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Vol.04 November 2015

BHUTAN LAW REVIEW

Bhutan National Legal Institute
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Editors
Pema Wangchuk, Director, BNLI
Tharchean, Judge on Special duty, BNLI

Magazine Coordinator
Tshering Nidup, BNLI
Pema Zangmo, BNLI

Layout & Design
Karma Denkar, BNLI
Tenzin,BNLI

Publisher
Bhutan National Legal Institute (BNLI)
Thorilam
Upper Motithang
Thimphu : Bhutan
P.O. Box: 575
Tel: +975-2-331628/331630
Fax: +975-2-336701
www.bnli.bt

Pema Wangchuk
Director, BNLI
pwangchuk@bnli.bt

Printed by
KUENSEL Corporation Limited
P.O. Box: 204
Tel: +975-2-334688
Fax: +975-2-322975
www.kuenselonline.com
Thimphu: Bhutan

The Bhutan National Legal Institute would like to acknowledge the support of Swiss Agency for Development and Cooperation (SDC) and Austrian Development Cooperation Agency (ADA).

The Family of the Bhutan National Legal Institute joins the Nation in celebrating the 60th Birth Anniversary of our beloved Drukgyel Zhipa, Jigme Singye Wangchuck, Patriot of the Kingdom of Bhutan. We thank and pay tribute to His Majesty for selfless service to the people of Bhutan and pray for His Majesty's Good Health and Long Life.

The Opening Statement on the Consecration of the Constitution's *Kuthangs*

Om Swasti!

The Mountain's beautifying Adornment, prophesied by the Victorious Ones,
The reign of mighty turquoise mane flourishing across the Kingdom,
The One with far-reaching and resounding roar, the Fearless Hero,
We prostrate to the glorious Wangchuck, the Lion of the Men.

The Dharma King, the embodiment of Bodhisattvas, His Majesty the Great Fourth Jigme Singye Wangchuck has selflessly endowed Bhutan with numerous extraordinarily distinguished temporal and secular legacies during his 34 years of glorious reign. Amongst others, the adoption of the Constitution, directly emanated from the jewels of thoughts of the Fearless Lion of the Men, by His Majesty the Druk Gyalpo Jigme Khesar Namgyal Wangchuck was one of them. His Majesty the Druk Gyalpo Jigme Khesar Namgyal Wangchuck has turned the Temporal and Dharma wheels with the rays of glory and compassion bringing greater realization to the people of Bhutan the Democratic Constitutional Monarchy endowed with exceedingly enlightened works and initiatives of His Majesty the Fourth Druk Gyalpo, the nation indeed continues to shower in an ambrosial rain of peace and prosperity, joy and happiness.

As the nation celebrates the 60th Birth Anniversary of His Majesty the Fourth King, the *Kuthang* befitting His 34 Years of Reign and 34 Articles of the Constitution is developed as a symbolic reflection and representation of principles derived from the Buddhist scriptures and important provisions and principles of the Constitution. In order to use it sagaciously that befits its purpose of augmenting the visions and wishes of His Majesty the Fourth King, Father of our Constitution, to the fullest of its objective so that the fortunate subjects of this Land of Medicinal Herbs continue to uninterruptedly enjoy the fruits from the tree of jewels thereof, an explanatory commentary of the *Kuthang* will also be gradually produced.

Furthermore, one of the principal objectives is to enable our people who are not legally literate and most importantly our future generations to instantly understand, appreciate and grasp the meaning and significance of the provisions of our Constitution merely by seeing the *Kuthang*. It is also prayed that may this *Kuthang* become one of the conditions to inspire future generation in the development of peace, tranquility and stability in the present and future and that Bhutan remains independent and sovereign in the eons to come.

May the luminescent flame of temporal and spiritual legal systems illuminate,
And eradicate all the darkness of harmful and antagonistic elements,
May the joyous occasion of perfect peace and happiness,
And their enjoyments at our will and wishes last for perpetuity.
May every one of us, The King, Ministers and People,
For we were and would be brought together in this life and in other lives,
By virtue of our good karmic connections and aspirations,
Liberate us to the Pure and Glorious land of Guru Rinpoche.

Bhutan National Legal Institute and Supreme Court of Bhutan join the nation in thanking His Majesty Drugyal Zhipa for His selfless services and sacrifices made to secure the future of the Palden Drukpa and promoting the well being of the Bhutanese people. We humbly wish our beloved His Majesty good health and long life.

This Kuthang Depicts Article 2: The Institution of Monarchy

A Tribute to the Bodhisattva King of the Modern World, His Majesty Jigme Singye Wangchuck

Namgyal Tshering,
Vice Principal,
Phuentsholing Higher Secondary School.

In the history of the modern world, there is no monarch who lived up to the insignia of his Kingship like the personality of His Majesty Jigme Singye Wangchuck, the Fourth King of Bhutan. Bhutan is fortunate to have the King, who embodies the attributes of Plato's philosopher-King, dynamic, wise and a progressive visionary. His Majesty's philosophy of Gross National Happiness calls for a balance between materialism and spiritualism singular craving of either, and not a gross national product or denial of spiritual values, have earned him the perfectionist's idea of a sublime philosopher King of the contemporary world.

It was only three days after the Crown Prince lost his father that he had to take the reins of the Kingdom. His Majesty was just 16 and became the youngest Monarch in the world. Since coronation on 2nd June 1974, His Majesty led a life totally devoted selflessly to upholding the well being of his people and safeguarding the interests of the nation. His affairs are evident not only from his visionary services of a King, but also from the ways he lived his private life. His Majesty, unlike fairytale Kings or historical monarchs, lived in a small log cabin in the woods, in austere surroundings of natural pine forests. It is said that the King has denied a proposal by the National Assembly to construct a new building to serve as the Royal Palace. He believed in simplicity.

His Majesty always believed that service to the people comes before everything else, and towards realization of the needs of the country, and people His Majesty regularly travelled to all the 20 districts to meet the people and their representatives in order to discuss development plans, programs and priorities. His Majesty and the Royal Family would eat with people and sit among the common people and celebrate important events by engaging in traditional games and conversations intimately. His Majesty also enjoyed mixing with common folk, he would hold and embrace the old and the sick, talk to children as a loving and caring father.

During his reign, Bhutan grew from a pastoral economy to an economically and technologically progressing nation. His Majesty is an exemplary of the twenty-first century leader and a true Buddhist King. His Majesty is a monarch to whom the security and sovereignty of the nation meant more than his own life and wellbeing. In fact, His Majesty had gifted the people with democracy when people adamantly refused it. His Majesty's visionary statement, *"…the future of our country, whether it is lifted high or brought down low, lies in the hands of our younger generation,"* envisions his concern to making Bhutan a self-reliant nation. His Majesty's visits to the schools, however, remote and far, were the most significant events in his travels. He ensured that he visited and talked to the teachers and students of schools in all the 20 districts to encourage and address the needs of the future generations.

The Bhutanese people are fortunate in their life, as we live in the age of Bodhisattva Kings for whom

nothing mattered more than their people's welfare and happiness. His Majesty the Third Druk Gyalpo Jigme Dorji Wangchuck, father of the then crown prince proclaimed that, *"If I were to make a prayer, I would ask that during my son's reign the people of my country would be far more prosperous and happy than they are today."* In the three decades of His Majesty's reign, the fulfillment of his father's wishes had been far exceeded.

The Bhutanese people worship His Majesty's visionary leadership and simplicity as a moral example to adhere to and practice in true sense. The Bhutanese society has developed an immense trust and confidence on His Majesty's colossal abilities of leadership. His Majesty Jigme Singye Wangchuck crafted a process of democratization founded on Bhutan's own culture and history, and his selflessness in his personality is strengthened by his unusual act of abdicating the Golden Throne in favour of the Crown Prince. He is a King, who fascinated the world by denouncing his power when everywhere in the world people die fighting for freedom from the ruling powers.

One of the most cherished memories in life among the Bhutanese people is His Majesty's exemplary leadership as a protector and savior of this nation, when His Majesty personally led the armed forces in December 2013 to flush out the Indian insurgents from the Bhutanese soil. According to Patrul Rinpoche's Words of my Perfect Teacher, a book on Buddhist theology, His Majesty's example of leadership, certainly be categorized as an example of practice of a King –like Boddhichitta, where the leader, the guru, the guide puts himself before his followers. It is not every day that we get to hear of a leader, who walks before his armed forces or a King who risks his life for his nation and people. His Majesty has fully lived by his pledge which he made during his coronation address at Changlingmathang in 1974. *"I give my pledge to take full responsibility to safe guard, and ensure the security and well-being of our country."*

The historical event remains etched forever in the conscience of every Bhutanese, and now the event is encapsulated in the physical architecture of 108 Chortens and Druk Wangyel Lhakhang at Dochula built under the patronage of Her Majesty Queen Mother Ashi Dorji Wangmo Wangchuck to commemorate the brave King and his sacrifices.

In the words of I. K. Gujral, the former Prime Minister of India, Bhutan *" is a nation modernizing itself under the direct leadership of a man of vision who is not tempted by the glitter of borrowed modernism but has the wisdom to find a judicious balance between the traditional and the modern…King laces power with compassion and humility."* His Majesty Jigme Singye Wangchuck is a model leader, an icon of our time. He is a sovereign monarch endowed with all the qualities of the Bodhisattva.

As the nation comes together to celebrate the joyous occasion of His Majesty's 60th Birth Anniversary, we join the cheerful people of Bhutan in praying for good health and everlasting peace and happiness in the Thunder Kingdom of Bhutan. Thank you, Your Majesty, and Tashi Delek to all the fortunate people of Bhutan!

For the Singye Galems, Baba Lovers and Dzee Buyers: *Ignorance is Not Bliss*

Ugyen Tshering, Judge, Thimphu District Court, Bench V.
LL.M. (George Washington University) & B.A, LL.B. (Hons), (NLSIU, Bangalore, India) & PGDNL, RIM, Thimphu

FOR THE SINGYE GALEMS[1], BABA LOVERS[2] AND DZEE BUYERS[3]! *IGNORANCE IS NOT BLISS*

"Ignorance of the law excuses no man;
not that all men know the law,
but because 'tis an excuse every man will plead,
and no man can tell how to refute him."[4]

1. Introduction

Ignorance is not bliss, definitely not in law. The ignorance of law doctrine, embodied in the maxim ignorantia legis neminem excusat[5] is a universal criminal law principle based on the notion that a person is presumed to know and intend the natural consequences of his act, and is therefore, held responsible for it. However, mistake of fact (ignorantia facti excusat) is sufficient for exculpation if what was done would have been lawful had the facts been as they were reasonably supposed to be. The ignorantia legis rule is premised on the knowledge principle, which is that the reason for punishing the legally mistaken or ignorant is to encourage the societal benefit of individual's knowledge of and respect for the law. The ignorantia legis doctrine exists as a matter of criminal law principle and by judicial fiat.

The strict application of the ignorantia legis rule despite mistake of fact and ignorance of law, especially for violation of laws which are vague and complex, contradicts and violates other principles such as the 'fair notice' and criminal law doctrine of

1 Singye and Galem are lovers of the much celebrated love story of Gasa Lamai Singye of medieval western Bhutan. The story of Gasa Lamai Singye and Changyul bumo Galem, like the tale of Romeo and Juliet, have become emblematic of young lovers and doomed love. In this paper, the phrase Singye Galem is used to refer to those cases where the offenders, most of whom were lovers, have been prosecuted and convicted under Section 183 of the Penal Code of Bhutan for having sexual intercourse between the age of 12 and 18 years. In almost all the cases prosecuted under this section, the sexual intercourse was consensual and they were either lovers or married.

2 Baba is the Indian chewing tobacco brand which is very popular in Bhutan. A small sachet of Baba cost Nu. 3. 'Baba lovers' refers to those individuals who have been prosecuted under the Tobacco Control Act of Bhutan for import, sale and purchase of tobacco products.

3 The Dzee is the mythical jewel of the Himalayan region and is highly treasured in Bhutan. It is believed that these are mystical stones, made of the bones of a mythical and rare animal that is similar to an Otter. They call the beads "Cat's eye or Dzee." It is said that one bead of Dzee can hold the whole family fortune for hundreds of years. The phrase Dzee buyers in the title has reference to those cases where the defendnats were convicted for sale, purchase and import of the jewel.

4 John Selden, Law, in TABLE-TALK (1689), quoted in THE QUOTABLE LAWYER 133 (David S. Shrager & Elizabeth Frost eds., 1986).

5 The maxim has a number of Latin variants. See, for example, E.R Keedy, Ignorance and Mistake in Criminal Cases, 22 Harv. L. Rev. 75, 76 (1908) (rendering the maxim as "[i]gnorantia juris non excusat, ignorantia facti excusat" and listing other versions). The maxim ignorantia juris non excusat literally means "ignorance of the law does not excuse." Sharon L. Davies, The Jurisprudence of Wilfulness: An Evolving Theory of Excusable Ignorance, 48 Duke L. J. 341,342 (1998). Hereinafter, the maxim will be referred to as ignorance legis.

mens rea, and goes against the fundamental ideals of justice and fairness, which is that a morally innocent should not be penalized. Therefore, the law provides for exceptions or defences to the ignorantia legis rule.

The Penal Code of Bhutan[6] (the Penal Code) provides two exceptions to the ignorantia legis rule. The first exception provides that ignorance of the law does excuse when it either (a) negates an element of the offense, or (b) is specifically established as a defence by the law. The second defence in the Penal Code provides that it shall be a defence to the ignorance rule when (a) the law defining the offence is not known to the defendant and has not been published or disseminated, or (b) the defendant acts in good faith with reasonable reliance upon an official statement of the law after having been declared invalid or erroneous. Most jurisdictions have recognized similar exceptions to the ignorantia legis rule.[7]

Despite the specific provisions in the Penal Code, the courts in Bhutan have not recognized and applied the exceptions, because of which the ignorantia legis maxim continues to enjoy a vigorous and automatic application, much to the peril and chagrin of those who are innocent - factually, legally and morally. In fact, the courts in Bhutan have had no opportunity to analyze and apply the ignorantia legis doctrine and its exceptions for three reasons. Firstly, most defence lawyers who are legally qualified do not challenge the prosecution on grounds of mistake and ignorance of fact and law as provided in the Penal Code. In most cases, it is the pro se accused who plead innocence on grounds of ignorance of law but their arguments or pleadings are never supported by the relevant sections of law and legal principles. Secondly, in a judicial system where the competence of the judge is judged by the number of judgments delivered, and that too within the shortest possible time,[8] and not the quality of judgments, the judges see little benefit in taking time inquiring into the facts, analysing and applying the legal principles such as the ignorantia legis and its exceptions. The judge's angelic silence does not serve the ends of justice, but as a career judge, his ambitious ends are well served. Thirdly, even if some defence lawyers plead ignorance exceptions and the courts reject their arguments, they do not challenge the court's rejection of the ignorance defence by making good legal arguments against the court rulings because of which this common law maxim of ignorantia legis continues to enjoy vigorous application in Bhutan.

The non-acceptance of the ignorance exceptions as a defence despite express provisions amounts to criminalising the innocent. The defendants who are prosecuted under Section 183 of the Penal Code for having sexual intercourse with a child between the age of 12 and 18 are held strictly liable despite mistake of fact and ignorance of law. Given the general consensus that the harsh rape law, in particular Section 183, need immediate amendment, the courts must start to accept mistake of fact if it can be proved.

The refusal to allow ignorance of law as a defence is due to a strong common law presumption that every person knows the criminal law. Today, this presumption is fictional, more so in Bhutan where 70 percent of the people are illiterate and have no access to television and print media. On one occasion, the Thimphu District Court had refused the defence of ignorance of law on grounds that the Tobacco Control Act had been published. In Bhutan, as in other countries, there is no system of laws being consolidated, referenced and published in the Gazette. These laws are not easy to find and not always easy to understand. Today, no individual in Bhutan, including the judges and lawyers can claim to know the exact number of laws in the country. It is even more difficult to count all the rules and regulations drafted by the relevant Ministries and agencies which impose criminal sanctions. This puts the citizens at risk of conviction and imprisonment for the violation of laws that are impossible to find and impossible to know. Therefore, the presumption and publication condition in section 77 of the Penal Code needs to be either reformulated, or the courts need to give a liberal interpretation so that reasonable ignorance

6 Section 75 & 77 of the Penal Code of Bhutan. THE PENAL CODE OF BHUTAN 2004 available at http://oag.gov.bt/wp-content/uploads/2010/05/Penal-Code-of-Bhutan-2004_English-version_.pdf (hereinafter PENAL CODE).

7 Many jurisdictions have recognized the defence. *See, e.g.,* Section 17 of Penal Code of 1871 of Germany; Section 122-123 of the Criminal Code of 1992 of France; Section 9 of Criminal Code of Austria; Section 76-79 of the Indian Penal Code; Section 2.04 (3) of the US Model Penal Code.

8 The judges in Bhutan, by convention, are required to dispose off criminal cases in three months and civil cases in one year. Once the courts have cases pending for more than one year, the judges are required to submit an explanation to the Supreme Court giving the reasons for the pendency.

of law is not excluded as a relevant consideration in criminal matters.

The number of laws in the country is increasing each year. Most of these laws are complex and contradictory. In fact, even for judges and lawyers, these laws are difficult to be understood in all their complexity. In addition to the laws enacted by Parliament, there are thousands of rules and regulations framed by the relevant agencies. In most cases, the rules and regulations are framed in excess of the authority granted by the parent Act. The ministries and relevant agencies tend to surpass Parliament's scrutiny by enacting broad parent legislation for easy passage, and then framing elaborate rules and regulations. Most of these rules and regulations prescribing punishment and penalties which are never published are always vague, complex and contradictory. The law regulating the sale and purchase of Dzee is a classic example. The prosecution and conviction of the individuals for violation of laws that are vague and complex, and not known to the person who is said to have violated offends the sense of fairness and justice. In addition, criminal sanctions applied in this way violate the long accepted principles of due process of law. As such, there is need for the courts to accept and apply the ignorantia legis exceptions.

My argument will be told through three categories of cases, each of which tells the story of defendants who made, or at least claimed to have made, a mistake of fact and law. The first Singye Galem kind of cases describes the stories of defendants who have been prosecuted and convicted under Section 183 of the Penal Code. In almost all the cases, the defendants had argued mistake of fact (of the age of the girl) and ignorance of the rape laws. However, the courts have dismissed the defence plea and found the defendants strictly liable and convicted them for second degree felony. The second 'baba lovers' category of cases relates to those defendants who have been prosecuted and convicted under the Tobacco Control Act of Bhutan. Specific reference is made to the first tobacco case where a monk was prosecuted and convicted to 3 years for import of chewing tobacco worth Nu. 120. The third Dzee buyers case tells the story of two defendants who were prosecuted for import of Dzee for violation of rules and regulations that is vague, complex and contradictory. The defendants pleaded ignorance of law. Bench V of the Thimphu District Court accepted the defence and acquitted the defendants. This is perhaps the only case where the ignorance of law defence was accepted.

