in conjunction with other Articles. Similarly, Articles 7(6) and 7(2) can be harmoniously reconciled with article 26.

5. Conclusion

The good governance being one of the pillars of GNH, its achievements depends on its main actors, the civil servants. In order to achieve happiness in the country, it is also necessary to achieve good governance but this can be done only through civil servants. Civil servants lie at the heart of good governance and it can be realized only if the civil servants perform their duties in an efficient, transparent and accountable manner. However, if the civil servants have political affiliations, it is not certain whether they can discharge public duties in an efficient, accountable and transparent manner. Once they have political affiliations their duties will be always inclined to the parties they support and good governance cannot be achieved through the civil servants who have political affiliations and therefore, to achieve good governance also it always necessary that civil servants should remain apolitical.

15 Article 26(4), the Constitution of Kingdom of Bhutan, The Commission shall endeavor to ensure that civil servants render professional service, guided by the highest standards of ethics and integrity to promote good governance and social justice, in implementing the policies and programmes of the government.

16 Article 7(2), Ibid, A Bhutanese citizen shall have the right to freedom of speech, opinion and expression.

17 Article 7(6), Id, A Bhutanese citizen shall have the right to vote.

18 Article 7(15), Id, 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.

19 Article 7(8), Id, A Bhutanese citizen shall have the right to equal access and opportunity to join the Public Service.

World VAT: A Plea for a Sociological Approach

Summary
History shows us that our approach to VAT has been purely economic and legal. In the 2000s, worldwide VAT and its irreversible expansion drew some criticism. This VAT crisis, whether or not it is justified or refuted, should prompt mindful observers to ask others and themselves new fundamental questions. In particular, has this economic and legal approach been overly simplistic? The broadly psychosocial analysis of VAT that we modestly undertake here shows that a sociological approach towards VAT is now absolutely necessary.

Introduction

There is a curious paradox about "world VAT", as we might call it. On the one hand, it may be described as truly splendid. Adopted in more than 150 countries, its advance was irresistible throughout the 20th century. Value-added tax has reached every continent, which is a remarkable and impressive expansion. In theory, it has now supplanted all other forms of taxation on consumption, including retail taxes. The *glory* of VAT is undeniable.

On the other hand, we should not deny the difficulties experienced in introducing and adapting the tax. There have even been some failures. Above all, we cannot ignore the "*VAT crisis*" of the 2000s. Some independent voices have challenged VAT's hasty and quasi-coercive introduction in developing countries. Without wishing to cover these criticisms in detail it is fair to say that they are of several different types. From an economic point of view, it has been contended that support for VAT has been more of an ideology than a notion backed by solid economic theory. On the sociological side, it has been claimed that specialist advice was given without sufficiently taking local conditions into account. Furthermore, a crisis of consent to the tax has been noted, with VAT often forming part of a fiscal package that is non-negotiable both for the working classes and for whole countries. One decisive criticism points out that, not only does VAT fail to resolve corruption, fraud and the flight to the informal sector; it encourages them.

It is not our task to assess such challenges here, but they are useful in allowing us to introduce some fundamental questions about VAT. At a time when the introduction of VAT to Bhutan is apparently imminent, it is worth posing some essential questions, even briefly. In this short analysis, an examination of World VAT requires an approach that goes beyond economic and legal considerations. As we shall see, the areas of tax liability, subjects of taxation, methods of deduction and documentary abstraction may be significantly influenced by a new sociological and multidisciplinary approach.

1. The Failure of Final-stage Tax Liability

1.1. History repeating itself

The first task is to make a psychosocial assessment of *final-stage tax liability*. Across the globe, retailers were already strongly resisting their liability by the 1930s, which led to a tax being adopted at the wholesale stage. The subsequent evolution of this single-stage tax into a net tax at all stages, bringing unavoidable liability, proved a highly delicate transition. A historical understanding of this phase is vital in order to develop a clear vision of VAT, given that this aversion to liability on the part of small enterprises has not changed. The big question is why the subjection of retailers to VAT was (and is) so difficult. Theoretically, from the economic point of view, even small companies ought to embrace their liability. All they have to do is collect the tax, while benefiting from the right to deduct input VAT – which only VAT payers may do.

1.2. The fear of tax audits

According to the view that we express here, the fear of *tax audit* has been a fundamental factor in the hostility towards liability, and this remains the case today. Audit anxiety can be divided into two fears, which have been utterly underestimated by tax authorities throughout history. The first of these fears is that of an attack on privacy, given that the inspection of companies can often have a disruptive effect on families, too. The second fear is that the findings of an audit on indirect taxation may be used in relation to direct taxation. The tax authorities, while completely disregarding the specificity of indirect tax auditing, have (or have had) a tendency to present it as a welcome practice, which carries benefits for direct taxation – the equivalent of a secondary tax audit.

1.3. The true nature of VAT auditing

That is perhaps where the fundamental error lies, certainly if we wish to pay attention to history and fundamental theory. The point is not to confuse the efficiency of tax receipts with the efficiency of VAT. If VAT is effective, that implies some respect for the mechanism, which is not so much a fiscal mechanism as a hybrid one, because it displays neutrality. Since VAT is a fiscal mechanism and a cleansing mechanism (to which we will return later), any VAT audit should be considered as a specific exercise and as being removed from direct taxation. Businesses only *collect the tax*, so any audit carried out on them is first and foremost an operational assessment, rather than a test of honesty, the question being "Is this correct or incorrect?" rather than "Is the company doing the right thing or the wrong thing?" Indeed, it cannot be the aim of a VAT audit to verify the honesty of VAT payers, because they do not bear the tax themselves. To instigate VAT audits because they present an opportunity to carry out a double audit with regard to direct taxation is a fundamental error. It had been believed that VAT would bring a breath of fresh air through the technique of self-taxation (by those liable to pay it), with regular auditing by the tax authorities. But this reinforcement of VAT auditing has been misunderstood and is partly responsible for the hostility towards the tax, especially through the flight to the informal sector by small businesses.

1.4. The urgency of guarantees forVAT payers

In other words, history shows, and reality confirms, that the fear of liability largely comes from the fear of inspection. This fear should be analysed, and sociological studies ought to be carried out. It ought to be possible to transfer a recovery in VAT, and firms should never become debtors as a result. A psychosocial analysis of this fear on the part of VAT payers could potentially challenge some of the axioms of taxability and economics: the linking of VAT administration with direct taxation, and the abandonment of transfers to market forces. There are measures that may be taken in accordance with the true nature of VAT as a mechanism, including *guarantees* not to use VAT data for the purposes of direct taxation, a *separation* between VAT authorities and those responsible for direct taxation, and a modification of rules on the *passing on of the tax*, which in some instances could be made obligatory and could be applied even subsequent to a VAT audit.

2. The Revolution of the Supply of Services

2.1. In the beginning: the supply of goods

Our second aim is to develop a sociological awareness of how the *objects of taxation have changed*. Originally, the taxable operation was the delivery of goods. It was easy to locate and verify the items concerned. As one might say today, they were easily traceable, and the taxation of turnover was closely related to *stock control*. The concrete nature of taxation allowed the authorities to control the situation, and to apply pressure on both supplier and purchaser. There was no reason to grant them a whole series of rights, and they did not have many in any case. Tax law was restrictive. Furthermore, *borders* made it possible to stop goods for inspection. There might have been contraband, but this could be controlled if adequate measures were taken. Hence, VAT could be divided among countries. Over the course of history, the security of VAT in its original form was shattered. This happened over three main stages:

2.2. No more stock

First came *the extension of taxation to services*. From the middle of the 20th century, the provision of services gradually attained the same economic importance as the trade in goods. Sociologically speaking, taxing services changed all the valid data that had hitherto applied to goods. Because of their very essence, there is no such thing as stocks

of services. Once provided, they disappear. Stock control was hence swapped for control over the supplier and the recipient, who are much more mobile than merchandise. The transactions could no longer be located. The actual service providers could be, however, and so the transaction subject to VAT only existed among its participants. Moreover, taxation at the border had become impossible, as there was nothing to stop there. A service is neither imported nor exported. The only option is to fix a *place of transaction*, taking into account the locality of the supplier or the recipient. Extending VAT to services therefore heralded a sociological revolution in terms of indirect taxation.

2.3. The conundrum of location

Secondly, the history of indirect taxation was characterised by a marked *internationalisation of the trade in services*. Given that the actual transactions had become invisible and non-traceable, their locations could only be those of either the supplier or the recipient. Bearing in mind the country-of-destination principle, according to which the place of consumption must determine the place of value-added taxation, the first step was to set it at the locality of the recipient. In the case of international trade, subjecting a foreign company to tax in the country where the consumption takes place carried great uncertainty. Companies would be reluctant to accept this, and the means of coercion that could be used against them were limited. Of course, liability could fall on the actual recipient (reverse charge VAT) but, if they were the final consumer, their liability was hypothetical, as this would wrongly assume a spontaneous declaration on their part. There was always the rule of taxation at the place of supply, although problems could arise here, particularly in any common market where borders had been lifted yet national fiscal sovereignty remained. Too many exceptions were required. Maurice Lauré, the inventor of VAT, is said to have regarded internationalisation with suspicion, partly because of the prevailing judicial practice, but also because it would mean losing the divisible nature of VAT, which he felt to be necessary.

2.4. Dematerialisation and fragmentation of VAT

In the 1980s, a third and final set of difficulties undermined not only the issue of the place of taxation but also that of the taxation of services as a whole. With the arrival of electronic trading and the development of telecommunications, there was a complete *dematerialisation* of services. The fragmentation of tax was hence complete. Furthermore, transactions themselves were no longer concrete and could no longer be located by the authorities, and suppliers and purchasers could essentially disappear at will. In addition, the rule of taxation at the place of supply could no longer be maintained, as domestic purchasers could easily choose a supplier in a far-off location in a country with a low VAT rate. Thus, the VAT tax haven was born. That leads us back, then, to the place of delivery, whose risks we are already familiar with.

2.5. Towards courtesy taxation

According to the hypothesis that we are describing here, neither economics nor the science of the law are capable of describing the societal change that came about through the taxation of services, as opposed to goods. We contend that only a sociological approach can shed light on the profound and subtle changes in indirect taxation. Given that the tax authorities are not in control of transactions any more, it is no longer possible to oblige traders to accept a value-added tax. A *new form of tax consent* is required: not the historical system involving citizens and consumers, but a system for traders. A partnership-based taxation – *courtesy taxation* – has now arrived. Without it, the authorities would leave themselves open to nothing less than traders staging a revolt or even abandoning all responsibility. Modern states are far from recognising the truth of this, however. It would be well worth adopting a sociological approach to dematerialisation as the cause of this change in power relations between those involved in taxation.

3. An Anatomy of the VAT Mechanism

3.1. A tax mechanism

A third, even more fundamental, analysis calls for a proper *sociological study of the mechanism of VAT*, which is, first of all, a *tax mechanism*. VAT payers must periodically declare their turnover and calculate the VAT due on it. Before passing on this amount to the state, they may deduct the amount of VAT levied on all their purchases during the relevant tax period. Only the outstanding balance – a reduced amount, but a payment of tax nonetheless – goes to the state. Most experts have always perceived this system to be

unique, because it protects VAT from fraud. The idea is that the supplier's interest in maximising input (a desire to sell as much as possible) is the opposite of that of the VAT-paying purchaser (a desire to pay as little as possible), and this tension provides security. That logic may be held to by the major specialists, but it has proved a false belief, as it has failed to prevent the widespread VAT fraud that we see today. It has not prevented *complicity* between dishonest suppliers and purchasers in avoiding VAT (through false invoices etc.). This basic error alone shows that, from a purely economic perspective, the mechanism has been poorly understood.