2. The Rule of Ignorance of Law Does Not Excuse

The maxim ignorantia legis neminem excusat has a long history of academic attention. The rule can be found in English decision as far back as 1231,[9] and was apparently adapted from Roman law.[10] Blackstone is generally referred to as an authoritative source for the rule, who defended it on the notion of presumption of knowledge of the law.[11] Andrew Ashworth defended the rule on the basis of an individual's duty to know the law as a responsible citizen. Mere ignorance of law would be a breach of this duty and the accused should not be permitted to plead such ignorance as a defence.[12] Austin defended the rule on the grounds of pragmatism. Austin believed that if ignorance of law were permitted as a defence, the courts "would be involved in questions which it were scarcely possible to solve, and which would render the administration of justice next to impracticable."[13] Proponents of the rule have also argued that this rule is necessary because proof of knowledge of legality would be difficult.[14]

This ignorance of law is no defence to criminal prosecution has been regarded as being deeply rooted in the American legal system. It has been called "a cornerstone in the edifice of criminal law."[15] The California Court said that "if a person accused of crime could shield himself behind the defence that he was ignorant of the law which he violated, immunity from punishment would in most cases result...the plea would be universally made and would lead to indeterminable questions incapable of solution."[16] Holmes justified the rule on purely utilitarian grounds, that to permit the rule would encourage

9 Keedy, *Supra* note 5 at 78-81 (1908).

10 *See Id.* at 80-81(noting that under Roman law, ignorance of the law as a defence applied only to certain classes, such as "peasants and other persons of small intelligence").

11 *Id.*

12 Andrew Ashworth, PRINCIPLES OF CRIMINAL LAW 245 (1999).

13 Kumaralingam Amirthalingam, *Ignorance of Law, Criminal Culpability and Moral Innocence: Striking a Balance between Blame and Excuse*, 302 Sing. J. Legal Stud. 4 (2002).

14 Livingston Hall & Selig J. Seligman, *Mistake of Law and Mens Rea*, 8 U. Chi. L. Rev. 646-48 (1941).

15 Jon Strauss, *Nonpayment of Taxes: When Ignorance of the Law is an Excuse,* 25 Arkon Law Review 611 (1992).2

16 People v. O'Brien, 96 Cal.171 (1892) quoted in Rollin M. Perkins, *Ignorance and Mistake in Criminal Law,* 87 U. Pa. L. Rev. 35,41 (1939).

ignorance and public policy demanded that the individual be sacrificed for the common good,[17] that public education is worth more than the welfare of a particular criminal defendant.[18] To promote good conduct, it becomes imperative that citizens be made aware of the content of the law and the consequences of breaking it. Hence, the law should show no mercy for those who claim to be ignorant of what the criminal law proscribes.

3. Exceptions to the Ignorantia Legis Rule

The strict application of the 'ignorance of law is no excuse' rule, without any exceptions, conflict with the 'fair notice' principle which hold that persons may not be punished for failing to comply with standards of which they could not have been aware. The idea that ordinary individuals have actual notice of criminal law is largely a fiction constructed as a necessary part of a theory that contemplates behaviour in accordance with law and punishment for behaviour in conflict with law.[19] The ignorantia legis rule also goes against the fundamental criminal law doctrine of mens rea. For a person to be liable to punishment as a criminal, one must have both the intention and must know that one's act is outlawed. In addition, the rule is violative of the fundamental ideals of justice and fairness in criminal law that the morally innocent should not be penalized. A person who had acted under reasonable or blameless ignorance of law should be treated as morally innocent. Most commentators admit that some injustice results from the application of the maxim of "ignorantia juris non excusat."[20] Therefore, law provides exceptions and defences to the rule.

Broadly, there are two exceptions to the ignoratia legis rule provided in Sections 75 and 77 of the Penal Code.[21] The efficacy of the ignorantia legis rule and its exceptions will be discussed and analysed in the following cases that were decided by the courts in Bhutan.

17 Oliver. W. Holmes, THE COMMON LAW 48 (1881), in David N. May, *Pioneer's Paradox: Appellate Rule 4(A)(5) and the Rule Against Excusing Ignorance of Law*, Drake Law Rev. 697 (2000).

18 Hall & Seligman, *Mistake of Law and Mens Rea,* 8 U. Chi. L. Rev. 641, 647 (1941); Mark C. Winings, *Ignorance is Bliss, Especially for the Tax Evader,* 84 J. Crim. L. & Criminology 575, 577 (1993).

19 Bruce R. Grace, *Ignorance of the Law as an Excuse,* 86 Colum. L. Rev. 1392, 1409 (1986).

20 *See, e.g.,* J. Hall, *Ignorance and Mistake in Criminal Law,* 33 Ind. L. J. 1, 36-57 (1957); Hall & Selig J. Seligman, *supra* note 13 at 648-51; Huges, *Criminal Omissions,* 67 Yale L. J. 590, 600-02 (1958); Ronald A. Cass, *Ignorance of the Law: A Maxim Reexamined,* 17 Wm. & Mary L. Rev. 671 (1976).

21 *Supra* note 6.

3.1. The Singye Galems:[22] Strictly Liable Despite Mistake of Fact and Law

According to Section 75 of the Penal Code of Bhutan, ignorance of the law does excuse when it either (a) negates an element of the offence, or (b) is specifically established as a defence by the law. The first exception limits the scope of the ignorantia legis maxim to pure questions of law, as opposed to mixed questions of law and fact. If, for example, someone takes or destroys a piece of property belonging to someone else under the mistaken belief that the property actually belongs to her, that mistake is arguably a factual one regarding the legal status of some physically existent object, and is therefore not a pure mistake of law defence. The second exception is an express mistake of law defence provided by statute.

In almost all the cases prosecuted under Section 183 of the Penal Code,[23] the sexual intercourse was consensual, with no evidence of physical violence, and the individuals involved were either lovers or married. In addition, in almost all the cases, the defendants have pleaded mistake of fact and ignorance of law. The defendants have always argued that they did not know the actual age of the girl, or that they thought the girl was more that 18 years of age.

For example, in the case between OAG vs. Phub Dorji & Others,[24] the defendants are charged under Section 183 of the Penal Code for having sexual intercourse with a victim who is sixteen years old. The defendant is a school dropout and is employed by one of the Drayangs[25] in Thimphu. The first defendant had met the victim at the taxi parking area, where the victim is said to have been loitering around with other boys all the time. The two were in a relationship and the sexual intercourse was purely consensual. When she heard that he was already married, she ended her relationship with the defendant. Around that time the victim met the second defendant and they became close

22 *See supra* note 1.

23 Section 183 provides that "*A defendant shall be guilty of the offence of rape of a child above the age of twelve years if the defendant commits any act of sexual intercourse against a child between the ages of twelve to eighteen years. However, consensual sex between children of sixteen years and above shall not be deemed to be rape*".

24 Regn. No.-T/PHU - 15/651.

25 Drayangs are bars with a stage where girls dance, sing and entertain customers. The customers are predominantly male.

friends. One night, after returning from a dance club, the victim and the second defendant had spent one night in a hotel where they had consensual sex. When the first defendant heard about the victim's relationship with the second defendant, he had informed the victim's step mother about the victim's affair with the second defendant and their one night tryst in the hotel. Upon enquiry, the victim confessed everything to her step mother. The father and the step mother called the second defendant to their home and tried to settle the matter out of court. When negotiations failed, the parents reported the matter to the police.

The prosecution's case is based purely on the confessions made by the two defendants to the police. The two defendants were arrested many days after the alleged offence is said to have taken place. To weaken the prosecution's case further, the medical report does not show any signs of physical violence or force. When summoned to the Court, she submitted that the sexual intercourse with the defendants were purely consensual and requested the Court to exonerate the defendants off the charges. The Court found that the victim is much taller than the defendants and looks much older than a sixteen year old. The defendants submitted that from the victim's appearance and from the fact that she is working in a Drayang, they presumed that she was more than eighteen years old. Their mistake of fact seems reasonable and genuine.

Similarly, the defence of mistake of fact and law also seem reasonable in many cases prosecuted under Section 183 of the Penal Code where teenaged lovers have had consensual sexual intercourse, and in other cases where the parents have gotten their under aged children married, most often with the acquiescence of the local leaders.

Despite such genuine mistake of fact and law, and regardless of the express provisions of exceptions in the Penal Code, there is not a single case where the courts have accepted the mistake and ignorance arguments. As a result, there is occasioned an occurrence of strict liability, in that even if there is mistake of fact and law, regardless of culpability, the offender is convicted. Such non-acceptance of plea of mistake of fact and law and conviction of the offenders under the principle of strict liability by the courts is wrong and conflicts with other legal principles.

Firstly, it goes against the basic criminal law principle of requirement of mens rea or guilty mind. The punishment of a conduct without reference to intent is both inefficacious and unjust. The maxim "actus non facit reum nisi mens sit rea" has acquired an imposing presence in criminal jurisprudence.[26] The excuse of mistake is based on the ground that a person who is mistaken or ignorant about the existence of the fact cannot form the requisite intention to constitute the crime and therefore not responsible for his deeds. The evidence of a genuine mistake of fact, which if the facts existed as the offender believed them to, would make his act innocent, would negative the mens rea. A mistake of fact which negates an intention to cause a consequence prohibited by law is a defence because a person must intend to cause all the consequences which he has in fact caused if he is to be held criminally responsible for causing those consequences.

Secondly, the requirement of mens rea in the form of knowledge, intention, recklessness, culpability, etc., is clearly provided in Sections 53 to 62 of the Penal Code. Excepting the offence of statutory rape, the Penal Code does not provide that the offences under Section 183 are strict liability offences which do not require mens rea.

Thirdly, if the accused are made strictly liable and punished despite reasonable effort to learn or know the law, citizens may be discouraged to making an effort to learn the law. Kahan suggests that if the aim of ignorance rule is to maximize private knowledge of law, a negligence standard would be superior to strict liability standard. This, according to him, is because "the value of learning the law is always higher when the law excuses reasonable mistakes of law than when it doesn't."[27]

Therefore, it is argued that if the mistake of fact and law defences are reasonable, genuine and can be proved, the courts must start accepting the plea instead of finding the defendants strictly liable. There is a general consensus that Section 183 of the Penal Code which criminalizes consensual sex is an unfair law which needs to be amended.[28] One way to

26 Ankit Majmudar & Nandan Kamath, *Why Doesn't Ignorantia Juris Excuse? – A Study of the Law Relating to Mistakes,* 10 The Student Advocate 10 (1998).

27 Dan. M. Kahan, *Ignorance of Law is an Excuse – But Only for the Virtuous,* 95 Mich. L. Rev. 134 (1997).

28 *See* Sangay Chedup, *Consensual Sex: When Consent Becomes a Crime,* Bhutan Law Review, Vol. 3, 10 (2014).

minimize the damage of this draconian law would be to take into consideration the plea of mistake of fact and law.

3.2. The Baba Lovers:[29] Ignorance of Law Does Not Excuse

Ignorance of law due to non-publication of delegated legislation has been held to be a defence in most jurisdictions. In England, the Statutory Instruments Act 1946 provides that in proceedings for an offence under a statutory instrument, it is a defence to prove that the instrument had not been issued by Her Majesty's Stationery Office, unless reasonable steps had been taken to bring its purport to the notice of those affected.[30]In two Australian jurisdictions, ignorance of a non-published statutory instrument is a defence.[31] In the US, the Supreme Court has specifically rejected the ignorance of law rule in the area of tax crimes for reasons that the tax laws and regulations are many and complex which are difficult for the average citizens to be familiar with their obligations under it.[32]The Court held that tax crimes required proof of "wilful" conduct and that such conduct in the criminal tax laws required proof that the defendant intentionally violated a known legal duty.[33]The US Supreme Court applied this "wilful" test to the prosecution of a defendant for structuring currency transactions.[34] The courts in the US have also begun to accept ignorance of law as a defence in administrative violations of the federal securities laws.[35] In a recent case in Liparota v. United States,[36] the Supreme Court decided that a mistake of law

defence will be allowed for the violation of a statute applying criminal sanctions to a "broad range of apparently innocent conduct."[37]

29 *See supra* note 2.

30 *See Simmonds v. Newell, Defiant Cycle Co* (1953) 1 WLR 826.

31 *See Criminal Code* 1983 (NT), Section 30 & *Criminal Code* (Qld), Section 22 (3). See also *Model Criminal Code* 1995 (Cth), Section 308.

32 *Cheek v. United States*, 111 S. Ct. 604, 609 (1991). *See also* Strauss, *supra* note 11; Andrew W. Swain, *Ignorance, Bliss and Ignoring Indiana Tax Law: Part 2,* 55-AUG RESG 22 (2011).

33 *Cheek* at 201.

34 *Ratzlaf v. United States*, 114 S. Ct. 655 (1994); *See also* Lindsey H. Simon, *The Supreme Court's Interpretation of the Word "Wilful": Ignorance of the Law as an Excuse to Prosecutions for Structuring Currency Transactions,* 85 J. Crim. L. & Criminology 1160 (1995).

35 *See* Alexander P. Robbins, *After Howard and Monetta: Is Ignorance of the Law a Defence to Administrative Liability for Aiding and Abetting Violations of the Federal Securities Laws,* 74 U. Chi. L. Rev. 299 (2007).

36 105 S.Ct. 2084 (1985).

37 *Id*. at 2088

In Bhutan, the ignorance of law defence is contained in Section 77 of the Penal Code which provides that a defendant's belief that one's conduct does not legally constitute an offence shall be a defence when "the law defining the offence is not known to the defendant and has not been published or disseminated or otherwise reasonably made available prior to the conduct alleged."Despite such specific provisions, the courts have not accepted the ignorance of law defence. For example, the ignorance of law defence pleaded by the defendant in the first tobacco case *OAG v. Sonam Tshering*[38] was dismissed by the Court.

In this case, defendant Sonam Tshering, a 23 year old monk was caught with 480 grams of Indian brand chewing tobacco product popularly known as Baba which he had purchased for Nu. 120. During the trial, the defendant took refuge of Section 77 of the Penal Code and argued ignorance of law. The Court dismissed his arguments on grounds that the Tobacco Control Act had been debated in Parliament and published. The Court convicted the defendant for felony of fourth degree (3 years non-compoundable imprisonment term). On appeal to the High Court, defendant Sonam Tshering pleaded the same ignorance of law defence. The High Court rejected his arguments and said: *"...the defendant cannot seek shelter and plead ignorance of law. Having committed crime and then to plead the ignorance of the laws will be the most convenient and easiest way of getting away from the arms of law. That is why the ignorance of law is not allowed as defense before the courts as "ignorance of the law does not excuse" or "ignorance of the law excuses no one."*[39]

Such outright rejection of the ignorance of law defence is not fair in Bhutan for a number of reasons. Firstly, there is no system of gazetting or publication of laws in Bhutan like in India for example, where the laws are consolidated, referenced and published in the Gazette.[40] Citizens have no access to the Parliamentary debates and to the laws passed by Parliament.

38 The case was initially decided by Bench III of the Thimphu District Court. On appeal, the High Court affirmed the lower court's judgment.

39 High Court judgment available at http://www.judiciary.gov.bt/html/case/Judg/2011/HC/HC-11-58en.pdf

40 The Gazette of India is a pubic journal and an authorized legal document. The Gazette prints and publishes laws and official notices from the Government. It is authentic in content, accurate and strictly in accordance with the Government policies and decisions.

One reason why the ignorantia legis is adopted in criminal law is because all men are presumed to know the law. This should not hold water in Bhutan where 70 percent of the citizens are illiterate, and have no access to media. Even in America where all citizens are literate, this presumption rationale has been labelled "absurd."[41] In an article published in the Bhutan Law Review, Sangay Chedup points out that the "right to obey the law and the lack of awareness are conflicting scenarios in Bhutan,"[42]and that there is a need to bring the law closer to the people.[43]

Secondly, the non-recognition and non-application of the ignorance defence by the lawyers as well as the courts, create tension between the 'ignorance of law is no excuse' rule and the contrary 'fair notice' principle which hold that persons may not be punished for failing to comply with standards of which they could not have been aware.

Thirdly, no individual will plead ignorance in offences like murder, robbery and rape. Ignorance of law is most likely to be pleaded in minor offences like the tobacco purchase cases. Such cases are unlikely to receive the publicity accorded to trials like murder and embezzlement, and therefore, the ignorantia legis sacrifices the individuals without educating and without deterring. The accused who commit such minor crimes are not able to hire lawyers to defend them. The burden on the court to protect the interest of the individual by giving credence to the ignorance plea becomes more and pressing.

3.3. The Dzee Buyers[44]

The regulations framed by the Ministries and relevant agencies are not only vague, confusing and complex but in most cases, are in excess of the powers granted by the parent legislation. There are internal contradictions or inconsistencies in the regulations which undermine the certainty of the concerned agency's interpretations. No public announcements or communications of the regulations are made. In fact, in most cases, the relevant agency's officials and lawyers themselves are ignorant of the rules and regulations. The regulation framed by the Ministry of Home and Cultural Affairs prohibiting the sale and purchase of Dzee is a classic example.

In OAG vs. Rinzin & Chimi,[45] during a routine search, the defendants were arrested by the police at Kamji while they were on their way to Phuentsholing from Thimphu when it was found that they were in possession of five Dzees. The defendants confessed to the police that the Dzees were purchased from Siliguri in India and Nepal few months before they were arrested. The defendants submitted that they had no intention to sell or smuggle the Dzees out of the country. The OAG charged the defendants for smuggling under Section 279 of the Penal Code[46] for the alleged offence of importing the precious jewel. Section 279 provides: *"A defendant shall be guilty of the offence of smuggling, if the defendant secretly and illegally imports or exports the restricted and prohibited goods or substances including animal parts."*During the trial when the Court questioned the prosecutor about the relevance of Section 279 of the Penal Code to the alleged offence, the prosecutor submitted that Dzees are prohibited goods by virtue of the Movable Cultural Property Act of 2005. Since the Movable Cultural Property Act is also silent about the sale and purchase of Dzee, the Court further questioned the prosecutor about illegality of the import of Dzee by the defendants. It was only during the evidence stage of the hearing that the prosecutor drew the attention of the Court to the regulation framed under the Movable Cultural Property Act. Upon inquiry, the Court found that the said Regulation did not prohibit import of Dzees. Looking at the manner in which it was framed, the very legitimacy of the Regulation is questionable. The Bench V of the District Court dismissed the case and acquitted the defendants. This is perhaps the only case where ignorance of law exception was admitted by the court.