3.2. A neutral mechanism

The mechanism of VAT is also a *neutral mechanism*. VAT payers have the right to deduct input VAT – as long as the 'inputs' have been assigned to their professional activities, of course. Previously, when there was only single-stage taxation, taxpayers were unconcerned with any fiscal consequences of their purchases. Their attention was turned towards the future, and they were required only to check the purchaser's declaration of liability to ascertain whether they should deliver their goods tax free or subject to tax. With the advent of VAT, the perspectives of those liable to pay it changed. With an eye to the past, the aim of VAT payers became to deduct as much input VAT as possible. This was a psychological revolution for the taxpayer, who would now do everything possible to minimise any exemptions from tax deduction. Indirect taxation thus witnessed an attitude of permanent claims, without any judgment. This was also an administrative revolution. For the first time in the history of taxation, the authorities were automatically obliged to grant tax reductions for the sake of neutrality. Traders that collected the tax and the tax authorities had to work hand in hand, and that included acting neutrally. Economically speaking, everything seemed clear. But it was not to be. The tax authorities had, and have, a tendency to water down this principle, considering certain purchases (of luxury goods, for example) to be taxable personal consumption. Indeed, the authorities have sometimes created hidden and residual taxes, even though the invention of VAT was meant to get rid of all that. Historically and psychologically, VAT has been a mechanism of *dialectical tension* between the traders that collect the tax and the authorities.

3.3. A mechanism for promotion

The VAT mechanism is still a *"subsidising" mechanism*. There are many situations where the balance between output VAT and input VAT, arrived at by subtraction, favours the VAT payer. The right to deduct VAT is immediate and vital for maintaining cash flow, thus leading to claims and reimbursements in the company's favour. This might just happen occasionally, as with major investments or stock purchases. For exporting firms, it could be a regular occurrence as, according to the country-of-destination principle, exports are taxed at a zero rate. The notion of an indirect tax disappearing in the name of neutrality comes as a shock. The primacy of neutrality over the tax mechanism is not in itself an imbalance. Again, this does not pose any problem, economically. On the sociological side, however, tax refunds effectively come out of the public purse, which is an intolerable consequence for state finances. VAT is becoming a tax against the state, which is a complete tautology – a contradiction in terms. At the same time, and for the same reasons, VAT necessarily carries a high fraud potential. Less scrupulous VAT payers could be tempted to invoice "exported goods" at zero rate, even though they never actually leave the country.

3.4. Economic simplicity v. psychological complexity

Although the VAT mechanism is economically clear and simple, it can still prove to be psychologically and sociologically complex. Paradoxically, VAT is first and foremost a mechanism, rather than a tax, and it contains major features of a contradictory and non-complementary nature. It has proved to be so sophisticated that it requires a high degree of fiscal discipline in order to function. Taking this point further, we can see that it is not only the VAT mechanism itself that is fragile, but the whole chain of associated mechanisms. Any break or gap in this chain leads not only to residual taxes, but also to fraud, especially carousel or missing trader fraud, which is well known in common markets where borders are open but countries retain their fiscal sovereignty.

4. The Supremacy of the VAT Invoice

4.1. The invoice creates the transaction

The final challenge is to move towards a *legal and sociological study of the VAT title* in this context. VAT,

with its essential link to *documentary abstraction*, cannot be sealed with a handshake. Invoices, as declarations of intent, but moreover as titles, play a fundamental role. First of all, they are *indicators of VAT transactions*. The issuer of an invoice is assumed to have carried out the action indicated, even if it was entirely delegated to a third party. Hence, the invoice creates a distancing from the all-important reality. Yet even if there is some correspondence with a real action (such as the sale of a car), this is difficult to verify if the car has been resold several times without having been delivered anywhere, through the creation of multiple, albeit notional, transactions subject to VAT. The documentary abstraction of VAT leads us to a point where simple reinvoicing in one's own name creates a transaction subject to tax. Naturally, this sort of abstraction is multiplied when it comes to services, and checking the actual fact of a transaction is practically impossible.

4.2 False invoice – real problem

With an increasingly complex economy, we are getting closer to the taxation of flows of money, rather than concrete transactions. As for subjects of taxation, VAT requires our adherence to abstraction, technicalities and fiscal discipline. If the last of these is lacking, invoices may easily be used against the authorities. VAT's documentary worth – the *fundamental "securitization"* of VAT – can potentially lead to tax avoidance. False invoices create false transactions, such as false, zero-rated exports. At a subjective level, it may become tempting to disrupt the chain of transactions using a front man, a contrived legal person or fictitious invoices. This is carousel fraud. The result of this documentations is a sacrosanct invoice: not merely a simple proof of transaction but a proper security under public law.

4.3. The perverse formalism of VAT

The same phenomenon of documentary abstraction also arises in relation to *the technicalities of deduction*. An invoice effectively becomes a cheque in favour of the taxpayer against the Treasury if certain material and formal conditions are met, which gives rise to a hybrid, contradictory formalism that is both delicate and double-edged. This is simultaneously a *formalism of constraint* and a*formalism of protection*. For a deduction to be made, the invoice must contain certain information (the constraint); without all the required data, the deduction is not allowed. The right to deduct is denied if just one piece of information is missing, even though, as a matter of substance, the purchase in question was indeed for business purposes. The good faith of the VAT payer, which is their sole contention, is rarely protected. Whenever the formalities are too tight, the principle of neutrality is sacrificed and, in essence, the operation of VAT is denied. This creates a hidden tax and undesirable residual taxation. On the other hand, if all the required information is noted on the invoice, unscrupulous taxpayers enjoy the right to make a deduction (protection) even though, in reality, the item might not have been used commercially. It is reality that is sacrificed for the sake of formal protection. Such formalism, *which is inherent in VAT,* therefore leads to contradictory and pernicious effects that are difficult to put in check.

4.4. Towards self-formalism?

This double-sided formalism, which can both distort VAT (denying the right to deduct) and falsify it (wrongly granting the right to deduct) is of sufficient subtlety to warrant a new approach. In those countries that have a culture of fiscal discipline, without significant levels of fraud, those subject to taxation put all their efforts into mitigating the formal constraints of invoicing. In states where fraud is endemic, the tax authorities endeavour to reinforce them. In countries where there are mixed trends – that is to say in most of them – it is no longer clear what to do: should this formalism be reinforced or softened? Neither law nor economics is capable of resolving this worldwide problem. At the very least, consideration must be given to introducing a type of self-formalism, set out and sanctioned by trade associations. In any event, there is an absolute requirement to develop our knowledge of fiscal practice and a sociological approach to abstraction and invoicing.

Conclusion

Historically, VAT was invented by economists. Adams, Shoup and Lauré were economists. Von Siemens was an entrepreneur. The first international tax assistance was provided by American economists. Lawyers have since taken over, particularly regarding European VAT. Whether it was a matter of compromise, demarcation or interpretation, the science of the law was required to analyse VAT. In the 1980s, with the growing influence of international

organisations, a highly economic approach was adopted. And yet, given the slide towards fraud, the flight to the informal sector and corruption, the classical scientific approach to World VAT is called into question because of the obvious fact that this *economic and legal approach is perhaps too simplistic*. It is an approach that only partly worked. Neither economics nor jurisprudence foresaw carousel fraud, the increase in VAT corruption or the flight to the informal sector. How could such endemic problems be resolved using these disciplines alone?

While being economically straightforward, VAT is complex from a psychological and sociological point of view. This subtlety is naturally a product of the empirical process that led to VAT, and goes well beyond the marvellous ideas of von Siemens and Lauré. All things considered, the tax indeed contains a fundamental complexity, which is due to its very nature and to its wonderful mechanism. Only a multidisciplinary approach will allow us truly to understand VAT. A fundamental sociological examination of the subject – never before undertaken – is now merited. It is as if the psychosocial implications of this sophisticated and cleansing form of taxation had never been truly realised until now, not to mention the basic errors and axioms that need to be challenged.

A new analysis of the mechanism at the heart of VAT and a sociological study of its technicalities have become essential. Also required is a multidisciplinary analysis of final-stage liability and the provision of services. New data and new surveys are required; there is more than just a need to educate and inform. Wherever VAT has worked well, this has only been possible by carefully listening to the groups of people concerned. A *new and multidisciplinary modelling* of VAT must now take place. It is for sociology to bring what it can to the subject, and it is for sociologists to explain why they have not hitherto been interested in VAT, despite its being such an enormous area of investigation. The ball is in their court, too. After all, economists and lawyers cannot be held responsible for everything.

Citations

Introduction

We cannot ignore the "VAT crisis" of the 2000s. Some independent voices have challenged VAT's hasty and quasi-coercive introduction in developing countries.

1.2:The fear of tax audit has been a fundamental factor in the hostility towards tax liability.

1.3:To instigate VAT audits because they present an opportunity to carry out a double audit with regard to direct taxation is a fundamental error.

1.4:A psychosocial analysis of this fear on the part of VAT payers could potentially challenge some of the axioms of taxability and economics: the linking of VAT administration with direct taxation, and the abandonment of transfers to market forces.

2.2:Extending VAT to services heralded a sociological revolution in terms of indirect taxation.

2.4:The fragmentation of tax was hence complete. Furthermore, transactions themselves were no longer tangible and could no longer be located by the authorities, and suppliers and purchasers could essentially disappear at will.

2.5:Given that the tax authorities are no longer in control of transactions, it is no longer possible to oblige traders to accept a value-added tax. A new form of tax consent is required: not the historical system involving citizens and consumers, but a system for traders.

3.1:The idea is that the supplier's interest in maximising input (a desire to sell as much as possible) is the opposite of that of the VAT-paying purchaser (a desire to pay as little as possible), and this tension provides security. That logic may be held to by the major specialists, but it has proved a false belief.

3.2:Traders that collected the tax and the tax authorities are supposed to work hand in hand, and this includes acting neutrally. Economically speaking, everything seems clear. And yet, things do not happen this way.

3.3: On the sociological side, tax refunds arising from the right to deduct essentially come out of the public purse, which is an intolerable consequence for state finances. VAT is becoming a tax against the state, which is a complete tautology – a contradiction in terms.

3.4:Although the VAT mechanism is economically clear and simple, it can still prove to be psychologically and sociologically complex.

4.1:Hence, the invoice creates a distancing from the all-important reality.

4.2:As for subjects of taxation, VAT requires our adherence to abstraction, technicalities and fiscal discipline.

4.3:Whenever the formalities are too tight, the principle of neutrality is sacrificed. On the other hand, if all the required information is noted on the invoice, unscrupulous taxpayers enjoy the right to make a deduction even though, in reality, the item might not have been used commercially.

4.4:It is no longer clear what to do: should the formalism of invoicing be reinforced or softened?

Conclusion

Neither economics nor jurisprudence foresaw carousel fraud, the increase in VAT corruption or the flight to the informal sector. How could such endemic problems be resolved using these disciplines alone?

A new and multidisciplinary modelling of VAT must now take place.

Biography

Pascal Mollard was born in 1954, and hails from Montagny (FR) in Switzerland. He graduated in law at the University of Fribourg. He was Head of the Swiss Federal Administration's wholesales tax (IChA) legal division (1989-1993) and Project Manager in the Swiss Federal Tax Administration for the adoption of VAT (1993). He was President of the Federal Tax Appeals Commission (1994-2006) and of the Federal Customs Appeals Commission (1994-2006), and also held the presidency of the Conference of Presidents of Federal Appeals Commissions (2003-2006). He has been a Federal Administrative Judge since 2007.

Chief Justice of Bhutan

Interview with the Hon'ble Chief Justice of Bhutan, Lyonpo Tshering Wangchuk

1. Congratulations Your Honour! His Majesty, with his trust and confidence appointed Your Honour as the Chief Justice of Bhutan. Kindly share Your Honour's feelings on this auspicious occasion.