Unlike the two defendants in the case, many are prosecuted and convicted for sale, purchase and transport of Dzee based on the said Regulation which is vague, contradictory and complex. Firstly, the conviction of individuals based on such delegated legislation that are vague and complex goes against the vagueness doctrine, which reflects the notion that a person of common intelligence cannot be required to guess the meaning of criminal laws. This doctrine

41 Keedy, *supra* note 5 at 80.
42 Sangay Chedup, *Know the Law! – And All It's Complex Realms,* Bhutan Law Review, vol. 1, 39, 41 (2013).
43 *Id.*
44 *See supra* note 3.
45 Judgment No. T/PHU -16/281 dated 24/6/2015
46 Section 279 provides: "A defendant shall be guilty of the offence of smuggling, if the defendant secretly and illegally imports or exports the restricted and prohibited goods or substances including animal parts."

has its origins in the common law principle that required criminal statues to be construed strictly so that criminal liability would attach only to clearly proscribed rules.[47] The notion that statutes should give "fair warning" of what is forbidden or required has been imported into the concept of due process.[48]

In the United States, there is a strong constitutional principle holding that to comport with due process, a regulated party must be on fair notice as to any conduct the government intends to proscribe.[49] In the General Electric case, the U.S D.C. Circuit Court analysed the doctrinal roots of the 'no punishment without notice' principle and held that "In the absence of notice -- for example, where the regulation is not sufficiently clear to warn a party about what is expected of it -- an agency may not deprive a party of property by imposing civil or criminal liability."[50]The Court further held that where the regulations and other policy statements are unclear, where the petitioner's interpretation is reasonable, and where the agency itself struggles to provide a definitive reading of the regulatory requirements, a regulated party is not on 'notice' of the agency's ultimate interpretation of the regulations, and may not be punished.[51] The General Electric case presents the most articulate and well-reasoned judicial decision and offers substantial food for thought on the deeper philosophical issues which underlie both the interpretation and application of laws and regulations and the concept of fair notice in a free society.

Secondly, as criminal law is increasingly used to regulate ordinary conduct, the danger of criminal sanctions being applied in an arbitrary manner to unblameworthy people who have had no notice of possible criminal liability increases greatly. Criminal sanctions applied in this way violate long accepted principles of due process of law.

Thirdy, such ambiguous laws also place unbridled discretion in the hands of police and prosecutors. While this discretion will give the police free rein to pursue the putative bad guys, it will also give them complete and arbitrary control over the deprivation of personal liberty. The locus and authority of deciding what is criminal is impermissibly shifted from Parliament to police and prosecutors. One way of limiting the abuse of authority by the investigation agencies and prosecutors is to allow the defence of ignorance of law.

4. Conclusion

This paper had three aims. First was to create awareness among the judges, legal fraternity and the public about the existence of the exceptions to the rule of ignorantia legis. Second was to argue that the courts and judges in Bhutan must give credence to the ignorantia legis exceptions provided in the Penal Code so that courts, based on this antiquated maxim, do not label as felons the timorous Dzee importers, the passionate Singye Galems, the harmless Baba chewers and other citizens who are innocent – factually, legally and morally. Thirdly, it is my intention to stimulate a legislative awareness so that harsh and vague laws are amended and that efforts are made to disseminate the laws as well as the legislative process to the general public.

As I have argued, as the regulatory state expands and more ordinary conduct and regulatory schemes are enforced with criminal sanctions, at a time when Parliament enacts laws at an alarming speed and regularity; when these laws are too complex, vague and contradictory; and when these laws are not published or disseminated because of which even the lawyers, leave aside the citizens are ignorant of the laws, the strict enforcement of the ignorantia legis rule without accepting the exceptions create tension between the ignorantia legis and 'fair notice' principle, doctrine of mens rea and other principles. The non-recognition of the ignorance defence also violate the fundamental ideals of justice and fairness in criminal law that the morally innocent should not be penalized.

The ignorantia rule was born at a time when there were fewer than a dozen common law felonies, all of which mirrored a commonly shared moral code. Today, the criminal law is a reflection of social

47 James J. Hippard, *The Unconstitutionality of Criminal Liability Without Fault: An Argunent for a Constitutional Doctrine of Mens Rea,* 10 Hous. L. Rev. 1039 (1973).
48 Rex A. Collings, *Unconstitutional Uncertainty - An Appraisal,* 40 Conell L. Q. 195 (1955).
49 *See* Timothy A. Wilkins, *Regulatory Confusion, Ignorance of Law, and Deference to Agencies: General Electric Co. v. EPA,* 49 Smu. L. Rev. 1561, 1575 (2011) (Timothy has analysed a series of cases which preceded the General Electric case on the issue of the tension between the ignorance rule and the fair notice rule).
50 *General Elec. Co. v. EPA*, 53 F.3d at 1326-27.
51 *Id.* at 1333-34.

preferences of a handful of parliamentarians, and most often do not reflect the common sense notions of wrongfulness. It may indeed be a bad idea to force one's own spouse to have sex, but it is unlikely that anyone would know it was a crime until they read this paper or were prosecuted for marital rape.

Therefore, the courts must give credence to the mistake of fact and ignorantia legis exceptions when advanced by the defendants. Despite the workload and the pressure to dispose off the cases within the shortest time, the judges must give a patient hearing and inquire further into the arguments of the defendants. Even if the pro se defendants fail to make the ignorance of law plea, the courts must, by virtue of being a follower of both adversarial and inquisitorial systems, inquire into the facts and circumstance of the case to ensure that justice is done. Until the time Parliament amends the harsh and ambiguous laws, the courts need to be proactive and exercise its powers to meet the ends of justice. The concept of judicial power to ensure fairness of judicial process has its basis in the due process clause of the Constitution. Hereafter, a decision that unless a copy of the law (including the rules and regulations), has been given to that concerned local leaders and Gups, a nonculpable ignorance of the law should excuse seems within the bounds of judicial power.

The so called educated lawyers who appear on behalf of the defendants must start to plead ignorance of fact and law exceptions. They must do so by making well researched arguments based on legal principles, relevant sections of law and foreign judgments. The foreign judgments definitely have a persuasive value.

On their part, the Office of Attorney General and Parliament must begin the urgent task of identifying all the criminal provisions of the laws. These laws should then be consolidated, published and kept in a single and easily accessible place for ease of location and understanding. Parliament and the Office of Attorney General must up-date the list of laws periodically. In addition, the Government must distribute these laws to the local leaders for distribution and dissemination so that Bhutanese citizens have a fighting chance to keep up with the criminal laws that apply to their conduct because ignorance is not bliss, definitely not in law!

The Mediation in Bhutan: *'Saving Faces' and 'Raising Heads'*

Lobzang Rinzin Yargay, Judge, Tsirang District Court. LL.M. (University of Queensland, Australia); MPA (UC, Australia); LL.B.(Delhi University, India); B.Sc.(Sherubtse, Kanglung); PGDNL, RIM, Thimphu; IMIcertified Mediator; DeSuung2 and RIGSS SELP1

Abstract

The system of amicable resolution of disputes through informal processes is inherent in every society; the practice precedes formal institutions of courts and judiciaries. The Bhutanese legal system promotes 'out-of-court' settlement of disputes. Though the mechanism of settlements vary across different parts of the country based on the socio-cultural values and practices, Alternative Dispute Resolution (ADR) methods such as mediation are widely practised in the communities. This not only diverts a number of cases from the courts, but it also help preserve peace and harmony, and strengthens community vitality – one of the nine domains of Gross National Happiness (GNH) philosophy. The informal dispute resolution systems help parties 'save faces' or 'raise their heads' by tailoring mutually acceptable solutions through mutual compromises based on their needs and interests.

Introduction

The incriminating impact of the adversarial litigation system is not suitable for small, close-knit and interdependent communities. An excessive focus on material development and the accompanying divisive impacts of adjudication of disputes are known to weaken sense of community and unity.[1] Therefore, even when the cases reach courts, efforts are made to wean them out to ADR in order to enable the parties to return to their community as friends and neighbours; rather than rival and opponents. Informal dispute resolution system enables the parties to reach solutions which optimise the results for all the parties based on their needs rather than seeking absolute victories in the conventional litigations.[2]

Unresolved Disputes and Happiness

The cost and consequences of unresolved disputes to the individuals, organizations and countries are enormous. Conflicts and disputes cause tension and stress which reduce concentration, motivation and results in loss of work hour and productivity. For a resource-strapped small country like Bhutan people are its main asset. Therefore, it would be counterproductive to embroil them in protracted, frivolous and vexatious litigations at the cost of weakening community vitality and social capital[3]. The Bhutanese legal system has perpetually strived to render inexpensive and expeditious legal services to our people by enhancing accessibility and making courts user-friendly.

Community Vitality and Happiness

Since enhancement of the happiness of the people is the essence of the GNH philosophy the state is mandated to create an enabling environment for its pursuit[4]. Therefore, all the development plans, policies and programs are required to be GNH-infused or aligned with it.[5] One of the most important factors for happiness is community vitality. Community

1 See J. Thinley(1998) 'Values and Development: Gross National Happiness', Speech delivered at the Millennium Meeting for Asia and Pacific in Seoul, Republic of Korea 30 October –1 November.

2 See Roger Fisher and William Ury, *Getting to Yes* (1981).

3 S. Diener and R.Biswas-Diener (2002) 'Will money increase subjective well-being?' *Social Indicators Research*, 57(2):119-169.

4 RGoB (2008) *Constitution of the Kingdom of Bhutan*.Thimphu. See Article 9 section 2

5 K.Ura, S.Alkire and T. Zangmo (2012) 'Case Study: Bhutan: Gross National Happiness and the GNH Index', in J. Helliwell, R. Layard and J. Sachs (eds.) *World Happiness Report*. New York: United Nations, 108-158.

vitality is interactions and relationship between people; it is sharing, volunteering, social cohesion, safety, family, and duration of stay in the community, etc.[6] Disputes and litigations weaken community vitality. The judicial branch of the government is primarily entrusted with the effective and efficient dispute resolution – thereby contributing towards enhancement of happiness in the country.[7]

Studies reveal that beyond certain level material well-being or the absolute income does not make people happier.[8] It is what we have that out neighbors do not have; or the relative income that makes people happier. In other words, higher GDP income is not necessarily accompanied by proportionate rise in happiness. For instance, the Chinese are found to be not becoming happier despite their progressing economy.[9] The 2010 GNH survey shows that despite better opportunities and higher living standards, Thimphu Dzongkhag has the highest number of unhappy people. This is mainly because of lack of community vitality and social capital which is aggravated by competitive and stressful life.[10] Denmark, which is one of the happiest countries in the world has not only high income but high degree of social equality and good governance.[11] As the zealous GNH-advocate and the former Prime Minister said, "we have always derived happiness from living in harmony and serving others."[12]

The Rule of law is a primary component of the Good Governance pillar of the GNH which presupposes an efficient and effective legal system for expeditious adjudication of disputes by the impartial and independent judiciary. In addition, the amicable resolution of the disputes in the communities spares the people of the divisive effect of the adversarial common law system resulting in winners and losers. This strengthens the community's cohesiveness and harmony, which in turn leads to avoiding of violence and thereby resulting in fewer number of crimes.[13]

We are largely a collective society though traces of individualistic trends are visible in urban pockets.[14] We are a society in which people are integrated into strong, cohesive communities; and friends and families form safety nets to fall back on during difficult times. In rural areas we still wait eagerly for the annual village rituals where we assemble in each house in turn and share feasts and entertainments. Neighbors still rush in with helping hands when we fall sick; or volunteer labor for sowing seeds and reaping crops. Disputes, diseases and famines are avoided and propitious rituals are performed to prevent them. Unresolved disputes are believed to disrupt the social harmony and hierarchy in the community; it indicates social decadence and lack of cohesion in the community. We are also a relatively high 'power-distance culture', where people heed the words of the senior members of the society. This makes the compromises in dispute resolution easier.[15]

When the disputes arise and threaten social harmony, the senior members of the community gather to resolve them. They apply the rules of shared norms and mutually binding value systems. The prevailing customs, moral and ethical precepts play important roles in persuading the parties to compromise. People reconcile over feasts and for some compensation. Apologies and forgiveness serve as important remedies. Mediation of dispute is basically about yielding or compromising on certain issues in order to gain over some. Often, individuals sacrifice their 'rights' over the 'needs' or 'interests' of other people for social harmony. The disputes are at times 'dissolved' rather than 'resolved'. For preservation

6 J.Thinley (2007) 'What is Gross National Happiness?', in Centre for Bhutan Studies (ed.) *Rethinking Development: Proceedings of Second International Conference on Gross National Happiness*. Thimphu, Bhutan: Centre for Bhutan Studies, pp.3-11. p5

7 Supra note 4. See Article 21

8 R. Layard, *Happiness:Lessons from a new Science* (2011) 2nded . USA: Penguin Books. Also see S. Oishi, E. Diener and R. Lucas(2007) 'The Optimum Level of Well-Being: Can People Be Too Happy?', *Perspectives on Psychological Science*, 2(4): 346-360.

9 H.Brockmann, J. Delhey, C. Welzel andH.Yuan (2009) 'The China puzzle: falling happiness in a rising economy', *Journal of Happiness Studies*, 10: 397405.

10 See supra note 5 (Ura et al 2012)

11 See J. Sachs (2012) 'Introduction', in J. Helliwell, R. Layard and J. Sachs (eds.) *World Happiness Report*. New York: United Nations, pp.3-9. p6

12 See supra note 6 (J.Thinley 2007)

13 See RGoB (2005) *Good Governance Plus: In pursuit of Gross National Happiness.* Thimphu.

14 See L. Ugyel (2013) *Dynamics of Public sector Reforms in Bhutan: interaction of values within a hybrid administration*. Crawford School Working Paper No 1301. p 10; Also see J. O'Flynn, and D. Blackman (2009) Experimenting with organisational development in Bhutan: a tool for reform and the achievement of multi-level goals? *Public Admin.Dev*. 29, 133–144 (2009).

15 See M. Gladwell, *Outliers: The Story of Success* (2008) Penguin Books, USA.

of social capital, 'a close neighbor is more important than a distant relative' and 'who you know is more important that what you know'.[16]

Elsewhere, mediation of disputes is confronted by the problems of choice of mediators and enforcement of mediation agreements. Moreover, mediators are the neutral facilitators and strangers to the parties reflecting individualistic principles. In our context, mediators are well known to the parties; they are usually senior members of the communities wielding moral or social authority and influence. Therefore, they can be interventionist, proactive or even authoritative. This also explains effective enforcement of the mediation agreements through social sanctions without involvement of courts.[17]

Social Sanctions and Happiness

Social sanctions and public opinion are powerful tools for the amicable resolution of disputes in the communities. In ancient China, people were required to mediate their disputes to preserve social harmony. Emperors were believed to have ordered courts to intimidate people who came with cantankerous litigations. People feared the stigma of being labeled litigious and anti-social.[18] In the Japanese society, there is cultural aversion to conflicts based on the ingrained notions of social harmony.[19] Bhutanese people also prefer 'losing cases in the villages than winning them in the courts' – basically for the same reason as that of the Japanese – to prevent damage to the relationship and peace in the community. Our preference to be the 'spectators' rather than the 'performers' indicate that we have believed in not 'washing dirty linen' or 'locking horns' in public. Customary values such as 'saving face', 'good relations', 'good will' and 'yielding' are antithesis to the results of adversarial adjudications based on power and rights. For instance, in southern Bhutan, we have a beautiful custom of 'raising head' in which the offenders tender apologies to the victims in the presence of the community members in a symbolic gesture to restore the dignity of the injured or the humiliated. A decision facilitated by community leaders emphasizing reciprocal duties and concessions eliminate the need for litigations. While the guilty are not stigmatized or blamed for the faults; the victims are able to vindicate their conformity to the social norms. Equitable settlements are fashioned by making mutual concessions and compromises with no clear winners or losers – thereby making an investment in future relationship and social capital. Therefore, by strengthening the system of amicable resolution of disputes in the communities, we are strengthening the cultural pillar of GNH which aims to preserve our social and cultural values steeped in Buddhist precepts and principles of middle path, tolerance, peace and non-violence – to achieve the ultimate goal of happiness for our people.[20]

Reviving the System

The age-old amicable community dispute resolution system received a major boost since 2012 after the Bhutan National Legal Institute (BNLI) launched the nation-wide revival program. After assessing state of the existing mediation practices in different parts of the county, the BNLI consolidated the system and began training the local government leaders on mediation skills and techniques thereby establishing uniform best practices throughout the country. Mediating dispute is basically about understanding people and their sensibilities, needs and interests. It is about listening, observing and communicating well. It demands leadership skills to persuade or motivate the parties to engage in negotiations. It also entails empowering and capacity building of the mediators to gain the trust and confidence of the people. Therefore, by imparting mediation skills to the community leaders, the BNLI has indeed taken justice to the doorsteps of the people in the communities. It is a significant judicial reform. Its short term impact will be the drop in the number of minor civil cases reaching the courts. In the long run this will strengthen community vitality and enhance social capital and happiness in the country.

16 Ibid.

17 See G.B. Chan, *Law Without Lawyers, Justice Without Courts - on Traditional Chinese Mediation* (2002) Ashgate Publishing Limited, U.K.

18 R. F. Utter, *Dispute Resolution in China*. Washington Law Review 1987 (62):383- 396.

19 A. M. Pardieck, *Virtuous Ways and Beautiful Customs: The Role of Alternative Dispute Resolution in Japan*. Temple International and Law Journal 1997 (11): 31- 56.

20 NEC, RGoB(1998) *The Middle Path*. Thimphu; Also see C. Rinzin (2006) 'On the Middle Path: the Social Basis for Sustainable Development in Bhutan', *Netherlands Geographical Studies* 352. Utrecht: Copernicus Institute for Sustainable Development.

Conclusion

The collective happiness, the essence of GNH has been our way of life. We share meals with our neighbours; attend religious gatherings and funerals; volunteer for community projects and make financial contributions for social causes. Dispute resolution outside of courts is not new. Many societies have used systems and strategies other than formal courts to resolve conflicts.[21] Similarly, Bhutan has developed its own system of informal disputes resolution methods during its formation and evolution to a parliamentary democracy. Such indigenous systems resolved minor disputes where they arose. Bhutanese legal system has echoed the increasing importance of the non-judicial means of dispute resolution especially mediation. It decentralizes judicial services as well as promotes social harmony. In the process we are also promoting the cultural and good governance policy pillars of the GNH castle for a truly happy country for all time to come.

21 Ibid.

The Significance of the "ten-day period" in the Negotiated Settlement

Sangay Chedup,
Legal Officer, Bhutan National Legal Institute,
LL.B (NALSAR University of Law, Hyderbad, India)
& PGDNL, RIM, Thimphu

In this article, the author intends to examine and analyze the "Ten Days period to question the validity of mediation agreement." This issue has become one of the top agendas for discussion and debates amongst the judicial personnel and legal fraternity. The analysis of the issue as presented in this article, however, would be from the layman point of view – a perspective of a person who works outside the judicial system – and reflecting the views expressed by the people on the judicial system of Bhutan. Sometimes, people feel aggrieved by the responses of the judicial personnel and they complain about the services rendered by the judiciary. On the contrary, it is quite natural on the part of the services delivering agencies including the judiciary, simply to brush off the allegations and not willing to consider the views of the people.

In 2014, I was attending the judges' workshop on solving legal anomalies and understanding of the law,[1] and I have written their entire discussions and anomalies in length in the report. However, my principal concern here is not to replicate the

1 The Bhutan National Legal Institute (BNLI) has conducted "Discourse on Judicial Ambiguities: Resolving Anomalies and Creating Consistency in the Application of Laws" on 26 – 28 June 2014 at Paro for the Judges of North and Southern Bhutan. The same discourse was conducted at Bumthang on 08 – 08 August 2014 for the Judges of East and Central Bhutan.

entire report, but to draw some inferences and understandings with regard to the 'ten-day period' to question the validity of mediation agreement.[2]

The "ten-day period" is repeatedly used in the Civil and Criminal Procedure Code of Bhutan, 2001 (hereinafter the Code). Ten Days is repeatedly used in the Code and sometimes I wonder if this number was favorite for the drafters by then. The appeal period is ten days,[3] the criminal preliminary hearing can be heard within ten days of registering the case in the Registry of the Court,[4] and the party shall raise objection to the validity of mediation agreement within ten days of the agreement.[5] However, as I said, my focus is to locate the reason and its associated problems of ten days period to object the validity of mediation agreement.

There is no concept called Court Annexed Mediation or Court Referred Mediation in Bhutan. It is, therefore, not mandatory for the parties to settle disputes through mediation. However, courts are mandated by virtue of Section 150 of the Code to encourage the parties to voluntarily mediate the case without formal adjudication proceedings.

Section 150 of the Code has beautifully incorporated the negotiated settlement principles.[6] It is for the purpose to provide justice expediently without delay with minimum cost to the litigants.[7] The litigants are provided with the opportunity to settle the case outside the court at any stage of the proceedings, in accordance with the Code. The very purpose of these procedural inclusion of negotiated settlement in the judicial process is to provide parties to resolve their own merit of the case voluntarily, and to maintain social fabric in a small society like ours. The parties ultimately benefit in terms of cost, time, and expense. The Code mandates the parties to request the court for adjournment in order to pursue the negotiated settlement, and the settlement shall be by voluntary consent and signed by the parties and the mediators in their presence. The settlement shall bear a proper legal stamp and shall be within the shadow of the law. The Code provides the parties to raise objection to the validity of such settlement agreement within ten days. If the agreement dehors existing laws or valid objection to its legality is raised by one of the parties, the court may declare such agreement null and void and resume hearing. Thus, the provision stipulates that the parties should provide valid objection to its legality to resume the hearing.

This "ten-day period" poses a series of questions and different people give different legal thoughts:-

1) Some legal professionals and judges argue that any mediation agreement concluded between the parties can be nullified within ten days if there is any objection. The parties' mere submitting to the court to nullify the agreement itself is a good justification to resume the hearing. Thus, according to them, the "ten-day period" is to question the overall mediation agreement, notwithstanding the question of its validity. This class of people, therefore, neither argues that this provision is only to question the validity of the agreement within ten days nor they consider for amendment. They rather feel that the parties can object the agreement within ten days irrespective of its legality.
2) Some lawyers and judges express that the "ten-day period" is not to challenge the agreement as such but to object its validity. Therefore, people belonging to this group argue that if the mediation agreement is

2 Although Judge Lungten Dubgyur has well-argued his stand on the validity of an agreement, however, he did not argue on the validity of an invalid agreement after the lapse of ten days period. For detail see Lungten Dubgyur, *The Validity of an Agreement: Laws that Govern an Everyday Undertaking,* Bhutan Law Review, Vol. 2, February 2014. P. 26-31.

3 Sections 96.5 and 109.1(c) of the CCPC.

4 Section 190 of the CCPC.

5 Section 150.6 of the CCPC states: "The party must raise objection to the validity of such settlement agreement within ten days of the agreement," in which "such settlement" here refers to negotiated settlement.

6 The recent Alternative Dispute Resolution Act (ADR) of 2013 defines Negotiated Settlement as "a process, whether referred to by the expression 'conciliation', 'mediation' or an expression of similar import, whereby parties request negotiator to assist the parties to settle dispute arising out of or relating to a contractual or other legal relationship, amicably." [Section 163 of the ADR Act).

7 Alternative Dispute Resolution Mechanisms are describe usually as less costly and more expeditious. See William L. Ury, Jeanne M. Brett, and Stephen B. Goldberg, *Getting Dispute Resolved: Designing Systems to Cut the Costs of Conflict,* Program on the Negotiation at Havard Law School, Cambridge, 1993, Mary Anne Noone, ADR, Public Interest Law and Access to Justice: the Need for Vigilance, *Monash University law review* (vol 37, no 1), Ojijo, Alternative Dispute Resolution (ADR) Handbook, 1st Ed. 2012, LawPronto (U) LLP, Elena Nosyreval, *Alternative Dispute Resolution as a means of Access to Justice in the Russian Federation,* Translated by Douglas Carman and Dana Tumenova, Pacific rim law & policy journal, Vol. 12 no. 3.

executed unlawfully through coercion or duress for example, the aggrieved party should question its validity within ten working days. Similarly, if the agreement is not within the purview of existing laws, the party can question is legality. If the agreement per se is valid, the provision of ten days period is not invoked. Therefore, this group of people feels that the court should pause for ten days before awarding the mediation judgment. This is because despite their successful mediation party prefers an appeal against mediation judgment. If the judgment is passed only after the expiry of the "ten-day period" from the date of execution of the agreement, it would be less likely for the parties to prefer appeal against the judgment. Even if they make an effort to do so, they will be barred by the time limitation.

3) Some legal fraternities argue that the "ten-day period" provision in the Code is redundant and devoid of any legal significance. They argue that if a mediation agreement is executed with elements of coercion and duress, any normal human being will question such an agreement immediately or raise objection to the court. Therefore, it is not necessary for the parties to wait until the expiry of ten days to object its validity. Likewise, they also questioned that if the agreement was not executed in accordance with existing laws, how can such agreement become valid, and enforceable after ten days? Therefore, they claimed that the "ten-day period" to challenge the legality or validity of any negotiated settlement is inefficacious.

I appreciate all these views because all are well reasoned and justified in their own ways of interpretation and legal understanding. My arguments would neither agree nor disagree all of them, rather try to dismiss some and agree with some providing relatively adequate legal explanation of my understanding.

1) Objecting the validity of the agreement – Some contended that if a party raises an objection to the validity of the agreement within ten days, the agreement shall be nullified despite its validity. I believe this argument must be in accordance with Section 36 (h) of the Evidence Act, 2005, which stipulates that "a written agreement shall not be valid, if it is objected to by any party in a Court within ten days." If this interpretation is given a due consideration and put into practice, there might be a situation wherein the parties may wilfully exercise out of court settlement in order to delay the justice. Since the very idea of negotiated settlement is to help parties resolve the dispute amicably with less time and expense, and if the parties are empowered with unbridled rights to challenge the mediation agreement which otherwise was mutually agreed by both the parties, the very purpose of mediation principle is defeated.[8] In this regard, I am of the strong view that, any objection, if there will be any, should be based on the legality and validity, and not on the mere time factor.

2) The Court should not award the negotiated settlement judgment until the expiry of the "ten –day period." – This argument is based on the principle that though the judgment rendered by the court is based on the negotiated settlement of the parties, they still prefer appeal against such judgment. Such decisions are also known as consent judgments. In such cases, as the parties mutually settle their disputes on the terms and conditions acceptable to both the parties, there was nothing for the court to decide, unlike the litigations. Thus, as the issues in the dispute or controversy were not adjudicated at all by the court, there was no legal basis for the parties to appeal against their own decision. Hence, it is the basic principle of appeal procedure, that no appeal shall lie against the consent judgment and there was no court's decision to be appealed against.[9] Therefore, it is principally

8 To appreciate this interpretation, please see *Tshering Penjor v. Nyephug Goenpa (HUM-12-12)* wherein Supreme Court held that a valid written agreement cannot be nullified purely based on Section 36(h) of the Evidence Act but be read in conjunction with section 150 of the Code. For detail see, Lungten Dubgyur, *The Validity of Agreement: Laws that Govern an Everyday Undertaking,* Bhutan Law Review, Vol.2, February 2014. P. 26.

9 See Common Pleas Court, *Mediation FAQs*. Available at http://www.clermontcommonpleas.com/faqmed.aspx (Accessed on 12/10/2015). Also, see Charles Kajimanga, *Enhancing Access to Justice through Alternative Dispute Resolution Mechanisms – The Zambian Experience*, Presented at the Annual Regional Conference Held at Southern Sun, Mayfair Nairobi, Kenya on 25 – 26 July, 2013, p.8.

inappropriate to entertain appeals against the consent judgments. If that is the case, the appellate court would end up doing the jobs of trial courts.

There is also no reason as to why the court should wait for ten days' expiry to award mediation judgment. If the parties appear before the court with mediation agreement, and if the court is satisfied that the agreement is legally valid and executable, and neither of the parties object to its validity, then the court can award the judgment.[10] If the court waits for ten days, again the very purpose of mediation is defeated, because the main purpose of mediation is for speedy justice.

3) The "ten-day period" provision in the Code is redundant and devoid of any legal significance – To appreciate this statement, first of all, we need to understand the intention behind this particular provision. Why the legislature has considered this time limitation?

In law, any time frame stipulated in the legislation is the limitation period. In other words, it is the law that regulates the parties within which they had to bring any legal action or proceedings to be instituted before the competent authorities. The "ten-day period" in the Code is a limitation period by which the action and conduct of the parties is regulated. The question, however, still remains – how can invalid agreement becomes legally valid, and enforceable after the expiry of ten days?[11] The Code empowers the court to nullify the agreement, if it dehors existing laws or valid objection to its legality is raised by one of the parties.[12] It is also to be understood that, after the lapse of the "ten-day period" from the day of the execution of the mediation agreement, the party concerned extinguishes his right to object the legality of the agreement. This however, does not mean that invalid agreement can be enforced after the ten days. It simply mean that the probability for the court to pass consent judgment based on invalid mediation agreement is very remote and unlikely. Even if the parties fail to object the legality of the agreement within the period of ten days, it is the fundamental duty of a court to oversee that such agreement violates the existing provisions of the law. If the court feels that the agreement does not fulfill the requirements of the laws, the agreement may be declared null and void and resume hearing. Therefore, any parties, if preferred to appeal, may be with a motive to delay justice, and such appeal should not be entertained.

The common understanding and belief among the judiciary is that the limitation period of ten days as enshrine in the procedure Code is to question the validity of agreement and the agreement per se is legally valid if no objection is raised by either of the party. It is the spirit and force of the law that we all have to respect and honor until it is amended by the Parliament. However, we also need to be mindful that invalid agreement cannot become valid after ten days simply because the parties did not raise objection within ten days.

10 Courts are generally mandated and empowered to enforce valid settlement agreement under contract law. See Section 16 of the Contract Act of Bhutan 2013 which states that "an agreement shall amount to a contract and shall be enforceable at law if it is made with the free consent of competent parties for a lawful consideration and for a lawful object and is not declared to be void or illegal by this Act or by any other law in force in the Kingdom of Bhutan."Since the Contract Act was drafted in consonance with the internationally accepted legal principles, I do not see any reason for courts to instantly award the judgment based on mediation agreement without pausing for ten days.

11 By the term "invalid" agreement, it simply means an agreement that is not enforceable in the court of law.

12 S. 150.8 of the Code.

Is Bhutan Ready for theTwenty First Century:- *Hi-Tech Virtual World?*

Sonam Tshering, Legal Officer, Bhutan Narcotic Control Agency, Thimphu. LL.B. final year (New Law College, BVDU, Pune, India); Bsc. Biological Sciences (Sherubtse College, Kanglung) & PGDNL, RIM, Thimphu

Abstract

Society changes every moment. Law must change with society to maintain peace, security and harmony, and peaceful co-existence of its people. The change is so rapid, and aggressive with era of information bombardment, where world now literally exists as a virtual world. With such a change, the justice system in any society is not only challenged but also tested its resiliance. This virtual world is even more complex in its functioning as well as its composition. The conventional legal system can no more stay in static nor away from this virtual world, as this world is also plagued by numerous problems in an absence of adequate, and strong legal system to mend it with physical world. Therefore, it is now imperative that the netizens are protected of their rights, obligate with duties and regulated including penalization should they violate the rights in the cyber space.

Introduction

Under the wise and farsighted vision of our selfless successive monarchs, Bhutan not only remained an independent and secured nation but also became one of the most peaceful and beautiful places on this planet. We have enjoyed the best of family bonds and interactions, stayed in isolation for centuries. Crimes were rare, and justice prevailed for every member of the society. However, as Bhutan progressed, the isolation came to end, as she became a member of the United Nations, and many other regional and international organizations over a period of time. The internet and television crept into our country in 1999. During the 17th December 1999, His Majesty the Fourth Druk Gyalpo in his royal address, reminded the citizens, on the use of internet and television, and its pros and cons.

Current Situation

Just over a decade after its introduction, we have already seen unprecedented impacts of use of these hi-tech gadgets especially the internet, both its benefits and harms. Therefore, it is of paramount importance for the nation to rethink on all aspects including our legal framework, and its adequacy and relevance with these new technologies. Accordingly, we may have to come up with necessary revisions and amendments to the existing legislations, to cope with such rapid change in the way society perceives the world today as opposed to a decade ago.

Information and Communication Technology is a "management, acquisition, processing, storage and dissemination of vocal, pictorial, textual and numeric information by a micro-electronics based on combination of computing and telecommunications."[1]

Social media is a 'internet-based software and interfaces that allow individuals to interact with one another, exchanging details about their lives, such as biographical data, professional information, personal photos and up-to-the-minute thoughts."[2] The space

1 (Kyoto Convention Guidelines on the application of Information and Communication Technology, WCO, June 2004, page 104.)

2 Investopedia US, A Division of IAC 2014

is called cyber space or cyber world, and people using cyber space are called netizens.

Although, Bhutan took a very cautious step in introducing internet and television by becoming one of the last countries in the world, it is estimated that over 80,000 Bhutanese are on Facebook and twitter.[3] It means over 10% of Bhutanese population are netizens. The majority of users would be from our young generation. The figure is going to rise even more rapidly with the introduction of better network connectivity, easy accessibility and affordability of modern gadgets complemented by techno-savvy attitudes and better education unlike a decade ago, where we were literally alien to cyber world.

The use of these technologies is indispensible in an era of information bombardment. Today, whether, one is a farmer or bureaucrat, poor or rich use some sort of information technology. From business models to government policies, academicians to researchers, lawyers to doctors, businessmen to politicians, spiritual leaders to terrorists, all are becoming more and more techno-savvy and active in cyberspace. The physical world is replaced by e-governance, e-commerce, e-records, e-litigation, e-banking, e-classrooms etc., saving not only expenditure, but also time, efficiency, distance and so many other barriers under the conventional style of the world. The world has practically, become so small, compact and closer to each other. It takes a second to see happenings on the other side of the world, to communicate, conduct meetings and even do business. The lives of people are made very easy and better, and are moving towards an even more complex hi-tech driven path.

Bhutan is no exception in its use. From private individuals to governments, numerous changes have seen recently. The government has already come up with e-governance concepts to bring citizens closer to its services. This include, e-banking, e-commerce, processing of various government approvals from our home with just a click through various modes, such as Government to Citizens (G2C), Government to Business (G2B), Government to Government (G2G), community information centres in all Gewogs across the nation. Recently, a more ambitious step was taken by the government by subscribing Google Apps, which is a cloud-based suite application to promote a paperless working environment and a secure email system for official correspondence.[4] The Government has already conducted trainings for 179 ICT Officers in Thimphu and 83 Officers in Dzongkhags, and 3653 Google Apps accounts have been activated. The Government is spending about Nu.9M for 5000 accounts in the first year.[5]

For a democracy like ours, social media is taking over all other forms of medium in gaining momentum for freedom of speech and expression. Some use genuine accounts, while some express anonymously. Everything that remained a private, a few years ago, now no longer remains private. For some, every single minute of their life has become public. The right to privacy and confidentiality are hugely challenged by such paradigm shift in few years. It also became an effective tool in curbing all forms of corruption as one can publicize on public forum even anonymously from anywhere. Therefore, benefits are too numerous to list down. However, we are also equally challenged by harms and injuries caused by the same technology.

This example demonstrates the adverse impact of social media. A 15 year old boy, Sofyen Belamouad was brutally murdered by 20 teenagers at Victoria Station in London in the public place. The teenagers used Facebook to plan the murder.[6] A man was imprisoned after he killed a friend who 'poked' his girlfriend on Facebook in October 2014, leaving his child fatherless, and wife widowed in Nottingham.[7] Recently, Federal Officials warned that 500 million financials records were hacked in USA.[8]

Bhutan is no exception. We have already seen number of cybercrimes even before we could come up with a national policy on these issues. A case

3 How social media woke up Bhutan, 19 Feb 2014, BBC, http://www.bbc.com/news/world-asia-25314578

4 Bhutan goes for Google Apps, The Bhutanese, 6 June 2014 http://www.thebhutanese.bt/bhutan-goes-for- google-apps/

5 Google Apps yet to be taken all board, 19 Oct 2014 http://www.kuenselonline.com/google-apps-yet-to-be-taken- all-on-board/#.VEibWyKUd1Y

6 A boy killed by a 'Facebook Gang' in a busyTheIndependent,Station,(26Jan2011)

7 Man jailed after killing a pal who 'pocked'his girlfriend on Facebook, Mirror, (4 Oct 2014)

8 Officials warn 500 million financial records hacked, USA Today, (20 Oct 2014) http://www.usatoday.com/story/news/politics/2014/10/20/secret-service-fbi-hack-cybersecuurity/17615029

of defamation of a political party is under trial in Thimphu District Court.[9] Recently, a private citizen petitioned the Prime Minister's Office to amend our laws after alleged leak of homemade amateur pornographic clips started circulating through the Wechat, a social media.[10] A few years ago, a woman in Monggar became a victim of blackmail through social network after she exchanged her nude photos with her chat friend supposedly in India.[11]

Similarly, over 200 people including some of the poor farmers who took loan from financial institutions, lost huge sums of money, amounting to million Ngultrums due to a fraudulent scam through internet called Unipay[12] which promised to pay back exorbitant interest. In 2007, Paro District Court sentenced a corporate employee for defamation of a couple to one year imprisonment and also awarded a compensation of Nu. 36000 each to the defendants.[13]

At the global level, the crimes related to cyber are too numerous and diverse. Some of the most common cybercrimes include, fraud, phishing, hacking, cyber bullying, cyber espionage, pornography, human trafficking, illicit trafficking of drugs and products, money laundering, terrorism recruitment, online trade of weapons, impersonation. Recently, there were several reports of an International Terrorist Group called ISIS using movies, video games and news channels to propagate their ideas. [14]
A small country like ours, which does not have strong cyber security, can be even more vulnerable to such crimes, and have a lot of risks. Besides, building our cyber-security stronger, one of the most effective ways to counter these threats as well as promote these hi-tech for legitimate use is to enact an effective and comprehensive legal framework. Currently, Penal Code, Bhutan Infocomm and Media Authority Act, Civil and Criminal Procedure Code, Evidence Act, Customs and Excise Act, and Election Laws are some of legal tools in dealing with virtual world.