Mere words will not be able to do justice to express the emotion and gratitude that engulfed me, for the trust and confidence reposed in me by His Majesty the Druk Gyalpo. I am indeed deeply humbled and honored by His Majesty's benevolence which has rejuvenated in me the inspiration to serve our nation and our fellow citizens with greater humility and ardor. I will always put in my best efforts to live up to the confidence bestowed upon me towards fulfilling the duties and responsibilities of the Chief Justice of Bhutan and the mandates of the Judiciary.

The presence of large gathering of well wishers during my inauguration as the Chief Justice, I would like to believe is a testimony of the respect which the legal professional generally, the civil servants and the public hold for the Court and the office of the Chief Justice. The trust and confidence reposed in me by His Majesty the Druk Gyalpo, coupled with the loving support of my family, valued encouragement of my judicial colleagues, loyal devotion of my staff and the prayers and good wishes of my well wishers go far to dispel the inevitable diffidence with which I assume the duties of the Chief Justice.

There is no greater glory than getting an opportunity to serve as the head of an institution, in which one started as a foot soldier.

2. What objectives or goals do Your Honour have as the Chief Justice?

As the Chief Justice of Bhutan, I look forward to leading by example in fulfilling the mandates of the judiciary and ensuring that justice is accessible and rendered to one and all. I aspire to achieve progress for Judiciary and guide each and every member of the legal fraternity towards making our Legal System responsive to the needs of our nation and the people. The Judiciary must do right to all manner of people according to law without fear or favour, affection or ill-will to forbid partiality and, most importantly, to command independence from any influence that might improperly tilt the scales of justice. As I shoulder the responsibility of this great office, I am committed to uphold the sovereignty and integrity of Bhutan faithfully, conscientiously discharge my duties in the service of the Tsa-Wa-Sum, perform duties of the office without fear or favor to the best of my abilities and bear true faith and allegiance to the Constitution of Bhutan.

Judicial accountability and responsibility being imperative in creating a reliable, fair and efficient justice system and inspiring public confidence in the institution, I look forward to promoting judicial accountability where every office holder of judiciary will be encouraged to serve one and all to the best of their abilities and be guided by the commitment to uphold the law in an impartial and unbiased manner and at the same time be accountable for any disservice to the nation and the people. The Judiciary shall promote explanatory accountability and not sacrificial accountability. Accountability to more senior judges is ensured through the appeal system and the accountability to the Chief Justice must be ensured through a complaints mechanism. Accountability to the general public will be ensured through open and easy access to justice and the publication of judicial decisions. It is however, important to bear in mind that reforms related to judicial accountability must be balanced with the need to protect the judicial independence, especially the decision making independence. Every judge has independence in taking decisions on court cases that even the Chief Justice cannot meddle with. It is only when the judgments are deemed as badly assessed can their superiors review and reverse their decisions on appeal and if needed mete out punitive actions against them.

Reforms related to judicial accountability will be considered cautiously, ensuring respect for the institution and public opinion. The judiciary must continue to be open to criticism and not feel offended every time the institution or a verdict is criticized, however, the criticism must be within the bounds of reason. If the media has the capability for providing constructive criticism, it will invariably benefit the judicial institution by enabling judges to be more responsive to certain situations and changes in society.

The Judiciary will continue to aspire to fulfill His Majesty the King's Command by being a repository of highly educated and professional judges, custodian of our age old customs, traditions (driglam-namzhag) and culture, and the guardian of the national language, Dzongkha which has been the basis of our success initiated by our forefather with wisdom and farsighted vision.

Judiciary being the custodian of the Constitution and the Rule of Law, I am confident that with the valued support and cooperation from my colleagues, and the loyal devotion of my staff, I shall continue to work towards fulfilling the aspirations of our people in achieving a Justice system that is just and dynamic. I have always believed that in a democracy enduring institutions depend upon the enduring support of ordinary citizens and citizens are more likely to support those institutions they understand. Therefore, I hope to conduct a public relations exercise, humanize the face of the judiciary and aspire to make it an effective branch of social service.

3. The Judiciary has been the custodian of justice for the people of Bhutan. To enhance delivery of justice to the people, what do we need to do to promote access to justice for the people?

Access to justice and enforcement of rights

is greatly dependent on the awareness of the existence of rights and the knowledge of avenues for redress. Access to justice can be enhanced through better awareness and knowledge of constitutional rights and freedoms among the public. We should strengthen the capacity of the public through dissemination of information, raising awareness about rights and duties, the existing laws protecting the rights and the avenues and procedures for enforcing these rights. An increase in public understanding of rights and duties must enhance respect for the rule of law, and the legal process, for which the role of the legal profession is vital.

Legal rights will remain only in the law books, if the institutions responsible for upholding these rights are inaccessible. Constant improvement of infrastructures, training of legal personnel and expansion of mechanisms for rendering effective services should be in place. Physical access which is trouble free and uncomplicated is another significant facet in achieving access to justice. To this effect, cooperation and team work between various organizations and institutions which link judges, prosecutors, police, CSOs with the public can enhance community legal awareness and improve the capacity of these institutions to respond to the need for access to justice efficiently. Further, promotion of the competence, ethical conduct and professionalism in these institutions and encouragement of pro bono and better public service by the legal profession is imperative.

There is a need to encourage the practice of monitoring legal service delivery at every level to ensure effective and better delivery of legal services to the public and to afford assistance services to those who are not proficient with legal knowledge and legal processes. The courts which are charged with the responsibility of delivering justice to the public should enhance access to justice by encouraging an environment where each staff of the court is courteous and responsive to the needs of the public. Judiciary can also enable individuals to represent themselves before the courts effectively by making courts more user-friendly and ensuring physical access both in design and location of institutions in areas where people can have easy access. Further, identifying and working towards overcoming language, cultural and other barriers which obstructs access to justice is vital and initiatives such as introducing e-litigation will go a long way in the efficient delivery of justice. The cost of litigation (court fees) must remain inexpensive and affordable to the common man. Last but not the least the legal aid system must be institutionalized and made effective. It must enable the poor people to access proper legal advice from capable lawyers. Hence, in this context I would like to believe that the existing system must be replaced by a public defender's office to make legal aid more effective and efficient.

4. As the Judiciary represents one wing of the government, under the principle of separation of powers, it is the feeling of the general public that the judiciary seems to be the silent branch of the government. Lyonpo's view on this.

   Rather than silent, I would like to believe the Judiciary to be an observant branch as the custodian of the conscience of the nation. With the changing times, it must cautiously observe the functioning of the other branches of government, diverse scenarios and the varying patterns of people's lifestyles, new developments and changes in society, and the possibility of new problems arising, to ensure that the judiciary has the capability and foresight to promptly channel its efforts in being alert to the needs of the society and dealing with them efficiently and effectively.

5. The Judiciary of Bhutan has been entrusted by the Constitution of Bhutan to render justice without fear and favour. In this light, to what extent Your Honour feel that this mandate has been fulfilled by the Judiciary?

   The Judiciary has always endeavored to safeguard, uphold, and administer justice fairly and independently without fear, favour, or undue delay in accordance with the rule of law to inspire trust and confidence and to ensure that justice remains to be efficient, inexpensive and easily accessible to the people. The Judges have always endeavoured to honour the importance

of confirming their conduct to the ethical obligations arising out of their office. Highest regard has been placed in assuring that every proceeding is heard and decided fairly and independently without any undue influence. Almost all the judges have displayed highest integrity and honesty, moral vigour and ethical fairness. I can confidently express that the mandate of rendering justice without fear and favor has been achieved positively. Bhutanese judges have always enjoyed decision making independence and must continue to do so.

The timely and appropriate reforms initiated on the command of their Majesties the Kings, have been helpful in ensuring the delivery of justice to the people by the Judiciary. The few misguided ones have been corrected and remedial measures initiated in keeping with the relevant rules that are in place. Our judges with complete probity and spine; courage and wisdom have interpreted rights in ways that adhere to the law, always making the welfare of the public and the nation a primary objective of the institution.

6. Please share with us Your Honour's opinion on the significance and role of continuing judicial education in the administration of justice in Bhutan.

Continuing education in any field is a sine qua non for the progress of an institution. Continuing legal education assists the members of the legal fraternity in keeping up with the latest developments in the law, meeting continuing education requirements, and learning about new ways and means of providing better services to the public. It provides judges and lawyers with an opportunity to gain knowledge on various areas which will equip them in performing their functions with enhanced knowledge and expertise. Regular participation in continuing legal education programs strengthens the professional skills of lawyers, judges and other legal personnel, affords them periodic opportunities for professional self-evaluation, helps in professional growth and enhances the quality of legal services rendered to the public. Continuing education also facilitates in promoting competence, ethical conduct and professionalism of the legal personnel. It thus promotes public service by the legal profession, serves in improving the administration of justice and benefits the public interest. Trainings must be used wisely and effectively and selection of candidates must be based on merit and equity.

7. The Bhutan National Legal Institute as a training arm of the Judiciary, what is Your Honour's advice for us?

The efficiency of an organization greatly depends on the ingenuity and competency of its employees. Training and career development are thus vital for any organization which aspires to progress. In today's time where there are numerous changes in the lifestyles of the people, scores of developments in laws, and rapid technological advancements, Bhutan National Legal Institute under the noble and dynamic leadership of HRH Ashi Sonam Dechan Wangchuck and the hard work and dedication put forth by the entire BNLI team have, from its inception, contributed immensely in equipping the Justices, Judges, lawyers and the bench clerks of the Judiciary with skills and knowledge through various trainings, that are fundamental in achieving the mandates of our institution. The BNLI with its noble vision have been playing a significant role in facilitating Judiciary and its staff to progress with the knowledge and tools for providing better legal services to our people. The Judiciary family is grateful to BNLI for their commitment of facilitating the Judiciary to grow as an institution towards serving our Tsa Wa Sum with better knowledge, improved skills and greater competency. Mandatory and need based trainings conducted by the BNLI has been most beneficial and effective. We are thankful to the BNLI for being one of the main pillars in our institution's path towards success and growth.

8. Your Honour will vacate the office of Chief Justice at an early age. Your Honour's views on it.

With changing times, fixed tenure for the Chief Justice is indispensable for a society to be vibrant and progressive. A constant influx of fresh ideas and enthusiasm is crucial which can be realized only if individuals charged with

public office are not appointed for unreasonably long tenure which invariably stagnate the growth and progress of the institution and the nation at a large. The fixed tenure for the Chief Justice is crucial in taking care of the Peter Principle as it ensures that incompetence does not shake the very foundation of any public office, if a wrong individual has been elevated the fixed tenure takes care of his removal.

When I demit office, I would have served in the judiciary for 32 years 2 months and 26 days. I consider myself fortunate to have been afforded by destiny to serve my country and the people of Bhutan. The opportunity to serve the Tsa Wa Sum as the Chief Justice of Bhutan for the next five years in true sense is an honor and privilege for me. The service we can offer to our citizens through this great office is enormous and diverse. Being able to offer my allegiance and dedication to a young democracy and a confident nation governed by the rule of law is not a burden but a privilege which cannot be weighed down by the length of tenure. I believe if we have the will and passion to do something, duration of office will mean very little. Be it five years or eighteen months plus, if we exert sincere efforts, our goals and endeavors will definitely flourish and see the light of day. The limited term affords one with an opportunity to make appropriate plans and execute them within a timeline.

9. Any message for the legal fraternity?

We, our systems, our mindsets might not be perfect. But we as a team and members of the legal fraternity and as citizens of our great nation have the potential to make positive changes in our society for the greater good. We have the appropriate aptitude and must develop the desire to safeguard the past and face the future challenges by ensuring due process of law and respect for the Rule of Law. I would like to urge every single member of our legal fraternity to work towards institution building (no individual is larger than the institution) and putting systems in place, creating and fair and just society and further the cause of justice. We must rise above our challenges and realize the aspirations of our people collectively. In achieving our objectives, criticisms and setbacks will be plenty and the path to discharging justice might be difficult. But always remember, our strength lies in our commitment and dedication to further the cause of justice and doing so with a clear conscience. So don't be dismayed by criticisms nor be awed by the challenges ahead. Be courteous, humble and responsive to the needs of the society (people come to the courts because they are in problem) and ensure protection and accomplishment of national objectives and policies with perseverance, commitment and humility. Exercise and keep healthy, keep alive the desire for self improvement as a professional and human being - be the true custodians of Justice by selflessly serving our King, Nation and the People.

Forensic Science and Administration of Justice: *Issues and Directions*

Lobzang Phuntsho, Dungda, Forensic Specialist, Royal Bhutan Police, Masters Degree , Molecular Biology

Introduction

Forensic is the use of scientific knowledge by the law and the courts. It is one of the few areas of law enforcement, where science and crime –solving meet to ensure fair trial. The main objective of forensic investigation is the recognition, identification, collection, interpretation and reconstruction of all relevant physical evidence. It begins with the examination of the crime scene[1] where the investigators gather the first clues and make initial assessment on the nature of offence, the causes and identity of the perpetrator(s). In essence, observation and interpretation of physical evidence is the primary tool in the investigative process.

Inquiry or investigative procedure is a lawful fact-finding or information gathering process for legal purpose with the aim to establish an unlawful act. Forensic examinations complement the fact-finding process in criminal as well as civil cases with scientific assessment and interpretation of physical evidence. The proper recording of the conditions and location of evidence and maintaining the chain of custodies are crucial for courtroom proceedings, wherein the integrity of evidence is habitually questioned.

The forensic investigation deals with the sterile environs of inanimate objects that cannot lie, fight, or flee, and thus has a role distinct from criminal investigation, which encompasses complex and often emotional arena. Research has shown that investigators are on an average about three times more likely to solve cases when scientific evidence is gathered and analyzed.

1 A place where an unlawful offence has been planned and/or committed

Issues

At the outset, access to forensic services in Bhutan is nominal in the absence of forensic laboratory facility. In fact, the awareness and demand for such technology driven services have come to the fore only recently. More so because of the generally held perception that suggests forensic technologies as curious, although frequently necessary, an optional appendage.

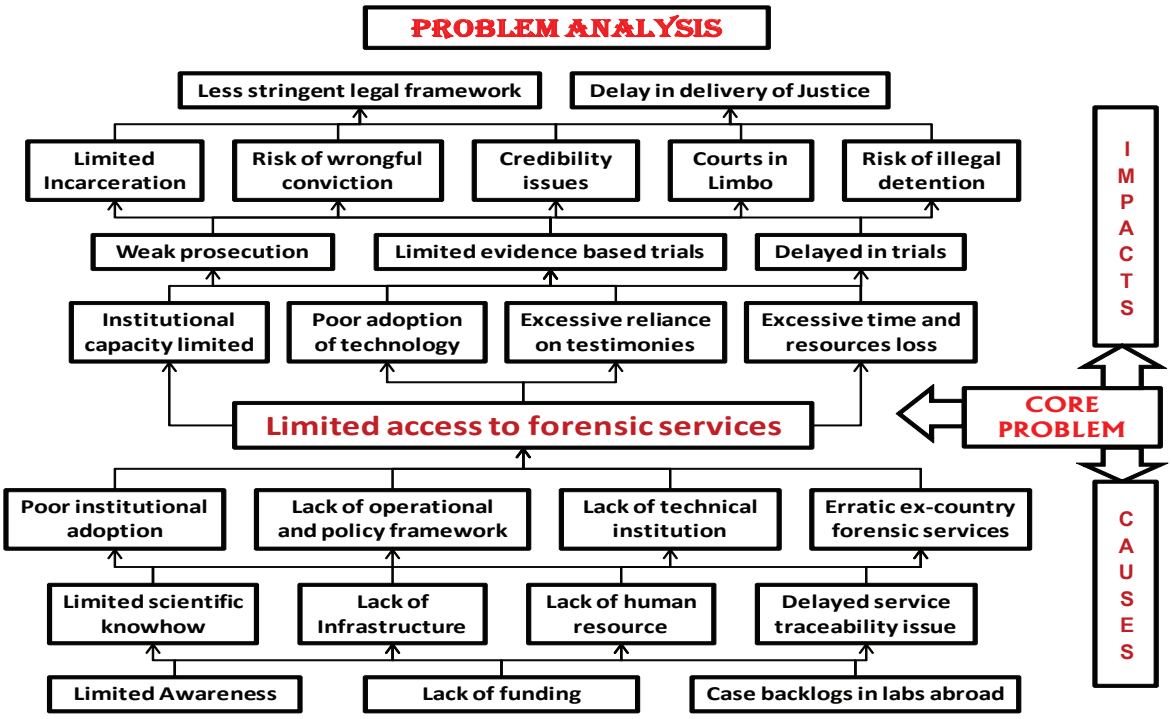
Today, law enforcement agencies fully depend on forensic laboratory services of the neighboring countries in serious cases. There are concerns over the validity of these forensic reports considering the problems of traceability and the chain of custodies of evidence. Therefore, the services overtime have proven to be erratic and time consuming, thereby causing undue delays in the administration of justice. In the absence of a reliable solution, the trend of reliance on testimonies and subjective narratives has rippling effects on the progress and quality of the investigation, prosecution and delivery of justice.

In fact, the efforts to integrate forensic technology are dwarfed by the absence of forensic facilities. Therefore, building the institutional capacity to deliver perpetual justice and good governance calls for a new paradigm.

The chart illustrates the underlying causes contributing towards the core issue of limited access to forensic services in the country and the apparent impacts especially on the criminal justice system.

Rationale

Analysis of physical evidence provides the courts with either direct or circumstantial proof. Analytical results provide *prima-facia* evidence and establish



Generic cause and effect of limited access to forensic services

corpus delicti in the court of law. Forensic services also provide critical leads and act as a powerful tool that can influence the outcome of the routine cases.

Approaching the criminal justice system objectively, would call for multiple levels of checks and balances to ensure that the justice is served through best practices. The chain of custodies of evidence is an important facet of the forensic procedure, which is mandatory to uphold the credibility of evidence. Operational framework always provide for independence of evidence management from the investigative process. The observers and the watchdogs also play an important role in evaluating the quality of forensic services. It is fundamentally essential for the defense lawyers to routinely challenge the soundness of the evidence in the court of law. Such checks provide for a robust system laying emphasis on the forensic services of highest quality.

A person charged with a penal offence has his fundamental right to be presumed innocent until proven guilty. Our justice system protects citizens against prosecution or conviction on the basis of suspicion, doubt or hearsay until such charges are proven or supported by witness or evidence. The Evidence Act, 2005 requires corroborating evidence to ascertain the validity of the charges, confessions and conviction or acquittal. In fact, the right to remain silent is a privilege that is a pinnacle of the human rights. Under such enlightened laws, justice can be pursued efficiently and professionally when the supports of forensic services are augmented.

Conclusion

Application of forensic science has leverage over a diverse array of social services. Collaboration will enable the key stakeholders to consolidate and collectively invest in the development of infrastructure and human resource. For a small nation like ours, this can greatly reduce the fiscal burden. It will avoid duplication of works and render a greater coherence and inter-operability amongst the partner agencies.

It is apparent that forensic services appeal to the mandates of all the institutions that have broad social leverages and it is time to realize the potential of a consolidated national forensic science facility. The key stakeholders who stand to benefit from such venture include the Judiciary, Law Enforcement Agencies, Attorneys, Civil Society Organizations, Ministry of Health and the citizenries in general.

Necessity of Statute of Limitation for Bhutan

Rinzin Penjor, Justice, Supreme Court of Bhutan, LL.M, Dalhousie University, Canada, Recipient of Danish Government Scholarship, LL.B, Delhi University, B.com (Hons.), S.R.C.C Delhi

Introduction

The Statute of limitation is a law which prescribes a time limit within which any criminal charge may be made or a civil action initiated upon accruing a right to do so before a court of law. The Statute of limitation, therefore, sets out the time period within which any legal actions can be instituted or rights enforced. If no actions are brought or rights enforced within the prescribed time, no legal actions can lie thereafter irrespective of a valid cause of action. It means that after the lapse of the specified time prescribed by law, no suit shall be maintained on such causes of action, nor any criminal charge be made for prosecution. Such legislation is enacted as a matter of public policy to fix the time limit within which any legal action must be brought to enforce remedy.

The Statute of limitation is a procedural law; i.e., it does not create any rights or cause of action in favor of any person. It only bars the remedy but does not extinguish the right. The law runs against such persons who are neglectful of their rights; or are not prompt enough to enforce them through proper diligence. The legislation is based on public policy which is to promote justice, peace and repose in the society.

Objects

The Statute of limitation is based on public policy and expediency. It is intended to create peace and harmony in the society by extinguishing 'stale demands' and 'quiet long possession.' If the farfetched claims and demands are not put to rest after a certain period of time, they might disturb the peace of the community because of endless disputes and litigations. Therefore, the statute of limitation is also known as 'statute of repose,' and 'statute of peace.'

The maxim, *interest reipublicae ut sit finis litium,'* captures the essence of the Statute of limitation. It means that, it is in the interest of the State to have a limit to litigation. It would secure the enjoyment of the property or of a right which may have been acquired in equity and justice by long possession or what may have been lost because of a party's own inaction, negligence or latches. The intention of such legislation is also to alert the people to be diligent and not to be indolent. This is in consonant with the Latin maxim, *vigilantibus non dormientbus jura subveniunt,*' which means that the law assists the vigilant and not those who sleep over their rights.

The Statute of limitation also ensures prompt prosecution of criminal charges. It safeguards individuals from the need to defend themselves against stale charges. This is because it becomes difficult for people to defend the charges after memories of witnesses have faded or evidence have been destroyed. The Statute encourages claimants to act diligently and refrain from an intentional delay in instituting any legal action.

The Statute of limitation helps to reduce uncertainties against the future, and guards from the risks of untimely claims. Some evidence, including physical evidence perishes very rapidly. Unless any claims, be it criminal or civil, are made within the stipulated time, the deterioration of evidence is a critical issue in many jurisdictions. The time limit ensures accurate fact-finding of the case and prevent fraud by either of the party. It helps minimize the transaction costs that are associated with the suits, as the litigation becomes expensive to argue based on tainted evidence. The Statute of limitation is designed to promote the

culture and values of diligence; encourage prompt enforcement of laws. This is expected to help in reduction of the volume of litigation in the country.

Limitation Principles in the Existing Laws

As a procedural law, *the Civil and Criminal Procedure Code of Bhutan (CCPC), 2001* lays procedures for implementation of laws. It also prescribes the time period within which a party can prefer an appeal to a higher court against the judgment of the subordinate courts. Section 109.1(c) requires the aggrieved parties to file petitions of appeal within ten days after the judgment is passed by the courts. In other words, one forfeits the right of appeal if he/she is not diligent enough to enforce it during the ten-day period; or it is deemed that the parties are satisfied with the judgment, and the judgment will be enforced.