Though most of these laws do not expressly mention of crimes or situations related to cyber space or virtual world explicitly, it does take care of many aspects including defamation, validity of electronic records,

and admissibility of electronic documents, such as emails in the court of law as evidence, terrorism, pornography, fraud, money laundering and many other issues. But laws on hacking of computers are not covered well in any of the laws yet it is one of the most common cybercrime often taking down

the whole government websites, steals information and commit many other crimes thereafter. The issue is even more so with the jurisdiction of courts on these crimes as the crimes can be committed outside Bhutan against the Bhutanese society.

Thus, with the current rate of development, and the use of these technologies, it may be more appropriate to come up with a single statute than amending many other laws. A single comprehensive law covering all possible areas on benefits as well as harms of these technologies can have. Enacting such laws would provide a legal recognition for any legitimate use, facilitate government's policy on e-governance, provides rights to citizens for using electronic communication, obligate users to use for legitimate purpose, provide penalties for misuse or illegitimate use of any of hi-tech techniques in Bhutan, and reconcile all the existing provisions related to ICT including internet and social media to suit the changing needs. It would also help the law enforcement agencies, the citizens, the courts to address these problems more expediently as the existing laws are scattered in so many other laws. When laws are scattered, it would not only make difficult for the law implementers, but also creates more possible room for overlooking at times which would ultimately lead to the miscarriage of justice to the common people.

9 Preliminary case on libel case, Kuenselonline (26, Sept 2014) http://www.kuenselonline.com/preliminary- hearing-on-libel-case/#.VEihDiKUd1Y

10 PM accepts petition on stricter laws against sexual materials distribution, BBS (10 Oct 2014) http://www.bbs.bt/news/?p=44765

11 A woman blackmailed on internet, BBS (19 Mar 2012) http://www.bbs.bt/news/?p=10815

12 Millions lost to a scam, BBS (24 July 2011) http://www.bbs.bt/news/?p=5710

13 First Criminal Libel Verdict in Bhutan, Berkman Center for Internet and Society At Harvard University (6 Aug 2007) ___ http://cyber.law.harvard.edu/node/3704

14 The ISIS propaganda war, a hi -tech media jihad, The Guardian, (7 Oct 2014) http://www.theguardian.com/world/2014/oct/07/isis -media-machine-propaganda-war

Development of Mediation in Australia and Bhutan: *The Future Perspective*

Serge Loode, Director, Peace & Conflict Studies Institute Australia (PaCSIA) & sessional lecturer, School of Political Science and International Studies, The University of Queensland.

The objective of this article is to present a short reflection on similarities and differences, and a discussion about developments in conflict resolution in Bhutan and Australia. I hope that it will articulate some of the results of the training in Brisbane, and also provide further opportunity for discussion and dialogue on the direction of mediation practice in Bhutan. The article also makes a brief comparison of mediation in Germany, a civil law country, which has taken a different pathway with regard to institutionalization of mediation.

In 2014, I had the opportunity to design and facilitate a training program on developing mediation and conflict resolution mechanism under the auspices of Queensland University of Technology and the Australian Awards Fellowship program to a team of officials from the Kingdom of Bhutan.[1] The nineteen-member team led by the Director General of the Department of Local Governance, Ministry of Home and Cultural Affairs included legal officers from Bhutan National Legal Institute (BNLI), schools principals, local government leaders such as Gups, and administrative officers to study mediation practices and institutions in Brisbane, Australia. Over a period of four weeks my colleagues and I had the opportunity to present mediation theory and practice from Australia, and to compare underlying theoretical and practical issues in mediation and conflict resolution as practiced in Bhutan and Australia.

If I had learned one thing from the program, it is that Bhutan has a well developed practice of mediation at the village, gewog and district levels that is based on values of community, compassion and participation. In my view, it is important to affirm and, where necessary, to reinvigorate these values as the underlying building blocks of the process. This might lead Bhutan into a different direction from Australia, when it reviews its goals on whether or not mediation requires more institutionalization, but it will most likely produce a more appropriate Bhutanese model of mediation.

In this article, I present, review of my experience as a mediator, mediation trainer and lecturer in mediation, Alternative Dispute Resolution (ADR) and peace building areas. I also have a strong interest in comparing different approaches to mediation and conflict resolution as practiced in different countries. As I

1 I would like to thank David Kozar, International Development and Program Appointment Officer, Queensland University of Technology for coordinating such a well organised and short course program. I would also like to thank all Bhutanese participants for their contributions, insightful questions and for sharing so many experiences about Bhutan with me.

have argued in a journal article comparing mediation in Germany and Australia, it is worthwhile to reflect on, and to compare practices of mediation and developments in different countries, as this allows reflection on the strengths and shortcomings of a particular system. Such a comparison also helps practitioners and policy makers to understand why such practices have developed a certain way.[2] One caveat is necessary, before I start my reflections: I do not profess to be an expert on the culture, history or the people of Bhutan, and my reflections are solely based on my limited insights gained from discussions with the participants in the training. I hope that my assumptions about Bhutanese people and mediation in this article are not inappropriate or offensive, and if they are mistaken, then I apologize to the readers.

ADR and mediation have always been contentious terms with a plethora of different definitions, underlying theories and approaches. While originally considered an "alternative" to litigation in court, the meaning of ADR in Australia and the United States has changed to "appropriate" dispute resolution, signifying a strong preference within the legal field for settling or resolving matters without a formal trial.[3] This also marks an increase in the use of ADR in daily routines of businesses and citizens. Nonetheless, the history of ADR and mediation in Australia and other English-speaking countries shows, that while mediation had been used informally in communities for hundreds of years, it lost some of its appeal with the rise and institutionalization of adversarial system of justice and the development of formal court systems. ADR in Australia nowadays includes a variety of processes which are often used parallel to each other or in an escalating order of intensity of third-party intervention. These processes include mediation, conciliation, med-arb, case appraisal, mini-trial and arbitration.[4] What needs to be emphasized is, that the increased use of ADR processes resulted from a great dissatisfaction with the adversarial trial starting in the 1970s but becoming more and more urgent in the 1980s and 1990s.[5] The institution of adversarial justice system as developed in Australia, favours the concept of party autonomy, which leaves the trial firmly in the hands of the disputing parties and their lawyers. Over time, this resulted in a mentality of conflict, antagonism and contest of will. Judges were often only allowed to ensure the fairness of procedure, but had little influence on case management or the weighing of evidence. Jury trials led to complex evidence issues to ensure that juries were given only information, which did not favour either party, but this also led to long legal arguments over the admissibility of evidence. The results of these developments were very expensive trials and high legal fees, which parties were required to pay, as it was mostly impossible to navigate the formalities of adversarial justice without a trained lawyer. Starting with community justice centres in the United States, and later also Australia, a counter-movement to state-based formal and inaccessible justice began, the rise of neighbourhood mediation centres.[6] Here, the disputes would be mediated to find consensual agreements between disputing parties and mediators were often members of the local communities, who underwent mediation training. Such training was only partially based on legal expertise. More often, it included training in communication skills, psychology and counselling practices as the basis for mediation.

Today, Australia is a world leader in the institutionalization of mediation. Nearly every court in Australia has a court-related mediation or ADR program, and it is common, that courts can refer disputes to mediation and other ADR processes, even against the wishes of the disputants.[7] In many business and industry areas, mediation and conciliation are primary processes of dispute resolution, often provided by government departments and statutory authorities. For instance, the Residential Tenancies Authority[8] in Queensland, which is an independent government authority, conciliates disputes between tenants and landlords over issues arising out of residential tenancy agreements. Likewise, the Anti-Discrimination Commissions, in various states and territories in Australia, deals with

2 Thomas Trenczek and Serge Loode, 'Mediation "made in Germany" - a quality product' (2012) 23 Australasian Dispute Resolution Journal 61.

3 Hilary Astor and Christine M. Chinkin, Dispute resolution in Australia (2nd ed, 2002).

4 David Spencer and Samantha Hardy, Dispute resolution in Australia: cases, commentary and materials, Lawbook Co. casebook series. (2nd ed, 2009); Thomas Trenczek and Serge Loode, 'Mediation "made in Germany" - a quality product' (2012) 23 Australasian Dispute Resolution Journal 61.

5 Laurence Boulle, Mediation: principles, process, practice (3rd ed, 2011); Tania Sourdin, Alternative dispute resolution (4th ed, 2012).

6 Laurence Boulle, Mediation: principles, process, practice (3rd ed, 2011).

7 Tania Sourdin, Alternative dispute resolution (4th ed, 2012).

8 For further information see www.rta.qld.gov.au.

disputes including discrimination and harassments in workplace or public vilification. Industrial relations disputes and disputes over pay and working conditions often are conciliated by government agencies, and even personal injury disputes, arising from car accidents, are sometimes mediated or conciliated to reach an agreement on monetary compensation. It is questionable, whether this large-scale institutionalization would have happened without the early support of the courts, and the necessity to address a crisis in the justice system. In the 1980s and 1990s, many courts in Australia were overworked and had backlogs of files, leading to years of waiting time.[9] In addition, there was a rise in self-represented clients, who could not afford legal representation, but were also unable to fully understand the procedures of the court system. This created significant administrative and financial constraints on federal and state bureaucracies. After an inquiry into the shortcomings of the system, and international comparisons, legal reform was initiated and implemented. This reform led to the introduction of mediation, and other ADR processes, which were considered to be faster, cheaper and less complex for disputants. At the same time, the court system was reformed, and a number of special tribunals were established and were allowed to use more active case management systems, and more interventionist judges, who could inform themselves about the case were under lesser restrictions from the Evidence Acts. While the legal profession was originally suspicious of mediation and other ADR processes, it has now embraced ADR, and some experienced barristers conduct more mediations than actual trials.

The reason, why I have presented this historical overview of the development of ADR in Australia is, that it shows a particular need, that ADR could fulfill: the need for fast, affordable access to justice. From the discussions that I participated in during the training, I believe that Bhutan may have different needs, when it comes to mediation and ADR. While legal academics and practitioners in Bhutan also point to a rise in formal litigation, litigation is by far not as expensive in Bhutan, as it is in Australia.

In a previous volume of the Bhutan Law Review, the Acting Chief Justice of the High Court, Royal Court of Justice, Sangay Khandu, addresses issues in access to justice for the disadvantaged people living in isolated villages, people suffering from disabilities and the elderly.[10] He argues that there is inadequate legal aid service provided to disabled people and people in isolated parts of Bhutan, who face natural obstacles in coming to court. In Australia and other countries, ADR and mediation are often viewed as ways to address these inadequacies of the court system. I would argue against this.

It should not be the role of mediation to fix the accessibility problems, but to offer genuinely different outcomes for disputants, outcomes that are focused on relationship building and improved communication. Bhutan has a long history of mediation as the preferred mode of dispute resolution at community level. Courts were introduced only in the 1960s, and are often considered a remedy of last resort. It is much more common for Gups, and other elected local leaders to assist disputing parties in resolving their differences and disputes. Therefore, the difference in the needs of ADR between Australia and Bhutan is significant. It means, that in Australia, mediation is almost always evaluated from a cost-benefit perspective, at least when it comes to government service providers or courts. The aim is to keep the costs of resolving or settling a matter as low as possible. This means that the time that mediators can spend with disputing parties is often limited. Four hours has become the average time for mediation, and one to two hours for conciliation. Sometimes, this has a detrimental impact on the quality of dispute resolution, and offers lesser opportunities for the parties to contribute into the resolution of the disputes.

Because, mediation was originally considered to bring justice back to the communities, it also led to the development of a facilitative model of mediation. The de-facto standard definition of mediation under the National Mediator Accreditation System (NMAS) is as under:

"2.1 A mediation process is a process in which the participants, with the support of a mediator, identify issues, develop options, consider alternatives and make decisions about future actions and outcomes. The mediator acts as a third party to assist the participants to reach their decision." [11]

9 Hilary Astor, 'Mediator neutrality: making sense of theory and practice' (2007) 16 Social Legal Studies 221.

10 Sangay Khandu, 'The need for access to justice for the disadvantaged' (2014) 2 Bhutan Law Review 63.

11 Mediator Standards Board, Practice Standards, National Media-

"2.3 The goal of a mediation process is agreed upon by the participants with the assistance of the mediator. Examples of goals may include assisting the participants to make a wise decision, to clarify the terms of a workable agreement and/or future patterns of communication that meet the participants' needs and interests, as well as the needs and interests of others who are affected by the dispute." [12]

"2.5 Mediators do not advise upon, evaluate or determine disputes. They assist in managing the process of dispute and conflict resolution whereby the participants agree upon the outcomes, when appropriate. Mediation is essentially a process that maximizes the self-determination of the participants. The principle of self-determination requires that mediation processes be non- directive as to content." [13]

In facilitative mediation, mediators determine and conduct the process, but they do not give any information or provide legal or other advice. They do not suggest solutions to the parties, but ask questions instead, that might lead parties to come up with ideas for solutions themselves. They also strongly encourage parties to talk to each other and to explain their views to each other. This can sometimes lead to confronting situations, in which disputants shout at each other or become very upset, but it also leads to important moments of recognition and to change in relationships, when they realize that they need to change their way of communication and interaction. While facilitative mediators also conduct sessions in private with one party, general facilitative mediation practice emphasizes that good solutions can only be found by the parties together and therefore they have to talk to each other to do so (and to implement the solutions after the mediation).

Conciliation, as it is practiced by many government service providers, is similar in the phases of the process, but allows the conciliator to provide information on relevant legislation, and to make suggestions for appropriate solutions to the conflict. Conciliators often have special legal or other training, and are operating under specific laws, which outline the kinds of matters that fall under their jurisdiction. While most conciliation is conducted by government officials, a relatively diverse field of private mediators from different backgrounds have developed in Australia.

Discussions during the training had led me to believe that much of the mediation practices at village or block level in Bhutan is possibly more similar to conciliation in Australia than to facilitative mediation. Elected leaders are often people of authority and they are often more knowledgeable about important legislation, and are also expected by disputing parties to give advice and use their authority. Some Bhutanese mediators tend to employ more separate sessions with the parties, as it is more comfortable for the parties, if they do not have to face each other during the process. Disputes can range from family issues such as separation to disputes between neighbours over farming practices or disputes between villages over access to irrigation networks. This makes for a very diverse practice for Bhutanese mediators, and also creates challenges for them, in that they have to be able to respond to such different situations appropriately. An advantage that I see for Bhutanese mediators is that they are often under less time pressure than their Australian counterparts. Good mediation, whether it is facilitative or more evaluative, such as conciliation, requires deep listening, empathy for the people who come with their disputes to the mediator, and the ability to analyze their conflict stories with them to ascertain underlying needs and interests. When mediators build rapport with their clients, then it also becomes easier to make suggestions, as their suggestions are trusted more, than if a mediator simply imposes a solution on the parties. Time is an important factor here, as it takes time to build trust, and to elicit the important details of conflict stories. In my view, it is important for any institutionalization process to consider this issue. If time is restricted because of administrative costs, this can lead to less satisfaction of disputants.

Areas where facilitative mediators in Australia often have very strong skills are listening and techniques to acknowledge emotions, and reframing of insults and adverse statements into statements of need and concern. Because they are trained not to provide suggestions, and not to give advice, these skills are often the only way, in which they can influence the process towards a more constructive conversation. I believe,

tor Accreditation System (2012).
12 Mediator Standards Board, Practice Standards, National Mediator Accreditation System (2012).
13 Mediator Standards Board, Practice Standards, National Mediator Accreditation System (2012).

that it is easier - at least in the Australian context - to develop these interpersonal rapport-building skills, if mediators (at least at the start of their practice), refrain from giving advice, and from making suggestions. While this may be very difficult for elected government officials, I suggest that Bhutanese mediators investigate their own practice frameworks to better understand, how interventionist they are, and how much the agreements that they facilitate are based on their own expertise and advice, and not on the ideas of the parties. Advice and authority of a mediator can help to find wise and sustainable agreements, but my experience tells me, that it is often more successful to refrain from giving advice, until the parties explicitly ask for it, and to encourage them to come up with their own ideas first.

Mediation in Bhutan has the advantages of a more "unhurried" approach to practice, which may go along with a more unhurried approach to life in general, in which people have more time to talk to each other, and to build and maintain community relationships. In large cities in Australia, this is often difficult. The Bhutanese mediators also should not strive to compare themselves, and their successes to the courts, in the way that the state-sponsored Australian mediation services have to justify their existence. The Bhutanese courts work very efficiently as can be seen by the court statistics published in the Bhutan Law Review. There is hardly any backlog and matters are decided mostly within 108 days from the day the cases were filed. There is no need for mediation to take any burden off the court. Instead, mediation provides very different outcomes to litigation and should strive to create more creative, consensual and long-term agreements than court processes can. Nonetheless, there are disputes where litigation is more suitable than a negotiated outcome through mediation, and for these disputes, it is appropriate to ensure, that they are heard before a well-resourced and experienced judge, who can make a considered decision based on laws. Seeing mediation predominantly as an alternative to litigation that saves time and money, and risks of losing the potential for creative solutions, and in the long term can decrease the quality of service provided in mediation, because it leads to shorter and shorter time available for conducting the process. While Australia has established some impressive and accessible system of dispute resolution, resources and time have certainly been an issue for state-sponsored ADR, and the downside of institutionalization.