In cases of matrimonial disputes, if the couples are not in possession of marriage certificates, the parties cannot mutually resolve the disputes through mediation before the cases are filed at the courts; but it is also mandatory for the courts to grant opportunities to the parties to mediate the disputes after the payment of the prescribed fines to the court. In other cases of matrimonial with marriage certificates, and other civil nature, the option for internal settlement remains open until the court pronounces the judgments. In the event of successful negotiation, the parties are required to reduce the settlement agreement into writing. The agreement must conform to the requirements laid down in section 35 of the *Evidence Act, 2005* and sections174-176 of the *Alternative Dispute Resolution Act, 2013.* If the settlement was not arrived at lawfully or was in contravention of laws, parties are allowed to challenge the validity of the agreement within ten days of the agreement as per section 150.6 of CCPC and section 36 of the *Evidence Act, 2005*. No objection or complaint is entertained after the lapse of ten-day limitation period. Instead, the agreement will be endorsed as valid and enforced accordingly. Similarly, other laws such as *Land Act, 2007* and *Water Act, 2011* contain some limiting provisions on customary right of way and repairing of embankments.

The Contract Act, 2013 contains the concept of 'time-bared debts' (which is also the feature of law of limitation), under section 89 of the Act, in respect of the appropriation of payments, where a debtor owes more than one distinct debt, to a creditor, but it does not define the term. Such lacunae are filled by the Statute of limitation.

The Need for Statute of Limitation

The underlying principle of the Statute of limitation is to encourage people to be diligent in enforcing their rights and remedies available in law – both in civil as well as criminal matters. It is not fair for individuals to remain in perpetual fear of potential prosecution for alleged offences; or being sued for some trivial and frivolous claims of the distant past. The Statute of limitation bars such dormant claims by denying remedies. It is a means of 'ensuring private justice, suppressing fraud and perjury, quickening diligence and preventing oppression'. By barring time-barred actions the Statute would not only reduce the volume of litigations, but would help in ensuring peace and harmony in the society. The re-ignition of malicious disputes and subjecting individuals to callous or vindictive criminal prosecution for past offences will disturb the tranquility in the small and close-knot society.

The purpose of the Statute is not only to protect and safeguard the rights of the defendants, but also to expedite the judicial processes and enhance the administration of justice system in the country. The barring or rejection of the time-barred suits and actions will de-congest the courts as there will be fewer number of cases. Therefore, the state can allocate its judicial resources on important issues and cases for their efficient and effective disposal.

While it is the supremacy of Parliament to enact laws, it is hoped that the temple of democracy may appreciate the importance of the Statute of limitation and enacts this important law at the earliest. This would go a long way in guiding us the timeliness of our actions as far as the litigations and claims are concerned. It is time, we consolidate the scattered provisions of the law of limitation and come out with a law conforming to the changing times and values in the democratic era.

Corporal Punishment in Schools

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1. Introduction

Corporal punishment of children, especially in schools, has been a common phenomenon in Bhutan. It is as old as the concept of education in Bhutan. From what our elders and folklore have to say, it was even more severe in the traditional monastic system of education that was prevalent before the advent of modern education. Monastic education was governed by and administered with very strict rules based on traditional etiquette and moral codes of mannerism.

But society has evolved along with time. The concept of corporal punishment of children is looked at in a different perspective. A minor bodily harm or injury inflicted on others' body which was perfectly fine and acceptable in the olden days is unlawful and opposed to today. So is corporal punishment. The way in which society perceives it has changed, and so have the laws that deal with the problem.

Bhutan has seen quite a number of serious issues arising out of teacher meting out corporal punishment to students in school. A couple of cases reached the Court and teachers have been found guilty in a couple of them. More than this, many people are aggrieved and enraged by the way children are treated in schools. They simply cannot accept the fact that students are subjected to violent punishments. Given the increasing number of cases related to corporal punishment and the society's response towards it, it is important to understand what it stands for and the laws that deal with it.

2. What is Corporal Punishment?

The United Nations Committee on the Rights of the Child defines corporal or physical punishment as any punishment in which physical force is used and intended to cause some degree of pain or discomfort, regardless of its intensity. According to the Committee, which is the monitoring body of the Convention on the Rights of the Child (CRC), most acts of corporal punishment towards children involve hitting (e.g., smacking, slapping, spanking), with the hand or with implements like a whip, stick, belt, shoe, wooden spoon, etc. It may involve other forms of contact, such as kicking, shaking, throwing, scratching, pinching, biting, pulling hair, boxing ears, forcing children into uncomfortable positions, burning, scalding, or forced ingestion (such as soap, rotten foods, or hot spices). In addition, some non-physical forms of punishment are equally cruel and degrading. However, the Convention doesn't cover non-physical forms of punishment in its definition of corporal punishment.

From the above definition, it is understood that, firstly it is not the intensity of punishment or degree of pain inflicted that determines whether an act is a corporal punishment. Some non-physical forms of punishment can also be said to be a corporal punishment. Secondly, whether an act is physical, non-physical, highly severe or mild, it is degrading invariably. All forms of corporal punishment leads to degradation of child's physical integrity and human dignity. However, in the ordinary language and the day to day social interactions, corporal punishment is understood as involving mostly, if not only, physical punishment and violent treatment of the child.

3. Corporal Punishment in Schools

Caning, spanking, slapping and boxing ears are some of the common forms of physical punishment that happen in schools across Bhutan. Another way of punishing students is by making them do some physical works such as cleaning the school campus and clearing over-grown bushes.

Such corporal punishments in schools has become a matter of intense debate in Bhutan recently. It is not that corporal punishment did not exist before. As the children who are victims of violent treatment in the schools and their parents are more aware of child

rights, corporal punishment in schools is gaining more attention. Therefore, when there are serious cases of corporal punishments, the parents are not ready to tolerate it. They complain to the concerned school administration of their grievance. If they think it is too severe, the parents complain to the Police.

Due to the increased awareness of child rights, many cases of corporal punishment are now reported to Police and further presented before the Court. However, some cases go unreported, especially the minor ones. In a recent case, a Principal was imprisoned for three months by District Court, Mongar for inflicting corporal punishment on a boy who, the school stated, was bullying and beating the junior students.

In another recent case, Principal of Drujeygang school was prosecuted for slapping and caning a student. The medical report confirmed that his ear drum was ruptured. Another case of corporal punishment was reported in Dagana District in which the parents of the deceased child filed a complaint to the Police that their child had committed suicide after he was punished by the school Principal.

There are different perceptions when it concerns such corporal punishment. One group of people is absolutely against corporal punishment. They feel that it is inhumane and intolerable as it is nothing less than physical abuse of the children whose mental and physical well being can be endangered.

However, another group of people think that some level of corporal punishment is acceptable. They argue that it is necessary to instill the fear so as to correct the students' behavior and make them learn more but not to the extent of supporting unnecessary brutal and violent physical treatment of the children. Therefore, it is impossible to demarcate the line that separates the tolerable form of corporal punishment from the intolerable. Hence, corporal punishment is not acceptable.

Normally, children are of different nature and disposition. Therefore, their reaction to the norms of the schools may differ. In such cases, how do the teachers or school authorities deal with them? Those who are against corporal punishment recommend counseling but this may not necessarily work. If counseling fails, should the school allow the student to behave as he/she likes and compromise his/her future?

Those people who support some level of corporal punishment think that teachers may be allowed to use reasonable force for the benefit of the individual child, if their only aim is to see the child improve, learn well and become a better human being.

4. What do the Laws Say?

a) Convention on the Rights of the Child, 1989:

The Convention on the Rights of the Child, 1989 provides for certain international standards on child rights required to be adopted and implemented by concerned states. Since Bhutan has ratified the said Convention, she has an obligation to ensure that necessary measures are taken to protect the rights which includes protection of children from violence.

Article 37(a) of the Convention says that the States parties shall ensure that no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. This provision talks about the rights of the children in a generic term, including the restriction on the kind of punishment that can be given to children under 18 years of age.

When it comes to school education, Article 28(2) of the Convention clearly states that States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

b) Constitution of Bhutan:

Article 7(1) of the Constitution provides that it's a fundamental right of a Bhutanese citizen not to be subjected to torture, cruel, inhuman or degrading treatment or punishment. Article 9(18) envisages the State 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.

c) Child Care and Protection Act, 2011

The Child Care and Protection Act provides for a number of offences against children, including assault (Section 212), cruelty (Section 213), "harsh or degrading correction or punishment" (Section 214) and battery (Section 215). Section 214 provides that a person shall be liable for the offence of harsh and degrading correction or punishment, if the person subjects a child to harsh or degrading correction or punishment measures at home, in schools or in any other institutions. Any corrective measure shall be culturally appropriate and in accordance with rules framed for discipline of children. The offence of harsh and degrading correction or punishment shall be a violation.

d) Notification of the Ministry of Education

A notification from the Ministry of Education in 1997 stated that corporal punishment should not be used. Teacher and Student's Code of Conduct (1997) and subsequent administrative directives discourage corporal punishment in schools as it is also against the promotion of Gross National Happiness.

e) Annual Education Conference, 2008

A resolution was adopted at the 11th Annual Education Conference in 2008 to enforce a ban on corporal punishment in schools, and guidance on school discipline was produced in 2011 to encourage positive non-violent forms of discipline.

f) Penal Code of Bhutan

Section 109 of the Penal Code of Bhutan provides that a defendant shall have the defence of justification, if the defendant uses force on an incompetent or incapable person and the defendant is the parent or guardian or other person responsible for the general care and supervision of such person and the force:

(a) Is used with the purpose of safeguarding or promoting the welfare of the incompetent or incapable person, including the prevention of serious misconduct;

(b) Used is not designed to cause or known to create a substantial risk of causing death or serious bodily injury; and

(c) Used is no greater than that which is necessary.

This shows that there is some leniency provided by penal law on the defendant in the case of parents, guardians or other responsible persons, who are responsible for care and supervision of the victim, using force for the same on the latter.

As stated above, various laws clearly provide that corporal punishment and other degrading and violent treatments to children shall not be practised or tolerated. Nevertheless, it can't be disputed that some necessary level of punishment for the care, welfare and safeguard of the child can be done away with completely. It becomes necessary to use some level of force to correct and take care of the children who are not matured and grown up enough to be left on their own. While I am in favour of necessary and minimal level of punishment, which can constitute corporal punishment more often than not, the only question is how do we draw a line between what is necessary and what is not. If the concerned agencies and bodies can come up with some acceptable means to determine the margin of necessity of corporal punishment, I would support its practice. Without a clear demarcation between the unnecessary and necessary corporal punishment, it is difficult to justify the practice of corporal punishment in places like schools.

5. Conclusion

Where do these laws and numerous cases of corporal punishment leave us now? After going through the relevant provisions of the laws, it becomes clear that violent and degrading treatment of child is prohibited. But corporal punishment of some form is accepted if it is not life-threatening or too severe. This shouldn't be a major problem as long as there is a definite way of drawing a line between what level of corporal punishment is acceptable and what is not.

However, it can concluded that the major chunk of our society is against corporal punishment in schools. The international practice also actively voices against corporal punishment of all forms, no matter its severity. And these trend might not change ever.

It is difficult to make any critical comments on the punishment given by the court to the convicted teachers as we don't have access to the evidence and

facts based on which the judgment was passed. As of now, different media are the only sources from where we are able to learn about these happenings. One of the major questions Bhutan face is whether these laws need to be amended and made consistent with other relevant laws in line with international practice. An argument countering this would be all laws can't be same as they will have to depend on the social milieu and cultural practice of the concerned countries. However, no matter what laws say (even if there is some leniency towards corporal punishment), the society largely is not ready to accept corporal punishment in schools. Therefore, teachers have a huge responsibility to correct and discipline the students in some other ways not involving corporal punishment. The societal pressure against corporal punishment and on the teachers is increasing by the day.

The Court System of Switzerland

Dr. Markus Metz, President of the Federal Administrative Court of Switzerland / Lukas Rast, BLaw, Project Officer at the Federal Administrative Court of Switzerland

Following the Heritage of Bottom-up Federalism

Much like the United States, Switzerland is a federal state, carried by its member entities. It was founded in 1848 by its 25 cantons. Following a civil war with high casualties, the cantons were aware as ever of their regional differences, and, therefore, put an effort in minimizing the power of the federal state, stipulating that cantons shall be autonomous in all fields of governance that don't require uniform solutions on a federal level. Although flattened in time, this basic principle of governance still exists now and was specifically requested by the cantons to be put in the newly revised constitution of 1999.

Divided into the federal, cantonal and municipal (district) level, the vertical layout of Swiss court organization follows the general structure of Swiss government. While courts of first and second instances are organized autonomously by the cantons, the Federal Court of Switzerland acts merely as a court of appeal for cases concerning public, civil, criminal, and social law. In contrast to countries that are dominated by characteristics of the *common law* legal system (such as Bhutan), Switzerland follows a monist approach: Both federal and cantonal courts apply federal, cantonal and municipal law, giving federal law priority over cantonal and municipal law. The constitution requires the cantons to provide for functioning judicial authorities, and frames minimum procedural standards for the courts. This is part of the realization of the basic right stated in art. 29a of the Federal Constitution of the Swiss Confederation (also: art. 6 no. 1 ECHR; art. 14 sec. 1 ICCPR), which guarantees rights to due process before an impartial court. As the cantons are free to specify the organization and the partition of the competences within their territory through cantonal law – and even cantonal constitutions, the structures of first- and second-instance courts vary from canton to canton.

The Federal Supreme Court

A Slow Rise to Limited Power

The Federal Supreme Court was established in 1848 by the first Constitution of the Swiss Confederation. It has started off as a court solely responsible for disputes between the cantons and the Confederation, for cases involving political crimes against the Confederation, and for some cases concerning infringements of fundamental rights based in the new constitution. At its natal stage, the Federal Supreme Court consisted of eleven non-permanent judges. Since then, parallel to the federal administration, it has gained in competences, case load, and size, peaking in 1999 when the legal basis for additional federal, non-last instance courts had been set: The Federal Administrative Court (FAC), the Federal Criminal Court (FCC), and the Federal Patent Court (FPC). These courts have been established in the process of the judiciary reform in 1999, to relieve the Supreme Court from its increasing case load, and to provide the judicial system with additional judicial instances for appeals against actions by the administration (FAC/FPC), or for criminal cases affecting national interests (FCC).

Today, the Federal Supreme Court acts as court of last instance[1], ruling on appeals against decisions emanating from last cantonal instances as well as from federal courts. Its main purposes are to oversee the application of federal laws and regulations by the cantonal courts, and to provide for certainty of the law through uniform interpretation of the law. Civil cases are only accepted before court if the amount in dispute exceeds CHF 30,000, if a basic constitutional right is affected, or, if they arise a legal question of fundamental nature.

The Federal Supreme Court is composed of 38 federal judges and 19 deputy (part-time) federal judges, each one elected by the United Federal Assembly (federal legislative) for six years, and, if reelected, for a unlimited number of terms until the age of 68. Since in theory, anyone with the right to vote can run for judge, the benches are complemented with skillful court clerks who are responsible for legal as well as technical research, and, as experts in their field, often take an active role in the drafting of the court's rulings. The court is divided into seven divisions: two for public law, two for civil law, one for criminal law, and two for social law. In the year 2012, the Federal Supreme Court received 7,871 new cases and decided on a total of 7,667, leaving 2,469 cases pending for 2013. Considering these numbers, it goes without saying that the Court has to follow a strict triage policy in order to give cases that are crucial for legal practice the highest priority.

Supervision within the Federal Supreme Court is ensured through the Court Assembly (consists of all ordinary judges), the Administrative Commission (consists of the president, the vice president, and one judge), and the Conference of Presidents (consists of the presidents of the 7 court divisions). While the Court Assembly and the Administrative Commission are engaged with questions arising in organizational and administrative matters, the Conference of Presidents is responsible for the coordination of judicial decision-making among the divisions.

When looking at the three powers of government, the Swiss judiciary has a relatively small size, compared to other countries. One possible explanation might be found if looked at this "gimmick" implemented by the framers of the constitution: Art. 191 of the Federal Constitution of the Swiss Confederation states that "the Federal Supreme Court and the other judicial authorities apply the federal acts and international law". Accordingly, Switzerland does not maintain a constitutional court (unlike Bhutan with its Supreme Court, which has the authority to interpret and directly apply the Constitution). Preventing the Supreme Court from applying the Constitution ensures continued superiority of the parliament over the judicial branch, since, in the case of a supposed conflict between the (often very vague) constitution and federal law, the Supreme Court may not declare federal laws (which are passed by the parliament) unconstitutional.

The European Court of Human Rights (ECtHR)

Keeping the Swiss Supreme Court in Balance

Located in Strasbourg, France, and established by the European Convention on Human Rights (ECHR) in 1959, the ECtHR is a supra-national court watching over its 47 member states' compliance with the ECHR's minimal standards of civil, political, economic, social and cultural rights. Taking the cultural, historical and philosophical differences of the member states into account, the ECtHR decides on appeals of individuals, groups, and member states against last-instance rulings of a member state.

In regards to the situation in Switzerland, having abandoned the Constitution from direct application by the Federal Supreme Court may seem to increase the likelihood of violations of human rights that are stated only in the Constitution but not in the federal laws, and therefore may also seem to increase the risk of Switzerland (as an ECHR member state) getting convicted by the ECtHR. Although there are a few convictions every year (nine in 2013), this is a smaller issue than one would assume: Most basic rights stated in the Swiss Constitution are also covered by the ECHR, which, as international law, *is* directly applicable for the Supreme Court according to art. 191 of the Federal Constitution of the Swiss Confederation. This sort of legal ricochet allows the Swiss Supreme Court to not having to

1 Except for issues concerning the European Convention on Human Rights (ECHR), the United Nations Convention against Torture (CAT), and the International Covenant on Civil and Political Rights (ICCPR).

deal with possible conflicts between federal law and the Constitution while being able to comply with the basic human rights that are most precious to the international community.

The Federal Criminal Court (FCC)

The FCC was established in 2004 as part of a comprehensive reform of the judicial system approved by the Swiss electorate and the Cantons in 2000. As the general criminal court of the Confederation, it is the second-to-last instance for criminal cases that fall within its jurisdiction. It is composed of three chambers:

One of them is the Criminal Chamber, responsible for first-instance decisions on cases dealing with offences that are subject to not cantonal, but federal jurisdiction. This includes felonies and misdemeanors against federal interests, explosives offences and cases of white-collar crime, serious organized crime offences and some money laundering offences. Additionally, the Court decides on cases concerning the Federal Acts on Civil Aviation, Nuclear Energy, and Pipelines.

The other two are responsible for appeals: "The First Appeals Chamber hears appeals against official acts and/or omissions by the Office of the Attorney General of Switzerland or the Federal Examining Magistrates. In addition, it rules on coercive measures in federal criminal proceedings and on extensions of periods on remand, and deals with conflicts of jurisdiction between cantonal prosecution authorities or between the prosecution authorities of the Confederation and those in the cantons. The President of the Appeals Chamber is responsible for approving telephone surveillance operations and covert investigations. The Second Appeals Chamber deals with matters relating to international mutual assistance in criminal matters, i.e. appeals relating to the extradition of persons who face prosecution or proceedings as well as execution of penalties based on foreign convictions."[2]

Decisions of all three chambers may be challenged in the Federal Supreme Court and can be viewed on the court's website. The FCC employs 18 judges, 20 court clerks, and received a total of 48 cases in 2012.

2 The Swiss Confederation, Bern 2013.

The Federal Administrative Court (FAC)

Building the New Powerhouse in Governmental Review

On 1 January 2007, the FAC was established in the same process of reform of the judicial system that introduced the FCC in 2004. It was built to relieve the Federal Supreme Court of some of its case load and to achieve a high standard of consistent legal practice in the field of administrative law.

The Federal Administrative Court, located in the city of St. Gallen, currently employs 72 judges and a further 260 members of staff. The court is organized in five divisions, with each having two chambers, and a General Secretariat. Each division is responsible for dealing with appeals and claims in a particular legal field: The first Division is responsible for appeal proceedings in areas including the environment, transport, energy and taxes. The second division focuses on proceedings relating to education, competition and the economy. The third Division deals mainly with proceedings in the field of immigration, social security and health. The fourth and fifth Division work exclusively in the field of asylum law, in particular in relation to questions of refugee status and deportation orders.

Mainly, the FAC deals with disputes over federal public law with one party originally representing the federal administration. The FAC handles mostly appeals against actions made by federal agencies. In some cases, though, when by federal law, cantonal authorities are entrusted with competences that are – according to the constitution – held by the federal government, the FAC may be responsible for appeals against decisions of cantonal instances, too. Certain decisions by the FAC, particularly in relation to asylum matters, are final and cannot be challenged in the Federal Supreme Court. In 2012, the FAC received 6,747 cases and was able to process 7,612 cases, leaving 4,361 cases pending for 2013. A total of 2,015 cases were subject to appeal, 337 of which ended up being appealed before the Federal Supreme Court.

Supervision within the FAC is structured analogical to the Supreme Courts' (see above). The FAC itself is subject to dual supervision: The Federal Supreme

Court holds administrative supervisory power over all other federal courts, while, as also in effect for the Federal Supreme Court, the Parliamentary Court Overview Committee follows the court's business and – if necessary – proposes personal changes to the United Federal Assembly (the parliament), which holds ultimate supervisory power over all federal courts.

Cantonal Courts: Keeping Up With Contemporary Civilian Needs

Cantonal courts, much like the federal courts, are divided by their level of appeal and by their field of law. The courts of second and last instance operate on a cantonal level, hearing appeals against rulings by district courts in civil and criminal cases, as well as against rulings by special cantonal courts of first instance. First instance courts are also installed by the cantons. While smaller cantons maintain only one first-instance court, most larger cantons have set up several court districts, factoring in the case loads in the respective areas. In a court of first instance, cases are usually heard before a single, well-trained judge, sometimes complemented by locally elected lay judges.

In Switzerland, laymanship plays an even bigger role in civil quarrels: Dating back to the French emperor Napoleon Bonaparte, pre-court mediation before laypersons has had its fixed place in Swiss legal history.[3] When in civil law, oftentimes legal endeavors are steered more by emotions than by economic calculations, empathetic mediation can be a both cheap and effective tool to resolve small disputes, and therefore, to relieve the justice system from unnecessary and expensive court battles. According to the current Swiss Code of Civil Procedure, it is mandatory to seek conciliation with the help of a layperson in a fixed procedure of resolution. This is binding for all inner-country proprietary claims below a disputed amount of CHF 100,000 (= slightly above an average yearly salary). If the attempt to resolve the dispute doesn't succeed, the parties then become eligible to take their claims to trial before a court of first instance.

Characterized by their expertise in a designated field of law, specialized courts revolving around commercial law, tenancy law, labor law, as well as administrative law, such as social insurance law, have proven to be of great value. Special courts for juvenile delinquency are tailored to the particularities of Swiss juvenile criminal law that are fundamentally different from the general Swiss criminal law. They work together with other social institutions such as homes for troubled teens, governmental youth advocacies and social work organizations. Four of the largest cantons hear disputes in trade and intellectual property matters in special commercial courts, the decisions of whose cannot be appealed in any ordinary cantonal court, but have to be appealed directly before the Federal Supreme Court.

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3 When French emperor Napoleon Bonaparte invaded Switzerland and left shortly after, everybody agreed that his bold centralization efforts had to be undone. At that time, no one would have figured that his short period of activity would have such a lasting effect on some legal institutions of Switzerland.

High Court

Naren Kumar Kami v. Office of the Attorney General

Judgment No.(Chhetho/14/472)

Background Facts

The Bench I of the High Court of Bhutan in Naren Kumar Kami v. Office of the Attorney General was confronted with the issue of whether the appellant was guilty of rape of a child above twelve years of age.