Mediation is not the only way to make up for the deficiencies of an expensive court system. My experience as a lawyer from Germany shows that courts can be efficient and more accessible:

"The modern German legal system has always been significantly more attractive for consumers than those of common law system: courts do not have a long backlog of cases to be heard, they have shorter listing period and hearings often take less time. Therefore, clients have not suffered the same level of inability to access justice as did their common law system counterparts prior to the introduction of court-related mediation schemes."[14]

Because there was not such a strong need for mediation to be an alternative to court in Germany, as mediation is practiced differently. There is even more emphasis on creative outcomes, on transforming relationships and on future-focused long-term change, than in Australian facilitative mediation. Mediation training is much longer and provides a more in-depth education in counselling techniques, psychology and mediation theory. Mediation sometimes take longer than court procedures would, because they are so focused on finding better and creative solutions and to changing the way that the conflicting parties think and act towards each other in the future.[15] Given Bhutan's long history of mediation, and the acceptance that mediation has among the general population, I would argue that law reform and training of mediators should emphasize these relational advantages of mediation, and not simply aim to provide a cheaper system than the court system. It needs to be noted, that a disadvantage of the German experience is, that there is far less mediation and conciliation practiced in Germany, when compared to Australia. Many more disputes tend to go to court to be decided by a judge. It also means that there are fewer mediators working in Germany than in Australia. However, this is unlikely to happen in Bhutan, given that mediation has such a strong history and roots in the community.

14 Thomas Trenczek and Serge Loode, 'Mediation "made in Germany" - a quality product' (2012) 23 Australian Dispute Resolution Journal 61.

15 Thomas Trenczek and Serge Loode, 'Mediation "made in Germany" - a quality product' (2012) 23 Australian Dispute Resolution Journal 61.

This article has attempted to trace some of the historical roots and developments of mediation in Bhutan and Australia, to provide explanations for why both countries have developed differently with regard to mediation and ADR. It has also provided some insights into the development of mediation in Germany. The aim of this historical overview was to argue, that different legal systems and different societal values lead to different practices in what we call mediation. This is not necessarily surprising, but it is also not necessarily detrimental. While Australia is a leader in many areas of ADR and mediation, this position was gained due to specific needs and problems within the justice system. These needs may be different in Bhutan. As Bhutan is currently in a process of legal reform, and has the goal of strengthening its well established mediation system, it would do well to carefully consider which values it wants its mediators to espouse. Given the strong community relations that are still existent in many communities, it might be an opportunity to strengthen the abilities of local leaders and mediators, to assist parties in having constructive conversations, in creating joint creative solutions, and in learning more about the values and needs of the other parties, so that they can transform their relationships and maintain connection and social harmony in the communities.

I conclude with the observation that the training program that I had the honour of assisting with, has provided an invaluable opportunity for learning for all participants and trainers, and has helped me better understand the strengths and weaknesses of the dispute resolution system, that I am working in, due to the thoughtful and critical questions and comments of my Bhutanese colleagues. Opportunities for international exchange like this are priceless and can help Bhutan and Australia to harness the strengths of their mediators, and to avoid some of the pitfalls of institutionalization that have happened elsewhere.

The Judicial Reforms under the Golden Reign of His Majesty Jigme Singye Wangchuck

Lyonpo SonamTobgye,
Former Chief Justice of Bhutan

The accession of His Majesty Jigme Singye Wangchuck to the Golden Throne of Druk Yuel as the Fourth Druk Gyalpo ushered in unprecedented reforms in economic, social, cultural, administrative, legislative, judicial and political spheres. His Majesty's vision was utilitarian for common good, with individual welfare. His inclusive vision with conclusive approach was unique and His contributions to the development of the country were enormous.

Judiciary of Bhutan

The judiciary is the institution, on which rests the noble edifice of the rule of law, that aspires to operate with unremitting efforts to fulfill its commitment to justice. Socrates said, Justice is virtue and wisdom and injustice is vice and ignorance. Thus, Justice is a promise to humanity. The paramount duty of the judiciary is to ensure that falsehood does not triumph over the truth, that injustice does not eclipse justice. The judiciary must be the true custodian of justice. Thus, His Majesty said that:

"Treatment for health and justice from the courts are indispensable to our public. Thus, justice can neither be denied nor delayed."[1]

His Majesty reminded judges that apart from transparency and credibility of the judiciary, fair trail and justice was of paramount importance for the people and that the judiciary was the most important organ of the State followed by health services and education. Therefore, His Majesty mentioned that:

"During the adjudication of cases, as difficulties occur, it is essential to provide justice, and the justice should be provided as expeditiously as possible, inexpensively and fairly without prejudice."[2]

Role of the Judiciary

The judiciary is a passive branch of the government. With the adoption of the Constitution under the visionary leadership of His Majesty, the judiciary has a major role to play, especially the Supreme Court, being the highest court of appeal, the guardian and the final interpreter[3] of the Constitution. His Majesty elucidated that:

"The Supreme Court is the guardian of the Constitution and must ensure its credibility and relevance in perpetuity. As the guardian, the Supreme Court must truly understand the significance and purpose of the Constitution as a guiding principle, interpret its content with incontestable clarity, and preserve it as a living document with unfailing vigilance."[4]

The judiciary also has an essential role in protecting the people from the wrong-doing of others, protecting the weak from the strong, and the powerless from

1 The Seventeenth National Judicial Conference (2005)

2 The 16th National Judicial Conference

3 SPEECH TO THE AMERICAN LAW INSTITUTE 16 May 2011 by Lord Phillips, President of the Supreme Court of UK.
" "The first thing that the new Supreme Court did was to strike down the Government's budget on the ground that it was based on legislation purporting to delegate the power to impose taxation, which was unconstitutional and void. Bhutan's Supreme Court really is supreme."

4 On 30th November 2009 during the private audience after His abdication.

the powerful as well as protecting individuals from the unwarranted or unlawful exercise of power by the State. Moreover, the judiciary plays a crucial role in securing domestic tranquility by providing a structured and institutionalized forum for the resolution of discord and dispute and the vindication of civil and criminal wrongdoing. Therefore, the courts will be faced with the role of balancing, and it is often a difficult balance, between the rights of the individual on one handand the interests of society as a whole on the other. Court decisions in the constitutional area are often controversial. In this difficult and controversial area, the challenge for the courts is to uphold the Constitution and the law, and maintain the enduring values of a civil society. Judges should act fearlessly, irrespective of popular acclaim or criticism. His Majesty said that:

"As the final authority on the interpretation, the Supreme Court must not allow the Constitution to be undermined through misinterpretation at any time, it must inspire the trust and confidence of the people in the Constitution by safeguarding its integrity as the font of legislative wisdom, and it must maintain the independent authority of the Constitution from all other power centers and institutions in the land."[5]

Further, His Majesty reiterated that:

"As implementers and upholders of the law, judges are not only responsible for the credibility of the legal system but for the countries' ability to respond to the changing socio-economic and political realities."[6]

Independence of the Judiciary

The judiciary must be strong and independent to discharge its duties. Political or any other form of interference should not paralyze the legal system as it perverts justice. If the beacon of the judiciary is to remain bright, courts must be above reproach, free from coercion and political influence.The Bhutanese legal system must punish the criminals and protect law-abiding citizens. Humanitarianism and mercy must be distinguished from miscarriage of justice. The rights of the people must be protected and legal means should be followed to render fairness. The Government and the public must have confidence in the judiciary.

Confidence in the judiciary does not require a belief that all judicial decisions are wise, or all judicial behaviors impeccable. If the justice system is based upon values of independence, impartiality, integrity and professionalism, and if, within the limits of ordinary human frailty, the system pursues those values faithfully, people will be satisfied. The judiciary of Bhutan must rise to the challenges and meet those expectations of the people in the administration of justice and enable the rule of law to continue to thrive. There are various aspects of judicial independence.

(a) Institutional independence is guaranteed by the Constitution. It is independent from the other branches of government, executive and parliament.[7]

(b) Personnel independence to maintain independence of judgment, independence of mind to make an independent decision. A court has entrenched judicial independence as a result of having security of tenure[8] where judges cannot be removed because the government does not like the decision. Each judge must make up his/her own mind about how to dispose off the case. Judges should be impartially selected with guarantee of adequate facilities and remuneration.

(c) Section 2 of Article 21 of the Constitution provides jurisdictional monopoly that states *"the judicial authority of Bhutan shall be vested in the Royal Courts of Justice"*[9] and thus *"the judiciary shall have jurisdiction over all issues of a judicial nature";*[10]

5 On 30th November 2009 during the private audience after His abdication.

6 30th November 2009 during the private audience after His abdication.

7 Section 13 Article 1 of the Constitution of Bhutan provides that, "There shall be separation of the Executive, the Legislature and the Judiciary and no encroachment of each other's powers is permissible except to the extent provided for by this Constitution."

8 Section 1 of Article 32 of the Constitution of Bhutan

9 Section 2 of Article 21 of the Constitution of Bhutan and Article 3 of Basic Principles on the Independence of the Judiciary Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan. "3. The Judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law."

10 Article 3 of the Basic Principles on the Independence of the Judiciary endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

(d) Under the Constitution, the state shall make adequate financial provisions for the independent administration of constitutional bodies. It cannot be varied.

(e) The independence of the judiciary is strengthened with the enactment of the Judicial Service Act in 2007. His Majesty Personally formulated the amendment section as under :

"The amendment of this Act by the way of addition, variation or repeal may be effected only when the Commission or the Council submit a motion to Parliament, subject to the requirement that amendments shall not undermine the effectiveness of the Judicial Service." [11]

(f) The act guarantees both institutional and personnel independence. His Majesty said that we have to enact the Judicial Service Act this year for the legal framework.[12]

(g) Further, the court building manifests physical separation of power affirming the principle of independence, cardinal to the doctrine of equal protection as enshrined under the Constitution.

Judicial Reforms

Judicial reforms in Bhutan were initiated in 1991 aiming at developing a dynamic approach in Judicial Administration to ensure uninterrupted and effective functioning of the courts. His Majesty commanded:

"Adjudicate cases expeditiously, fairly and inexpensively."[13]

To execute the Royal command, the reforms included institutional and structural developments, enhancement of professionalism and human resources, introduction of user-friendly technologies (Information and Communication Technology-ICT) making the judicial process efficient and courts accessible.

11 Section 230 of the Judicial Service Act, 2007
12 The 16th National Judicial Conference
13 The 16th National Judicial Conference

His Majesty in order to take justice nearer to the people with a clear delineation of responsibilities between the executive and the judiciary established the first Dungkhag Court in 1978. It was the culmination of the independence of judiciary and the separation of powers from the apex to the lowest court.

Access to Justice

Accessibility was the prominent feature of His Majesty's reign. He met many officials and personally heard grievances of people patiently and personally during His whole reign. The judiciary followed this hallmark paradigm to enhance access to justice.

Access to justice is vital in redressing the grievances of victims of illegal acts such as fraud, theft, sexual or economic exploitation, violence, torture or murder. Justice system can provide remedies, which will minimize or redress the impact or the misfortune. Fair and effective justice system eliminates and deters people from committing further injustice or from taking justice into their own hands through illegal or violent means with impunity. Through unhindered access, victims would be comforted and the offenders be made accountable. The judiciary has made progress in refining a just and efficient legal system, enhancing greater transparency and strengthening the rule of law, while keeping the cost of litigation inexpensive. These reforms have addressed the complaints that litigants had to wait for a long time before their complaints were registered in the court and avoided the allegation that the court officials were indifferent, hostile or arrogant.

Institutional Reforms

Institution building in the judiciary had to review internal structure, administrative and professional support and legal framework with vision and dynamism. His Majesty has introduced many institutional reforms which include, inter alia:

- Introduction of the National Judicial Conference in 1976;
- Appointment of efficient and professional Drangpons;
- Establishment of Dungkhag Courts;
- Introduction of National Legal Course;
- Establishment of a separate Judicial Cadre in 1990;
- Establishment of Post Graduate Diploma in National Law course; and

- Establishment of the Royal Judicial Service Council and National Judicial Commission in 2003 under a Royal Decree.

Procedural Reforms

In order to make justice accessible, prevent undue delays, ensure efficient and effective delivery of justice and to make the courts user-friendly, many procedural reforms were introduced. With the enactment of Civil and Criminal Procedure Code, 2001 under the guidance of His Majesty, the following procedural reforms were made:

- The miscellaneous hearing calendar was further modified and improved;
- The registration procedure and hearing process were simplified and made systematic;
- The adjudication process through the introduction of various management principles were adopted;
- The legal language and Bhutanese terminology were improved;
- Professionalism was strengthened and reduced time consumption with the introduction of Seventy-Six judicial forms;
- Elimination of wasteful effort through single entry;
- Unproductive and unnecessary efforts were avoided;
- Rendering of summary and default judgments were introduced; and
- Inexpensive litigation with nominal court fees was initiated.

Enhancement of Professionalism and Human Resources

Human resource is a national treasure and an institutional necessity. The vitality of any organization depends upon the quality of its human resources. It must be supported by strategic planning, critical analysis and methodological implementation with personal perspectives and national objectives. Therefore, His Majesty bestowed tremendous emphasis on human resource development from 1980. The judiciary was one of the greatest beneficiaries of His patronage. His Majesty enjoined that:

"The quality of judicial service will determine the credibility and the performance of the governance and the stability of the country."[14]

Many candidates were sent abroad to study law since 1991. Further, as a part of continuing legal education, law graduates are being sent abroad for LL.M. Judiciary has sought to enhance professionalism through:

(a) Human resource development in the form of pre-service, in- service and continuing legal education;
(b) Recruiting and training of the bench clerks in relevant subjects; and
(c) Establishment of the Bhutan National Legal Institute with normative function.

Under the Royal Command, the National Legal Course was started for pre-service and in-service training of the Judicial Service Personnel so as to meet the human resource requirements of the Judiciary. The course ensures pre-service and continuing legal education with special emphasis on ethics, morality and traditional values. This training includes courses in Bhutanese laws as well as Buddhist literature. Legal education has been institutionalized under the Judicial Service Act 2007. His Majesty conveyed that:

"There will be the growth of a strong and independent Judiciary cadre with the emergence of a qualified generation of legal professionals in future."[15]

Harnessing Technology

ICT was introduced in the Judiciary in 1991. Technology, specifically the computers has helped in adjudicating and dispensing the cases in a faster, easier and better manner. His Majesty the King commanded that:

"Information Technology should be applied in the judiciary to facilitate the communication between the court systems and further the cause of fairness and due process of law.[16]

The Judiciary is maximizing the use of information technology to expedite the drafting of judgments and furthering the objectives of justice. The computerization of the courts has enabled procedural and managerial reforms in the Judiciary. The use of ICT (applied through the case information system – CIS) must continue to help and guide the judiciary by maximizing the use of data storage and retrieval system, statistical and quantitative methodology for comprehensive analysis, and qualitative results through comparative reports and case monitoring.

14 The 16th National Judicial Conference

15 The 16th National Judicial Conference
16 The 15th Judicial Conference in 2000

Infrastructural Development

The constructions of court buildings are an integral part of the structural reforms. The court building manifests physical separation of power affirming the principle of independence, cardinal to the doctrine of equal protection as enshrined under the Constitution. The construction of court building is an investment and service to justice. It will be recognition of the inherent dignity of the human person and keeping its promise to render justice according to the laws. Therefore, His Majesty said:

"Justice is of paramount importance for the people… and with the unveiling of the Constitution, the Judiciary of Bhutan would have a vital role to play in its implementation, so it is important that the Supreme Court building is constructed as early as possible."[17]

Legislative Reforms

In obedience to His Majesty's command, the Judiciary initiated and drafted various laws including the Civil and Criminal Procedure Code, the Evidence Act, the Judicial Service Act, the Jabmi Act, the Religious Organization Act and the Civil Society Organizations Act.

Penal Reforms

In obedience to His Majesty in 1995, the High Court started drafting the Penal Code of Bhutan, which was enacted in 2004. The Penal Code is the consolidation of provisions from the existing laws dealing with criminal offences and addition of new offences in keeping with the changing time and need. It was intended to reinstate dignity to the victims of crime and increase the possibilities for rehabilitation of offenders. On 20th March 2004, His Majesty, by a Royal Decree abolished capital punishment.

17 The 16th National Judicial Conference.

Jabmi (legal counsel)

The Civil and Criminal Procedure Code permits a person to be represented by a Bhutanese Jabmi of his or her choice. Therefore, His Majesty commanded the High Court to formally train the Jabmis[18] and enact necessary laws enshrining the duties and accountability to discharge their professional service based on Code of Conduct to gain public confidence.

The Jabmis have always been included along with Barmi and Ngotsabs in the traditional right to legal counsel.

Conclusion

His Majesty Jigme Singye Wangchuck is truly a unique person. He is a born leader, creator of institutions, reformer, simple, honest and a true patriot. Without His Majesty's wise and timely interventions, culture would have been destroyed, traditions would have been displaced, nature would have been ravaged, the people would have been fragmented by regionalism and sovereignty would have been compromised. Bhutan would have been melted in the crucible of global imperialism. Indeed, He leads by example and has inspired His nation through His words and deeds. His uncompromising patriotism and burning nationalism united us and inspired us to aspire for national greatness. To know Him is to admire Him.

18 During the Thirteenth Judicial Conference, His Majesty the King commanded the High Court to conduct the Jabmi training. The first training was conducted on 28th February 1999.

The Paradox between Law and Violence

Gyelpo, Court Registrar, Thimphu District Court, Bench I. Pursuing LL.M. (St. Gallan University, Switzerland); B.A.,LL.B. (NALSAR University of Law, Hyderabad, India) & PGDNL, RIM, Thimphu

Abstract

Law is considered to be the very institution able to limit violence and the endless sequence of counter-violence it calls forth. Law thus presents itself as the negation of violence and of the interruption of the infinite circle of violence and of its repetitions. However, in order to be more than dead letter, it needs to be empowered to apply its principles and resolutions, which sometimes entails even physical violence and can go as far as the death sentence. It is the violence that posits law and the violence that preserves it. This paper seeks to analyze the relationship between law and violence that is of highly ambivalent nature, which can be expressed in the following paradox: law cannot be violent while at the same time law requires violence.

1. Bringing Law and Violence into Perspective

Almost all the time, we get visited by the immensity of violence: extralegal or legal. Violence is more than the use of physical force. It can be psychological as well. We hear of murder, rapes, etc., and we read of someone sentenced to death or for life, etc., across the jurisdictions far beyond and within. In the long march of mankind from the cave to the computer, a central role has always been played by the idea of law – the idea that order is necessary and chaos inimical to a just and stable existence.[1]

As law is called on to perform many different functions in the society, it shields us, for instance, from violence to keep us safe and secured. The purpose of the state's legal apparatus is to regulate certain conducts so that there is an order in the society.[2] Unfortunately, law is also an instrument of violence; it is an executioner, a dacoit, a robber. Often created and almost always imposed by the state itself, law is a force that, at best, disrupts specific ways of life and, at worst, destroys them. For Benjamin,[3] "lawmaking is power making, assumption of power, and to that extent an immediate manifestation of violence." Unfortunately, while the other kinds of violence are brought to public discourse and presented as weapons and wounds, and described in most vivid, concrete, and in gory details, law's violence is hardly presented and thus it remains little spoken even if it is lethal.