The facts involved in this case was such that the accused Naren Kumar Kami was living in Gelephu, and the victim Aitama Rai was living at Trongsa. Although they were living at different places, they were in constant touch with each other through phones and eventually developed a mutual intimacy and love for each other.

Upon mutually agreeing to tie-up their marital knot, the victim has travelled to Gelephu and informed the accused upon her arrival. The victim has apparently told the accused that she is above the age of eighteen years and hence, legally competent to give consent for the marriage with the accused. Before the sexual relationship, the victim also informed the Chhuzaygang Mangmi, Tshering Dendup and Chaksikhar Chiwog Tshogpa, Rinchen Dorji that she has attained the age of 18 years.

Unfortunately, when the brother of the victim knew that the victim was missing from Trongsa, he accordingly reported to the Royal Bhutan Police. During the course of search and investigation, it was found out that the victim has allegedly absconded to meet the accused in Gelephu. The investigation also established that the victim was just 16 years of age as per her Citizenship Identity Card (CID). Therefore, the Office of the Attorney General (OAG) has charged accused Naren Kumar Kami for the offence of rape of child above the age of twelve years in the Gelephu Dungkhag Court.

Decision of the Gelephu Duungkhag Court

In the trial court, the accused Naren Kumar Kami submitted that the victim Aitama Rai had come from Trongsa to Gelephu on her volition; and that the victim had fraudulently informed him that she was above eighteen years of age.

Denying the affirmative defense thus submitted by the accused, the trial Court held him guilty of rape of a child above twelve years of age and sentenced him to nine years of imprisonment under Sections 183 and 184 of the Penal Code of Bhutan 2004. The Court solely based its decision on the victim's date of birth as reflected in the CID.

Decision of the High Court

Aggrieved by the decision of the trail Court, Naren Kumar Kami appealed to the High Court.

In the High Court, the accused contended that the victim has affirmatively misrepresented being of age of 18 years and submitted that he reasonably believed that the victim is a major and legally competent to consent for the marriage. He further submitted that the trial court has failed to appreciate the submission of the victim and the witnesses. The appellant also argued before the Court the rationale of segregating Section 183 of the Penal Code (Amendment) Act of Bhutan into two parts: the rape and consensual sex, and reiterated that their sexual activity was totally consensual and it did not amount to rape.

In accordance with section 111(b) of the Civil and Criminal Procedure Code 2001, the High Court graciously reversed the trial court's judgment and acquitted the appellant on the ground that their sexual activity was purely consensual.

The Court considered that it was victim's mistake to

inform the appellant that she was above the age of consent which induced the appellant to resort into sexual relationship with the victim. The Court also relied on the statements submitted to the trial court by the Chhuzaygang Mangmi, Tshering Dendup and Chaksikhar Chiwog Tshogpa, Rinchen Dorji.

The Court also stated that according to the Criminal Jurisprudence and Penal Code, for any act to constitute a criminal liability, there must be element of mens rea and actus rea. For any criminal offense, the Code requires that an alleged act must be committed purposely, knowingly, and recklessly and negligently. However, in the present case, the act was not committed purposely, knowingly, recklessly, and negligently by the appellant but upon reasonable belief that the victim Aitama Rai was a major. Thus, the High Court stated that the reasonably relying on the juvenile being above the age of consent by the accused is a valid defense for rape above the age of twelve years.

This decision has brought so much of impetus to the history of Bhutanese criminal jurisprudence. It is settled principle of law that when an accused believe that the victim was 18 years of age or more at the time the offence was alleged to have been committed, it is a valid defence for the rape of a child above the age of twelve years.

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Sonam Dema v. Sonam Kinga Tshering

Judgment No. (Drangmang-34): 13/06/2011

Background Facts

This is a matrimonial case between Sonam Dema and Sonam Kinga Tshering, a civil servant. The couple was married for 17 years and had three children. After Sonam Kinga Tshering contracted a second marriage with Tashi Zangmo, Sonam Dema filed a suit at the Thimphu Dzongkhag Court for the dissolution of the marriage and payment of matrimonial compensation and child support. She also staked a claim in Sonam Kinga's post retirement benefits such as Government Employees' Group Saving cum Insurance scheme(GEGSIS) and Pension and Provident Fund(PPF). As the parties were not satisfied with the decisions of the successive courts (Thimphu District Court, Bench I of the High Court and Full Bench of the Court) in the judicial ladder the matter finally reached His Majesty the King on appeal from the High Court, the highest judicial authority then.

The Special Legal Task Force (SLTF) of His Majesty's Secretariat decided that Sonam Dema was indeed entitled to share of any and all properties amassed by the couple during the subsistence of the marriage since it comes under the ambit of the 'matrimonial property'; which includes income and benefit accrued to Sonam Kinga Tshering as a civil servant and husband of Sonam Dema. The Advisory Panel of His Majesty's Secretariat which reviewed the decision concurred with the SLTF and forwarded the case to the High Court. Finally, the parties resolved the dispute through negotiated settlement which was endorsed vide High Court judgment No. Larger Bench-2011/34 of 13 June 2011.

Grounds of Successive Appeals

While the district court granted the divorce to the parties and the matrimonial compensation (such as *Drok Zhenpai Zhenthue*, *Gao* and *Logyel*) as per the Marriage Act to Sonam Dema including custody of the three children and their maintenance, her prayers for a share in their joint income accumulated in the form of Sonam Kinga Tshering's retirement benefits such as GEGSIS and PPF were not addressed. She staked her claim in the benefits by drawing attention to the service documents of Sonam Kinga Tshering where she and her children were nominated as the beneficiaries including the proportion of the benefit. Upon verification, it was also revealed that Sonam Kinga Tshering had changed the nominations in favor of his new wife Tashi Zangmo and his mother as the beneficiaries; while Sonam Dema was the sole nominee as per records. Therefore, it was imperative to determine whether these benefits are matrimonial

property acquired through joint or sole efforts of the couple.

When the High Court ruled to maintain the *status quo* of the nominess of Sonam Kinga Tshering's retirement benefits, if they were the children, Sonam Kinga Tshering appealed to His Majesty the King on the ground that his children from former wife Sonam Dema are not entitled to his service benefits since they are given maintenance (40% of his month salary @20% per child).

Issues Before the SLTF

The issues before the SLTF were whether GEGSIS and PPF of Sonam Kinga Tshering constituted matrimonial property of the couple, and therefore whether the children and former wife were entitled to claim shares from such benefits.

Rationale Behind the GEGSIS & PPF

The purpose of the GEGSIS and PPF is to provide income security to the members when they exit civil service or become permanently disabled; this is also to provide support to the surviving members on the demise of the members. In other words, it is a kind of saving plan for the members for their retirement. The National Pension and Provident Fund Plans are two-tiered. A defined benefit Pension Plan as Tier 1 and a defined contribution Provident Fund Plan as Tier 2. The Tier 1 is a partially funded scheme under which monthly pension benefits are provided to the members upon retirement or upon becoming permanently disabled prior to retirement. Upon death of a member prior to or after retirement, the monthly benefits are given to the surviving spouse and children. In other words, no lump sum payment can be made from this account.

The Tier 2 is a defined contribution, fully funded plan under which a lump sum benefit equivalent to the amount of contributions made by member, together with returns thereon are paid to the member on the date of retirement or death while in service. From this plan, the member can withdraw the benefit in lump sum.

Elucidation of the Relevant Laws

The SLTF examined Sonam Kinga Tshering's benefit schemes in accordance with Section Ga 6.12 of the *Inheritance Act* which distinguishes matrimonial property and individual properties of the parties. The joint matrimonial property is subject to division when the marriage is dissolved. In the light of section Ga 6.12 of the Act, the Task Force held that the amount accumulated in the Tier 2 of Sonam Kinga during the subsistence of marriage is the saving to which both the parties have contributed through mutual division of labour; in that, while Sonam Kinga Tshering discharged his official duties as a civil servant, Sonam Dema tended home and cared their children. Thus, retirement benefits of Sonam Kinga Tshering are deferred compensation (benefits to be accrued in the future). Therefore, Sonam Dema was entitled to a share in the accumulated amount from the day she was married to Sonam Kinga Tshering till the marital ties are annulled by the courts.

Further, the division of joint matrimonial property should be executed as per section *Ga 6.15* of the *Inheritance Act.* The division is based on the fault theory. Since, Sonam Kinga Tshering is at fault by contracting second marriage against the wish of Sonam Dema, she is entitled to half of the property; while half of the property should be divided between the 3 children jointly and Sonam Kinga Tshering.

Therefore, retirement benefits of Sonam Kinga Tshering which was accumulated during the subsistence of marriage should be divided as analyzed above as per the Inheritance Act, 1980. Sonam Kinga Tshering may thereafter, nominate beneficiaries of his choice as per the prevailing Rules and Regulations. While the treatment of the Provident Fund Plan in line with section *Ga 6.12* of the *Inheritance Act* may be appropriate and correct in the said case, as the victim spouse Sonam Dema was a house wife, the same may not hold true in all the cases as the status of the parties differ. In such cases, it may depend on the facts and circumstances of the cases.

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JABMI ACT OF KINGDOM OF BHUTAN, 2003: Law and Practice

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"Legal Profession] refers to a group pursuing a learned art as a common calling in the spirit of public service – no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose."

Roscoe Pound (1953)

In the era of liberalization, privatization and globalization, almost every professional venture is now geared towards profit maximization, undermining their origin, history and profound foundation. Legal profession too could not escape the influence of profit motive that undermined the very purpose of profound and noble profession, resulting in compromise of service quality and professional standards. The primary objective of the legal profession as manifested in the above quote is to provide public service based on learned art, and making livelihood and profit generation is merely an incidental and secondary objective. The legal professionals, particularly practicing lawyers have a greater role in the administration of justice, upholding the rule of law, particularly in emerging democracies, besides making livelihood out of this profession.

Bhutan has peacefully transitioned into Democratic Constitutional Monarchy, under the dynamic leadership of our successive Kings. To fulfill the noble vision of our Kings in building a strong and vibrant democracy, several democratic institutions are created and legislations enacted to meet the emerging issues resulting from rapid socio-economic transformation. Creation of rights and imposition of duties not only benefited our citizens, but also led to rise in disputes that require active participation of the key actors in the administration of justice.

The existence of Jabmi, an equivalent Bhutanese term for advocate pre-dates the introduction of modern legal system in the country. Their roles and responsibilities were not formalized until the enactment of the Jabmi Act, 2003. Under this Act, Bhutan has adopted a unique system of legal profession, which can be fairly called as mixed system - an amalgamation of traditional Jabmis and professional lawyers. The Act does not recognize the distinction between a barrister and a solicitor; rather it is based on fused system, creating only one category of legal professional called Jabmi who is given an exclusive right to appear before any courts in the country.

The role of Jabmi in the administration of justice as enshrined in the preamble of the Act is to protect and ensure rights at every stages of hearing. Hence, this Act marks the transition from conventional Jabmi system to a modern system of professional attorneys, and the formal recognition of legal profession in the country. Creation of Jabmi Tshogdey (Bar Council), and Jabmi Thuentshog (Bar Association) is the spirit of the Act, which activate other provisions of the Act.

The Attorney General is the chairperson ex-officio, and the only permanent member of the Tshogdey. The issue of the conflict of interest of the chairperson requires serious consideration in the light of existing scenario. The Attorney General under the Constitution has an important role of advising, representing and prosecuting both civil and criminal cases on behalf of the state. This may lead to conflict of interest and may compromise the independency of the Tshogdey. The

situation is further worsened due to absence of public defense office. For those who can afford, their cases are currently represented by Jabmis, who may be eligible for registration, if Tshogdey and Thuentshog are created as mandated by the Act.

An eligibility criterion for admission to the roll of Jabmi, and selection process is another crucial feature of the Act. It is important to highlight the legislative intent to retain traditional Jabmi system while transforming the legal profession to suit emerging needs of the society. This is obvious from the Act that the Tshogdey was given absolute discretion to determine the legal qualification and did not specifically require mandatory formal legal qualification. The legal qualification as specified under the Act would mean any legal qualification and may include the license holder of Jabmi Training conducted by the Judiciary in 1990s, and current Diploma holders of National Legal Course. If an individual possess the requisite qualifications, and is not barred by any of the provision under the Act, Tshogdey shall enroll the applicant on the roll of Jabmi except Ex-Drangpon, who is explicitly barred from appearing before any court.

The restriction of Ex-Drangpons needs to be revisited in the light of Supreme Court ruling in the case of ***the Government of Bhutan vs. the Opposition Party***. The court in this case observed that the section 24 of the Jabmi Act may be in contravention of Art. 7 (1) & (10) of the Constitution. The Supreme Court has rightly pointed out that such provision which predates the Constitution violated citizen's fundamental right to practice any lawful trade, profession or vocation. Similarly, it would run afoul of equal protection clause under the Art. 7 (15), because section 24 of the Jabmi Act discriminates Ex-Drangpon based on status. However, the Supreme Court did not rule that the section 24 of the Act was unconstitutional, thereby, leaving room for another legal battle to settle the ambiguity. Rather, it merely indicated that Ex-Drangpon may be permitted to practice, provided the Act is amended, which did not happen till date. This shows that in the absence of appropriate institutions, no initiatives can be taken to improve and enhance the system.

Another issue that may require careful consideration is whether Dungkhag Drangpon and other full-fledged non-sitting Drangpon, holding different positions in several other government agencies fall within the definition of Ex-Drangpon under section 24 of the Act. Non-sitting Drangpons fit well within the definition of Drangpon, yet they cannot qualify as retired Drangpon as stated in section 24, because they may resign as lecturer of an institute or as a legal advisor to any government agencies. Similarly, Drungkhag Drangpon are full time sitting judge, yet not considered as full-fledged Drangpon, rather they are called Drangpon Rabjams, which has totally different connotation. If the restriction under section 24 applies to them as well, what happens to those who are already practicing before the courts? This issue can perhaps be completely resolved only by the Parliament who is vested with legislative authority by effecting necessary amendments to the Act.

If through amendment of the Act, Ex-Drangpons are permitted to practice, the legislators may consider the Supreme Court ruling, and observation on the practice of Ex-Drangpons. Compared to other legal professionals, service of Ex-Drangpon opting for private practice should be subject to strict scrutiny. They must be subject to stricter rules and regulations, in addition to the existing provisions under the Jabmi Act to prevent undue interference to influence the outcome of the case. Further, they should be allowed to appear only before a court higher than the court from where he/she resigned. For instance, Dzongkhag Drangpon should be permitted to appear only in the High Court and the Supreme Court. Without such regulatory mechanism, the image and reputation of judiciary as an institution will tarnish due to perceived bias, ruining public's faith and confidence in justice system.

This leads to discussion on the rights, privileges, duties and responsibility of Jabmis as provided under the Act. Unlike in other jurisdictions, the Act does provide for specific provision on code of conduct, except section 50 and section 66 that provides for constitution of disciplinary committee, and punishment in case of professional misconduct or other unethical act. However, the Act provides for comprehensive general duties and responsibilities, duties and responsibilities to clients, duty to opponent, and duty to the court. Review of these

provisions implies failure to perform or fulfill his duty as required by these provisions would amount to professional misconduct or unethical act that would attract disciplinary action and punishment. However, the language and terms used in the above mentioned provisions are plain and vague, which may be subject to different and wide interpretation to include even minor acts. Therefore, there is a need for reconsideration on having clear and precise provision on code of conduct of a Jabmi.

Another most significant aspect of the Jabmi Act is fees for the services of Jabmis. This is one of the controversial issues discussed around the world, particularly the mismatch between charging exorbitant fees and their social responsibility of assisting in the administration of justice. Like in most of the jurisdictions, Jabmis should fix the fees prior to taking the case by executing an agreement with the clients. The term "a reasonable fee" is very contextual that does not have a precise definition, which may be used as a tool to exploit the clients. Though it is very difficult to determine the basis of charging fees in the current legal market, those who availed their services, often complains about disproportionality of fees and services provided. This is quite rampant in legal offices and law firms providing drafting conveyances and pleadings services. Therefore, it is high time to regulate such practices. However, the question still remains, whether these law offices providing basic services in drafting conveyances and pleadings fall within the purview of the Jabmi Act. Considering the existing fee practices and to achieve long-term objectives of legal profession, requires standard norm on regulation of Jabmi's fees.

The careful analysis of the Jabmi Act and the current legal practice shows existence of huge discrepancy in law and practice. Jabmis are functioning without a parent organization to regulate their fees and services. In the absence of Jabmi Tshogdhey, the license for existing practitioners are issued on ad hoc basis, authorizing ill-eligible individuals with sheer intention of making livelihood to get a free ride, undermining profound values and principles of this noble profession. This is the consequence of non-implementation of the Jabmi Act, even after a decade of its enactment. Non-creation of relevant institute as mandated by the Chapter II rendered the entire Act almost redundant.

The responsibility of implementing the Act is vested with the Jabmi Tshogdey and the Jabmi Thuentshog, which are not in existence. The situation is further aggravated by the fact that more professional lawyers are venturing into private legal practice, since the establishment of first professional law firm in the country. The members of private legal profession raised serious concern, insisting for effective implementation of the Act, and in particular establishment of the Jabmi Tshogdey and Jabmi Thuentshog as parent organization to address issue and matters concerning their profession.

While the reason for non-implementation of the Act is still a mystery, two things are quite obvious. First, the presence of few private practitioners did not demand for strict implementation of the Act. Second, the lack of leadership and proper coordination among the relevant stakeholders. Implementation of the Act should be intended to achieve long-terms goals and create easy access to justice. Further, to ensure fair and effective administration of justice by the courts, protecting the rights and regulation of legal services are very crucial, while being mindful of their noble duty to provide pro bono and legal aid services to needy people which is currently lacking in our system.

The lack of appropriate avenue to address issue concerning their profession has directly or indirectly affected the legal professionals as a service provider. The general public is the real victim. Though, there was no study or survey conducted so far on the quality of private legal service, it is uncertain whether they are enjoying a quality service of the unregulated legal service in the market. The situation is further aggravated by the limited choice of legal professionals in the market. It is even worst for the so called "indigent accused/person" who, as per various legislations, including the Constitution are eligible for free legal aid from the state. Instead of enjoying free legal aid, they are rather pitched against state prosecutors, who are not only a qualified lawyer but enjoy unlimited state resources.

This situation itself is a testimony that, it is high time for key stakeholders to take lead role in creating required institutions by implementing the Act. When

fresh legislations like Tobacco Control Act 2011 can be rigorously implemented at any cost, why can't an important legislations like Jabmi Act be implemented, which otherwise will have disastrous impact on innocent people. The reason is quite obvious. The Act in itself impedes its implementation that demands for effecting necessary changes and amendments to prepare ourselves to play role in constituting democracy – both political and economic which can and should mark the future and to fulfill noble vision of our kings and desire of our fellow citizens. Let us be reminded what His Majesty the King commanded "*Our immediate and foremost duty is the success of democracy. That is our foundation for the future success of Bhutan. But democracy can only flourish if all Bhutanese uphold the rule of law…*" Since Jabmi plays significant role in upholding the rule of law, we should protect and regulate this noble profession.

The Establishment of the First Bhutanese Law School in Progress

Sangay Dorjee, Director, Royal Institute of Law

It is the noble vision of His Majesty the King Jigme Khesar Namgyel Wangchuck to establish the nation's first law school. The development of and maintenance of the rule of law is seen as a necessary element of a vibrant democracy: such was the noble vision of His Majesty the Fourth King Jigme Singye Wangchuck, the architect of democratic Bhutan. In turn, a law school that reflects Bhutanese priorities and values is a vital component of the rule of law. To achieve this noble vision, the Project Office of the Royal Institute of Law, led by Her Royal Highness Princess Sonam Dechan Wangchuck as its President, is diligently working towards timely founding of such a school. The law school aims for nothing less than the transformation of the Bhutanese legal profession by forging of the first generation of Bhutanese-trained lawyers, scholars, and leaders. The institution will serve as a strong foundation for human capacity development in law, for outreach to our people, and for the maintenance of the highest standards of professionalism within the judiciary and in the legal system as a whole.

Consistent with the pillars of Gross National Happiness and Bhutan's national priorities, research and studies at the school will emphasize environment and sustainable development. In addition to training and educating a generation of sensitive and ethical leaders for Bhutan, the law school will dedicate itself to training and educating a generation of global leaders in whom the values of GNH and sustainable economic development are deeply ingrained. In addition to providing a research hub for law and policy in support of Bhutan's democratic institutions, it will serve as a home for scholars from around the world who wish to dedicate their minds, pens, and voices to the causes of sustainability and GNH under law. These core values will be reflected and represented in every aspect of the law school, from its "green campus" architectural concept to the course curriculum.

The Project Office is delighted to report significant progress towards the establishment of the law school, with great strides made on both the physical facilities and the academic aspects of the law school.

The RIL Advisory Board, chaired by Tshewang Tandin, Director General of the Department of Adult & Higher Education (DAHE), Ministry of Education, appointed a special Programme Advisory Committee to draft an undergraduate curriculum for the B.A./LL.B. programme. The Committee, chaired by Lyonpo Tshering Wangchuk, the Chief Justice, concluded its work in the summer with the submission of a five-year curriculum that combines humanities, legal doctrine, Dzongkha language and Bhutanese culture and values, and practical training courses. The curriculum is designed to produce "practice-ready" graduates who will upon graduation, be able to join the ranks of the judiciary, the civil service, and the private sector.

Work on the law school's library began with the arrival of the first batch of books – focusing on international law, sustainable development, and environmental law – in late 2014. The second batch of books, due to arrive in early 2015, will focus on religion and law, international business transactions, and intellectual property. The library's goal is to have a full collection, suitable to support faculty research and student studies, by the time the law school opens.

In January, His Majesty designated a suitable site for the law school campus at Pangbisa, Paro, and the National Land Commission promptly produced a detailed survey of the campus. RIL's engineering team is now turning its attention to producing a detailed architectural plan for the site and to conducting a detailed environmental impact assessment for the project, as required by law.

The project has also benefitted from generous assistance from Bhutan's far-sighted bilateral state-partners. The Government of India committed significant funds for the planning and construction of the law school's physical infrastructure. The Austrian Development Agency has likewise committed substantial funding to support faculty development, joint projects with Austrian law faculties, and a kick-off conference for the law school. In January, the Institute's first faculty scholar, Mr. Pema Wangdi, began two years of study at Fordham University in New York City, leading to his Master of Arts in Philosophy.

The Project Office anticipates a busy 2015, with construction efforts, faculty recruitment and capacity development, and fundraising efforts beginning in earnest. RIL family continues to remain optimistic for a successful launch of the law school in August 2017.We remain inspired to work even harder with the trust bestowed upon us, and support we have received from His Majesty the King. We remain inspired by the benevolent leadership of the Hon'ble President, the support we receive from the Government, and the assistance from other RIL friends.

On this joyous occasion of the 35th Birth Anniversary of His Majesty the King, the RIL family would like to join nation in wishing His Majesty the good health and very long life. On this special occasion we reaffirm our pledge to work with utmost dedication towards achievement of His Majesty's noble vision of establishing one of the best law school in Bhutan.