In order to prevent or reduce violence, law legitimates violence and by legitimating it, law prevents the disappearance of violence.[4] Capital punishment and the whole processes of trial leading to it, which fortunately remains abolished in our country, best demonstrates the relationship between law and violence. Capital punishment becomes the ultimate extreme violence of the law. The law's violence does not limit to capital trials. It is equally applicable to other forms of trials and sentences. Life and time-bound imprisonments are a few examples. Not only the law that authorizes those is violence in itself but

1 Shaw, M. N. (2003). International Law, 5th. *Cambridge University Press.*

2 Breslin, B., & Cavanaugh, K. (2013). Austin Sarat, Robert Cover, and the Problem of Legal Violence. *Quinnipiac L. Rev.,* 31, 523.

3 Benjamin, W. (1996). Critique of violence. *Cambridge: Belknap press,* Vol. 1, 1913-1926.

4 Rivera Ramos, E. (2003). Violence and the law: notes under the influence of an extreme violence. *Yale Law School Legal Scholarship Repository*.

the whole processes of investigations, trials, and legal interpretations vis-à-vis applications, and other discourses surrounding those are but a gory and nasty manifestation of the law's violence, an antagonistic to what law seeks to avoid. The whole operation of the legal system especially criminal justice system demonstrates the complex relationship between the law and violence and helps us appreciate what Robert Cover called the *"field of pain and death"*[5] on which law acts.

2. Distinguishing Ordinary Violence and Law's Violence

It is difficult to understand precisely about how law's violence is different from the ordinary violence. Often the line between the two is drawn through the juxtaposition of the alleged rationality of legal coercion and irrationality of a violence that knows no law.[6] The violence outside the law is seen as unnecessary, irrational, indiscriminate, gruesome, and useless, while law's violence is seen as rational, purposive, and controlled through values, norms and procedures external to violence itself.[7] Violence is thus the illegitimate or unauthorized use of force to effect decisions against the will or desire of others.

Unlike the indiscriminate use of violence, law provides elaborate procedures (an exhaustive trial, an extended process of review and appeal, and even a retrial) to ensure that its violence is visited only on the guilty. It is generally argued that sentences are given to those only who have done something to deserve such sentences, and therefore that the sentence to which one might be subject at the hands of the law is considered by most neither wanton, nor cruel, nor unnecessary but legal and legitimate.

It seems far more than just saying law's violence is legal.A convicted murderers for instance may not be innocent victims. Their murderousness in itself however does not prevent them from being the victims of a full-fledged murder (in reference to capital punishment) acted upon by the state through the force of law that legitimates it. The violence of law certainly has to be different from the violence to which it is opposed and to which it is seen as a response. How this can be different is another question especially when a thoroughly nonviolent legality is inconceivable in a society. And this aspect is treated in Part 4.

3. Identifying Agents of Law's Violence

Robert Cover left a famous line. He said, *"Legal interpretation takes place in a field of pain and death."*[8] Every one of us, directly or at least in a representative capacity, interpret the text of the law. Investigators interpret to investigate, prosecutors to prosecute and judges to decide. Decisions are reached and sentences are given through the interpretation of facts, issues, evidences, etc., within the parameters of laws and ultimately through the interpretation of the law itself. The *"legal interpretation is a practice incomplete without violence – because it depends upon the social practice of violence for its efficacy."*[9] There is no automatic sentence. It is the creation of law and its interpretation and, the interpretation that establishes the legal justification for any kind of sentence is what is interpreted by the agents of state – investigating agencies, the prosecution and ultimately the judiciary in the modern polity. As the words of the law are interpreted and the fact that "words do not bind them,"[10] the agents give meaning to those words which often differs from one another.

The institutions bestowed with interpretive authority do have a capacity to do noticeable damages in the society. In fact, they are the chief agents of law's violence because often it emanates from their actions or inactions.It is the understanding and utterances of one's understanding of a text that somebody loses freedom, property, spouse, children, even life in some jurisdictions. It is "legal interpretive acts" that "signal and occasion the imposition of violence upon others."[11] The judicial utterances following interpretation for instance are performative. When judges speak, people just don't listen, things happen; someone act and someone or something gets acted upon.[12]

5 Cover, R. M. (1986). Violence and the Word. *Yale Law Journal,* 1601-1629.
6 Sarat, A. (1993). Speaking of death: Narratives of violence in capital trials. *Law and Society Review,* 19-58.
7 Ibid
8 See supra note 5
9 Ibid
10 Easterbrook, F. H. (1984). Legal Interpretation and the Power of the Judiciary. *Harv. JL & Pub. Pol'y,* 7, 87
11 See supra note 8
12 Wald, P. M. (1992). Violence under the Law: A Judge's Perspective. *Wald Frank G. Raichle Lecture Series on Law in American Society,* 81.

4. Can Law Even Transcend its Violence?

The law is never innocent of violence. It is so intrinsic that it need not be mentioned. Law's violence must be different and better than the violence to which it is opposed. And it can only be different and better if law's violence is exercising restraint and by ensuring that it is not used where it is unnecessary. Law's violence must be used in measured ways to achieve purposes which can be achieved by 'no other means.' Each use of law's violence must be justified on its own terms. In order to be different and better, law's violence has to meet the test of necessity and, in so doing, live with its own restraint. Law exercising restraints in its violence and through the consideration of alternatives, those that can punish the soul effectively, would indeed transcend its violence. The essence is not about law not punishing but about choosing from the choices of punishments. Whether exercising restraints and consideration of alternatives can even be called 'transcending' law's violence would depend on whom we ask. I however think it is.

On the generality of law's violence, I am as apologetic as I am pessimistic in this. If we are to have a totally non – violent law, we have to propose a new role for law and probably we would have to rename it. It is a utopian idea. But law certainly can reduce the experience of its violence and whether if this is possible will depend on transformation in the wider culture of which law is a constituent part. It depends on the possibility of very deep transformations in social structures.

In nutshell, violence is indispensable feature of law and, at the same time, deeply antagonistic to it, thereby sharing a paradoxical relationship. And certain sentences manifest extreme violence of law that is excessive and unnecessary which has danger of imperiling the legitimacy of law itself. Certain sentences and violence it engenders erode the boundaries between law's violence and the ordinary violence. Therefore, while violence is constitutive of modern law, law must transcend its violence by exercising restraints in its violence and possibly through the consideration of alternatives.

Attorney General of Bhutan

Interview with the Attorney General of Bhutan, Shera Lhendup

Q.We take pride and congratulate you on your appointment as the Attorney General of Bhutan. His Majesty the King has reposed His faith in you in promoting the rule of law, and enhancing the administration of justice in the country. Kindly share your feelings on this important occasion.

I am grateful to both the Bhutan Law Review and its Leadership for this kind opportunity. Being the highest point of recognition in the field of law profession, the post of Attorney General is most coveted by the lawyers world around. In terms of honor, ours is even highly distinguished as the appointment order itself is handed down from the sanctimonious Golden Throne by our beloved Monarch in person. Thus, the honor and confidence reposed in me shall be the culmination point of my lifetime career. Yet, being entrusted as the Kingdom's chief law officer is equally worrisome with recurring pangs in you, if you will measure up to the high trust and confidence reposed in you by the government and the Monarch.

Q.What goals and objectives do you have for the country as the Attorney General of Bhutan?

Once the opportunity befalls on your lap, one can do many good things, if you commit yourself to it, regardless of the tenure length. It is important to ensure that the goals and objectives I strive for confine within the AG's mandates. Anyone can run an established institution, but one believes that the difference is made in leading it. Keeping OAG's doorsteps clean is an uncompromising first in-house culture, while strengthening professionalism of the human resource pool that we have and infusing motivation in them is an ever changing need an AG has to keep up with. Needless to say that keeping up with the technological change means to live the state of art efficiency. Further, it is pertinent for any institution to have proper working procedures. Therefore, once who does what is made systemic within OAG, it is important to establish working correlation with other institutions that we have to deal with on a daily basis, like RBP, ACC, Judiciary, BNLI, and Bar Council. It is also important to simplify our working channels and attain alike understanding, giving equal importance for what each institution does to arrive at the same national goals. To me personally, it is critically essential to maintain consistent sense of balance, in general, in the modus operandi of respective institutional functions.

Q.We know that the Office of the Attorney General is the central prosecution agency in the country. What do we need to do to promote and enhance access to justice for the people?

The belief that justice can only be done by judges in the courts holds true only to the limit of matters adjudicated by courts. There is larger area outside of the courts that actually needs alike treatment because justice is the total cumulative sum of administrative processes that one needs to go through for various purposes. Thus, simplifying administrative process, limiting information requirements to its purpose, iron out duplications of procedural requirements and pre-inform public of who does what within what time limits are the daily litmus test of fairness in a system of governance.

For the similar reasons, OAG is fully geared towards delivering all the evidence to the defense, in a criminal prosecution, right after filing of the suit. Because that process will not only ensure best opportunity for a quality defense but will also substantially cut down on the number of hearings the court has to conduct on a single case. Secondly, there will be greater exertion on the investigation quality requirement as a prosecution merely premised on self-incriminating confessions, which are open to retraction by defense at any stage of court proceedings, does not hold lasting credibility. Conclusive corroborating evidence is thus a must requirement for the OAG to prosecute cases that are primarily based on self confessions made by accused. Assigning blame on the court judgment is thus not a remedy to prosecution failure.

Although the concept of social decriminalization may be too farfetched right now but it is distressful

to patronize criminalizing acts that conventionally have never been crimes. Aggressive awareness campaign and social disapprovals are a better option to discourage certain socially undesirable habits of individuals. There is also lesser need for custodial confinement during investigation unless there is an imminent risk of flight or high chances of evidence tampering.

Q.By the nature of the mandate and in the interest of the justice, the Office of the Attorney General and the Office of the Anti-Corruption Commission have to work in close coordination and understanding to ensure that the guilty does not escape and the innocent does not suffer in criminal prosecutions. In this regard, how do you think this objective can be jointly achieved by these two organizations?

Same importance applies to the Police as well. Our mutual understanding on the importance to grow together is taking deeper roots. We have the common understanding of being not only efficient in our respective functions but legally correct as well. Some isolated media coverage may, at times, project appearances of institutional confrontations which I feel is healthy as well. But what we cannot compromise or undermine, at the end, are that: all institutions are connected to each other, and one cannot succeed by island-territorial claim; only one institution attaining distinguished skills and efficiency does not guarantee the same end results as one is dependent on the output quality of the functionally related other institutions; to promote more win-win working culture within respective domains, each must strive to cultivate a correlating mind set in the outlook of dealing officers and their juniors to leave behind a good track for the institutional continuity; and the fact that all institutions are aligned to converge at the accomplishment of common national goals.

Q.The Attorney General has very important role to play in the legal reforms of the country. In this regards, what are your plans and programmes?

In addition to AG's duty to appear before both the Judiciary and Legislature to present matters concerning law situations in the country, the present government has also appointed AG as the Chairperson of the National Law Review Taskforce. The mandate of the Taskforce is wide enough to do much good in harmonizing laws, ironing out duplications, proposing redundant laws for their revocations, amendments or amalgamation, on both substantive and procedural laws. Thus, the outcome of the Taskforce will largely determine the quality of important law reforms it can propose to the government.

Q.We know that the Office of the Attorney General is only in Thimphu. Do you have any plans to establish regional and other offices in different parts of the country to promote access to justice to the rural masses with responsive and accessible venues?

Based on ever increasing number of cases that OAG needs to represent before Dzongkhag and Dungkhag courts, it is timely to establish few zone based OAG offices that will not only cater effective legal services in those courts but will also be economical in the long run. We also curtail the risks involved for our staff while traveling long distances during extreme winter and rainy seasons.

Q.The tenure of the Attorney General of Bhutan is at the pleasure of the government. In such situation, how do you think that the Office of the Attorney General can fulfill its roles and responsibilities independently of undue influence from the government's agencies?

The Constitutional requirement of the Prime Minister recommending AG candidature to His Majesty seems to project AG's appointment as a political appointment but, with the recent amendments of the OAG Act on the tenure and resignation process of the AG, it has been made clear that AG functions in a most apolitical manner. AG being placed at the central nervous system of all the legal affairs and AG continuing his tenure (even after change in the government) greatly strengthens the already existing inbuilt mechanism of checks and balances in our model of democratic governance. In reality, AG is well secured to function independently without undue political pressure from the Government of the day as one might construe otherwise. From my thus far practical experience in the office, our present government is admiringly sensitive on the legitimacy of its plans and actions. Perhaps, I am lucky that way!

Interview by Tharchean, Judge, Bhutan National Legal Institute
LL.M. (Osgoode Hall law School, York University,Toronto, Canada);
LL.B. (Government Law College, Mumbai, India);
B.A Eco (Hons)(Sherubtse College, Kanglung) & PGDNL, RIM, Thimphu

His Majesty Jigme Singye Wangchuk the Fourth Great: *A True Patriot of Bhutan*

Sangay Choden , X D, School Law Club Member,
Chhukha Higher Secondary School,
Chhukha

The Kingdom of Bhutan is a beautiful, and a land-locked country, blessed by Guru Rinpochhe and Zhabdrung Ngawang Namgyel. Despite its small size, it enjoys peace and harmony under the dynamic leadership and farsighted vision of His Majesty the Druk Gyalpo Jigme Khesar Namgyel Wangchuck. It is a country, ruled by the splendid Monarchs over generations. Above all, His Majesty, the Fourth Druk Gyalpo Jigme Singye Wangchuck- the visionary leader of our nation- is the greatest gift for the people of Bhutan.

The darkness of the people had been dispelled; the sun had shone over the country, smiles in every citizen of our country, and Bhutan has walked a long way, ever since His Majesty, the Fourth Druk Gyalpo was born in the land of Thunder Dragon, "Druk Yuel" on 11th November, 1955. His Majesty proved to be the greatest blessing for the Tsa-Wa-Sum.

Bhutan has achieved tremendous development because of numerous reforms initiated by His Majesty. His Majesty served the Tsa-Wa-Sum, to the best of his abilities and capabilities. He focused on making our country a Gross National Happiness (GNH) nation, where people could live in peace and harmony. He initiated decentralized policy in 1981 at the Dzongkag level by establishing the Dzongkhag Yargye Tshogchhung, and in 1991 at Gewog level, the Gewog Yargye Tshogchhung, for the betterment and development of our nation. He fostered positive foreign relations with other countries around the world. He introduced many schools in and around the country, to educate more citizens. Bhutan also became the member of many international and regional organizations such as UNO, WHO and SAARC to name a few. The accomplishments of His Majesty for this country is immeasurable and beyond words.

Bhutan, though being a tiny Kingdom was once a mystery for the world has now become well-known to all. Above all, His Majesty cared least about his life, in an act of preserving and safeguarding the sovereignty and security of this Kingdom. His Majesty said, "*When the security and sovereignty of our county is under threat, the true sons of Palden Drukpa must step forward and not wait to be called upon to serve the country.*" His Majesty encouraged the youth of our country to take part in various activities as the future of our country lies in the hands of the youth. Our country also transitioned to Constitutional Democratic Monarchy in 2008, under the guidance and leadership of His Majesty.

His Majesty the Fourth Druk Gyalpo is the most precious jewel of Bhutan. He is the greatest gift to Bhutan and her people. He is the father of the people, and the pride of our Kingdom. He demonstrated the real sense of, how a legendary King should be like. He served the Tsa-Wa-Sum and none has ever done thus far in the history of this country. He is a living

example for every living being on this 'Mother Earth.' His contributions are infinite that cannot be measured. He is the Charlemagne of the Palden Drukpa. Bhutan could step out from an era of isolation only because of His Majesty's sole dynamic leadership and farsighted vision. He has lit a candle of happiness, and has sown a seed for realization of personality of every citizen of this country. Our National Flag is fluttering high in the air of peace only because of His Majesty the Great Fourth. He harmonized the life of every single citizen with others, and the environment. He provided a unique identity of who we are to the world.

The Bhutanese Democracy of My Dream

Kinley Wangmo, Intern at Royal Office of Media, Media Studies/English, Sherubtse College, Trashigang

Born in a system, where the form of governance was a Monarchy until the first general elections in 2008, I confess that my understanding of democracy may be rudimentary. However, democracy is also a form of governance, and as I write on "Bhutanese Democracy of my Dream," I will basically write about "Bhutanese Governance of My Dream," and in that, democratic governance.

From few books I read about Democracy, I have understood that Democracy is not new. It has been in existence for hundreds of years, going back to the days of Plato. There have been several waves of democracy, spearheaded by the western countries. The simplest definition I found was "government of the people, by the people, for the people."

Bhutanese Democracy did not just appear from nowhere. In installing the democratic system that we have today, His Majesty the Fourth King began establishing democratic institutions and systems for the political transformation that was to take place inevitably. He was far ahead of the times, and by the time Our Beloved Fourth King abdicated the Throne in 2006, the ground work had already been done. Decentralization, establishment of the Election Commission of Bhutan, Anti-Corruption Commission, and other agencies significant for a vibrant democracy was completed. And of all, the Sacred Constitution was drafted and finalized as His Majesty the King, signed it on July 18, 2008.

According to His Majesty the Fourth King, "Monarchy is not the best form of government because a King is chosen by birth and not by merit. The people of Bhutan must be able to establish a system which works for them."

Similarly, democracy is also not the best form of government. Examples from around the world where political parties put their interests ahead of the people and nation, leading to mass corruption, violence and ultimately becoming failed states are embodiments of the democratic system of government. In the context of Bhutan, the country blossomed under the reigns of the Wangchuck Dynasty. Was Monarchy then not the best form of government?

These are questions that occupied my mind, and as I went on seeking solutions to my questions, I conjured factors that make a good government. And I would call these factors the core ingredients of a vibrant democracy, which forms the "Bhutanese Democracy of my Dream."

At the core is the protagonist of the system, the system's Shepherd, the Captain of the Ship. I am referring to leadership, and the Democracy that I dream of will remain a dream without a Leader who can lead from the frontlines. "The Bhutanese Democracy of My Dream" has at its helm leaders like our beloved Kings, past and present. Just as our King was born to rule, but lives to serve, elected leaders and his team should do the same. As representatives of the people, leaders should reflect the aspirations of the people; they should think beyond winning the elections, but winning the hearts of the people, and taking our nation ahead. They should know that they were elected to serve and thus have responsibilities towards the people, the King and the country. There is no going ahead without good leaders and the democracy of my dream will crumble without a visionary leader.

Peace and happiness are our ultimate aspirations. But peace is fragile, it can be made fragile. And in a democratic system, the odds are more, for political parties can play along religious and ethical grounds leading to polarization within societies. We have seen this happening right after two general elections. "He is DPT. She is PDP." This is not what our Monarchs envisaged when they gifted democracy. We are all Bhutanese first. The rest is immaterial; it should be immaterial. We should remain bonded by the same forces and positive energy that have brought us to this juncture. Yes! During elections, we vote for the party of our choice. Once that deed is completed, all of us should revert back to our former positions – citizens of the country and not party members or supporters. The Democracy that I dream of will consist of people and societies, working together, which no force can divide.

The Judiciary, Legislative and Executive are three arms of the government. Powers are separated, and each of the three has their own functions. The lines are clear and rules of engagement defined. There should be mutual respect between these bodies. Encroachment into the other's domain or territory should be avoided at all costs. Additionally, there should be no enmity or witch-hunting involved as the three perform their functions. There will be no democracy or a democratic nation if the three bodies do not function as they are supposed to do. "My Democracy" will have these three bodies performing their tasks exceptionally well.

The Fourth Estate, or the Media, and Civil Society Organizations (CSOs) are other important components of a democratic government. The Media is a medium of correspondence between the people and leaders. The media is also a watch-dog, ensuring that everyone, especially those in power do not abuse power. In other words, preventing and exposing corruption has become media's main duty across the world. However, the media should also be accountable; the watchdogs should not become MadDogs or Straydogs. The truth should override everything else, and media should not fall into the hands of those who could use it to their own advantage.

Along the same lines, CSOs should be strong, competent and reliable. Just as the media, these non-profit organizations should hold the government to account, apart from performing their main functions.

Just as the four pillars of GNH, I have attempted to project Bhutanese Democracy of my Dream around four broad components. However, there is one Factor, whose significance is immeasurable. Where will we turn to if all or some of the four factors fail? What do we do if our elected leaders become despotic? What will happen to my Dream?

This is where the main factor that I spoke about emerges. The Parliament of Bhutan consists of the National assembly, the National Council and the Druk Gyalpo. We are fortunate that if everything fails or falls, we have the wisdom of the Druk Gyalpo, Our Beloved King to guide and take us ahead. We have something to look up to, unlike other countries. Thus, the Throne is a sacred and need of my Dream, for it is the light that will bring us out of darkness, should we fall in the Dark.

I do not know how much sense I made or if I made sense at all or not. Nonetheless, what I spoke about is my personal belief of what would make "the Bhutanese Democracy of my Dream." I have shared my Dream with you. And to end, it is a Dream I ardently believe in.

Judges and Continuing Judicial Education

Ugyen Jamtsho, Judge, Samdrup Jongkhar District Court.
LL.B. (Punjab University, Chandigarh, India); B.A. Eco (Hons) (Sherubtse College, Kanglung) & PGDNL, RIM, Thimphu

The concept of judicial education is relatively a recent phenomenon, and it used to be considered that any type of training for Judges was a threat to judicial independence. The phrase ' judicial education' evoked questions like "What is there to learn about being a Judge?" "Where have you heard that lawyers, people who were trained and skilled in the law need to be trained to become Judges?" Suffice to state that such an attitude is a recipe for disaster – a fertile ground for intellectual suicide. Simple mediocrity cannot suffice the tall call of the nation to do right and redress the wrong. And today, it is seen as a necessity.

This shift in attitude can be attributed to a number of factors such as the need for specialisation in various fields and subjects within the legal profession. This also means that it is no longer true, if indeed, it ever was, that new appointees to benches came equipped with general skills needed to perform their functions. Besides, even the task of judging is becoming more and more complex with the emergence of new and difficult social and technical issues.

Judges today are working in a climate where their work is being scrutinised more closely than ever before, and persons accessing the courts are not merely seeking a resolution of their disputes but they are also in pursuit of a broader objective of "justice." No society would cohere for very long, if the only justification we offer for requiring people to obey laws and rulings of the courts is becasue they are laws and rulings of the courts. Public confidence depends upon Judges doing their job well and efficiently, while being sensitive to the needs of the communities, whom we serve and communicate to those communities, what we do and why. When I joined the judiciary and was sent for LL.B program, some people asked me, "What training do you need outside the country, when we have our own laws to work with." And some critics gave the full form of LL.B as "Learning Laws of Bhutan."

Judicial education was not a priority, and the assumption was that simply because Judges had been working in the courts for many years, during which, and because of their exposure to many forensic battles, they acquired new skills to make themselves good as judges without any special training, and logically, there was nothing for them to learn. However, practical experience has proved such an attitude to be pure hearsay, as I will demonstrate the reasons why Judges need continuous trainings.

The truth is that no textbook can teach a judge on how to conduct a trial, in a manner which avoids losing control to combative counsel; or to guide a trial into ventilation of what are the truly relevent areas, without descending into the arena of conflict; or how to encourage a just settlement of disputes without creating the impression of bias in any direction; how to deal with rude counsel without appearing to be angry; how to manage the temper of litigants hostile to each other in court; or how to control long-winded or repetitive arguments, and how to write judgments that is clear and concise, and quite importantly, how to control and conduct the proceedings of the court while not compromising its decorum and dignity. Nor is it fair to litigants or to the proper ends of justice, to leave it to each judge to acquire training in his or

her own time in the face of a wealth of accumulated experience which can be passed on through properly prepared courses.

The Judges posses enormous powers which can either make or break others – depending on which side you are. It is even more frightening that we have the power to send accused persons to imprisonment for life, and as per Article 1(10) of the Constitution, we have the power to declare any law which is inconsistent with the Constitution to be invalid to the extent of the inconsistency. Do we not then, as a nation owe to our people to ensure that people who are given the privilege to judge others are trained properly to enble them to discharge their daunting tasks effectively and efficiently. No doubt that any society will only have trust and confidence in the judicial system, if it is staffed by men and women who are professionally sound– hence the need for continuing judicial education.

The Bhutanese society expects the judiciary to be competent, efficient and effective in delivering judicial servies to the people, and they write about it so much in social media, and that competence will include the ability of appreciating persons, experiences and cultures outside our own. It will also include appreciation of things that judges do not know, so that decisions are not taken exclusively from the judges own narrow worldview when a wider perspective would contribute more understanding before decisions are taken. The truth is that we cannot operate in silos. Hence, the need for the judicial education which will offer judges a structured forum where they can learn from one another, and importantly from their more experienced and knowledgeable colleagues, they can discuss and share common problems, debate issues with a view to finding a pragmatic solutions tailored to provide what is needed to strengthen the institutional capacity and administer judicial services.

With the adoption of the Constitution, and due to our seismic shift from Monarchy to Democratic Constitutional Monarchy form of government, the judicial landscape had drastically changed. It has brought about some far reaching changes in the political, social and economic environment in the country. The Judges have to take an oath to remain faithful to the Tsa-Wa-Sum, and to the Constitution. They are required to give effect to the underlying values and ethos of our Constitution, and undergo a radical change of mindset and embrace the new values and mores espoused by the Constitution.

The demands and expectations of people for judiciary have also changed, and has become ever more exacting on it of the quality of services not just of handing of judgments but also as to how cases are conducted. These changes have had a huge impact on the substantive and our jurisprudence in general. Hence, the need for continuing judicial education and training to understand the values and ethos espoused by our Constitution. The judges have to remain attuned to the changing realities of the world in which we live and operate. This demands that we should strive continously to improve ourselves, and the services we render to our people to ensure that we are responsive to the public needs.

The Fundamental Rights enshrined under Article 7 of the Constitution affirms the democratic values of human dignity, equality and freedom. It commands the State, including the judiciary to respect, promote and fulfill the pledge as set out in the Preamble of the Constitution which are to secure the blessings of liberty, to ensure justice and tranquility and to enhance the unity, happiness and well being of the people of Bhutan for all times by administering fearless and fair justice beyond pressure or purchase with social sensitivity. The reality is that for the majority of us this culture of constitutional adjudication and transformative jurisprudence is unknown and the need for judicial education becomes neccesary as the judiciary has to keep pace with these developments to make critical value-laden interpretation and ultimate decisions.

Delivering effective and efficient judcial services, and administration of justice depends essentially on the abilities, capacities and sound knowledge of the judges. It admits of no doubt that for judges to be efficient, they have to know the law, and the reality is that the law, like human being, is never static but dynamic. It grows, changes and adapts to the changing needs, as people respond to their changing lifestyles.

Admittedly, judging even from the number of Acts our Parliament passes and amends every year, it has become humanly impossible to keep pace with, and the only way that our judges can keep pace with the development of the law domestically and internationally is through continuing legal education. It is only through such forum that we can keep pace and remain abrest of developments in the law, and sharpern our legal knowledge and skills to effectively deal with the new challenges brought about by rapid cultural, sociological and technological developments in the country.

Continuing judicial training is at the heart of that preparation, to provide an essential and viable means to build upon the capacity of the judiciary to dispense justice and meet its responsibilities for judicial governance.

Nurturing a culture that prizes training, development and sharing is real, but not necessarily elusive challenge. It takes time, sustained efforts and passionate commitment. Mindsets have to be changed, it is not easy, but it is not impossible either. If we are to have an effective, responsive judiciary, it is crucial to have our judges constantly and effectively engage in the process of learning, lest we become redundant to our own system and people.

The confidence of the people and the commanding height of the judiciary must be restored through continuous judicial trainings, so that if anything goes wrong, people will rest assured saying *'that the law taking its own course and our judges doing their best, everything should be right.'* Justice is too serious business to be left to the judges alone since judges do not inherit the justice system of this country.

A de facto Drangpon: *Perspective from Goshing Wangling (Zhemgang)*

Ugyen Tshering, Sr. Forest Ranger, Information and Communication Services (ICS), Ministry of Agriculture and Forests (MoAF), Thimphu

It was the mid-summer, and Wangling, a small and remote hamlet in Goshing Gewog under Zhemgang Dzongkhag, has transformed into an extraordinarily a beautiful hamlet. The quaint little hamlet has extravagantly turned into lush with tropical vegetation fencing the village, while its interior part was chock-full with different varieties of agricultural crops growing green and fresh. It was possible to literally hear the butterfly wing beat and feel the soft seasonal breeze transporting to some magical land of peace and plenty far away from the crowd of modern settlements.

The vista stretches far beyond the little settlements. One wonders that if Wangling can contain and give so much to its residents, what amazing wealth of floral and faunal beauty could exist between the tall, splendid mountains faraway, and the vast spotless azure sky behind them. Peace that appears to reign so abundantly in this small village, however, was not absolute.

In the far corner of a room of a house that stood right in the middle of the village, was a group of three people, two of whom were engaged in fierce arguments. They were throwing rude remarks at each other, and pointing blank fingers. Both the parties were fiercely arguing and defending their rights, and asserting their points to justify their claims and counter claims. The bone of contention between them was that one party was accusing of other, of his cattle rampaging his maize fields. The former was demanding appropriate compensation from the other, which the latter flatly refused to comply with the demands.

The third one, who was sitting in between the disputants, was seemingly a mediator. He, on his part was making every effort to ensure that equal opportunity was given to both sides to present their arguments. He was also seriously concerned about their submissions, and urged them on the need to submit their arguments and defences in a chronological order. Meanwhile, he also cast upon himself a duty of active listening of the parties, which is one of the attributes of a mediation practices. Upon exhaustive hearing of the contending parties for an hour or two, and summation of their arguments, he delivers a resolution of the dispute. But as is the case with every decision, it was in favour of one party and against the other. However, both the parties seem satisfied, and happy as they considered that it was a fair and impartial decision.

This depicts the scene of a case in the Royal Court of Justice. Whether we like it or not, the litigants and lawsuits are going to surface in the community. Even the settlements of disputes were carried out in a manner similar to the real litigation in a court of law, except the fact that the parties were not represented by lawyers or jabmis of legally qualified and recognized ones. The scenario as depicted here was akin to that of Nangkha Nangdrig, an informal settlement of disputes out of court.

Ap Chodhan, a resident of Goshing Wangling was a most sought person, when it came to the resolution of disputes in the community. He dealt with mostly the civil suits, and refrained from criminal cases. In his lifetime, he had handled a wide range of issues, and various types of disputes. When a dispute arose between the neighbors about the crops being damaged by the other neighbors' cattle, Ap Chodhan was consulted, and sought his interventions for settling the dispute. Likewise, the people would seek his advice with regard to other disputes, such as matrimonial, monetary, land, inheritance, etc.

In far flung villages and communities, Nangkha Nangdrig, played a vital role in settling the disputes at the local level. People were not aware of the existence of the formal system of resolving the disputes. Even few of them who were aware of it, dreaded of long distance of travelling to the Dzongkhag or Dungkhag Court, the monetary costs and other real problems associated in availing the court system of dispute resolution. In view of this, many litigants preferred Ap Chodhan. This was particularly because he was readily available by virtue of being that he is one of the community members. For his legal fees, they could pay him in kind, and it generally constitutes a Palang (a wine container) of Ara (locally made alcohol), dozens of egg, plateful of beaten maize for that matter anything locally available products. This eased them from the burden of having to spend in cash.

Since the Office of the Gup or the Ngangla Gewog Administration Office was located far from the scattered settlements and villages, it made more difficult for people from Wangling to access the judicial system. Even if the people could successfully access the court, the procedural requirements of the court system, to file an application to register a suit in the court, and thereafter to comply with the entire processes of trial with numerous rounds of rebuttal, only made them feel more tortured and lost. Taking the matter to Ap Chodhan, they would simply avoid all these legal hassles.

It was also to do about the trust, confidence and respect that people had developed towards Ap Chodhan over the period of time. He also mastered the skills of Nangkha Nangdrig or mediation through his experiences of dealing various kinds of cases. Even from his side, he also made sincere efforts to keep abreast himself of developments in laws, rules and regulations, as he had to refer them daily in settling the disputes.

His communication skill was also another attribute that helped him gain the trust and confidence of the people in the community, and proclaimed him as the Drangpon of the community. As he was so eloquent in his speech, he could convince his clients, and that as well had raised his standing in the community.

He also made a point that he should never miss government officials' visit to his village. Attending their talks, he had more to gain from it, since their talks would generally be on government plans, policies and other legal matters. By actively participating in such visits and talks, Ap Chodhan got opportunity for himself to enhance and widen his horizon of knowledge on government plans, policies and other issues pertaining to their community. All these afforded him to gain trust and confidence of the people, and they considered him the only capable person for settling the disputes in the community.

However, things had changed over time, both for him, and the community. His age got better of him. He became old, his vision, speech, and hearing had failed him. The community too with the interventions of the development plans and programmes, improved its accessibility to the new Gewog Administration and to dispute resolution services. The village got a separate Gewog known as Goshing, even to which many disputes were referred and settled.

Roads have come to the community, so are many other social infrastructures. This has enhanced their access to other forms of dispute redressel services. Literacy rate of the community has improved and awareness level too. Many are exposed to the world outside their community.

The room which served as a courtroom for Ap Chodhan now bears a deserted look. In the same corner of the room of the house that stands in the middle of the village sits Ap Chodhan counting the beads chanting Mani. He leads a retired and peaceful life, satisfied that he has served his community well.

The Law: A Means of Happiness

Tashi Dema, XI Com, School Law Club Member,
Daga Higher Secondary School, Dagana

Law is a set of rules that govern the way the society acts and behaves. It helps us to create a comfortable and peaceful environment, and it is the main component to unite the country. It neither allows us to go beyond the limits nor it permits us to stay below the limits, as a result of which, it acts as a source of happiness for all. Moreover, it creates a fair and just society without any discrimination on the grounds of race, sex, language, religion, and politics. It gives equal right for the people without differentiating us in any form. To those who act like a villain, it is a hero, and to those who are blind, it is a helping hand. If one always does what is supposed to be done, then for them, the law is like a stranger, but if one tries to do, what is not supposed to be done, then for them, the law is like a guest who visits frequently.

The law is an invisible thing that keeps people happy directly or indirectly by giving them rights, and fulfilling their wishes. Because of the law, we are able to maintain peace and security in our country. Like in the past, during our forefather's time, corporal punishment could not be tolerated. People who committed crimes were given corporal punishments, and other forms of punishments meted out to them were unimaginable.

Our older generations faced lots of hardships and suffered a lot, as the superiors were fighting for powers, and burdening the people with heavy kind taxes and labour contributions. But all of these changed with the coming up of laws, rules and regulations. Finally, the wronged people got justice, and those who plundered them got punished.

The laws are like fences to obstruct wild animals from entering our farmlands. If there is no fence, then wild animals will freely get into the fields and destroy the crops. Similarly, if there are no laws then everybody will do whatever they like, and human beings will become wilder than animals when they are free. Some might even resort to battering each other, and committing murder as well. Here also, laws act as a tool to prevent the ones from committing offences, and jeopardizing the peace and harmony of the society.

In the past, our people also suffered hardships because of discrimination. Some people had to work for others, and were treated as bonded labourers. Their welfare was neglected, and nobody heard their grievances.

Over the period of time, all these conditions discontinued because of the interventions of the law, and the plight of those people improved, and became better off. Hence, both the sections of people could live harmoniously in the same country.

Though Buddhism and Hinduism are the most popular religions in Bhutan, people practice and profess religion of their choice, and they co-exist with each other and live happily under the same roof.
Besides everything, we all know is that, people come from different walks of life; some have good jobs and earn good income, whereas there are others, who don't have a job and have became dependents on others.

As a result, there were times, when the 'haves' had controlled the 'have not; the men had dominated the women; but such things will not happen in this 21st century, where there is strong implemention of the law. Because of the force of law, the distinction between the sections of the people had diminished, and are treated equally, and ensured with equal and effective protection under the law.

I give the whole credit to law, which is the source of happiness for all. I would like to thank the 'Law" for being the great to the greatest, and enemy to the worst.

The Law from the Lens of Youth

Ratu, XII Science, School Law Club Member,
Bajothang Higher Secondary School,
Wangdue Phodrang

Ruler of man's affairs
Holder of pride of humanity
Guardian of liberty and freedom
The seekers of peace shall
Find virtue in your words.
The devotees shall be
Granted immense wisdom since
The secret scriptures lie in those words.

Law is the ruler of coordinated actions on land.
Neither the mighty nor any great warrior can defy its words
Nor any passive minds are denied their rights but
It accelerates the world to
The state of lasting peace,
Where equilibrium between the
Varying souls are established
To its extreme height.

It gives it subjects,
The immense support of truth
Yet at times binds the people,
With venomous pride or
Creates slavery out of same species.
Out lives are all the lame,
Yet completely different.
To drive the world to that
Sky of limitless boundary of freedom
We must strive to create strong laws
Since law cannot make men free but
Men must make the law free.