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Contents

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To Their Majesties, We Offer Our Heartiest Tashi Delek for Gifting the Nation with the Gyalsey.

With immense joy and happiness, as the Nation gathered at Changlimethang stadium to celebrate the long awaited momentous occasion of the 60th Birth Anniversary of His Majesty the Fourth Druk Gyalpo on 11th November 2015, His Majesty the King, in His address to the nation broke out the very important and far reaching news, "I am deeply pleased to announce that Jetsun and I look forward to the birth of our son in the coming Losar….I take this opportunity to offer prayers on this most propitious day, as a father, for my son."

As prophesized and promised, almost after 84 days of the Royal announcement, much to the Nation's excitement and joy, Their Majesties the King and Gyaltsuen, blessed the Land of Thunder Dragon (Druk Yul) with His Royal Highness, The Gyalsey on 5th February 2016 at Lingkana Palace, Thimphu.

The Crown Prince came as a New Year Gift to the Bhutanese family, making it unique New Year celebrations in the history of this great Nation. The birth of His Royal Highness was truly a special and memorial moment for every Bhutanese, both old and young, as the day will be cherished and fondly remembered by all the Bhutanese for all time to come. The auspicious birth of the Gyalsey was also a *Tendrel* for the country and people, as it coincided with the Birth Year of Guru Rinpoche, and the 400 years of Zhabdrung Ngawang Namgyel's advent to our country.

"Since He will carry forward our future, the Prince will be a son to all Bhutanese." True to His Majesty's words, the Nation now rest satisfied and assured of the perpetuation and continuity of the Wangchuck Dynasty, and has secured the future both for the Country and the People.

On this joyous moment of the national pride and happiness, the family of Bhutan National Legal Institute joins the Nation in offering our prayers for good health, happiness and long life of Their Majesties and The Gyalsey.

Tharchean, Judge, Bhutan National Legal Institute, Thimphu.
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 (Royal Institute of Management, Thimphu).

With Zhabdrung Ngawang Namgyel and Ugyen Guru Rinpoche's blessings, and the prayers of an entire Nation, we are blessed with a destined son of the Palden Drukpa. May he grow in strength, wisdom and compassion like his forefathers to lead us in Times of darkness and shine light upon our country like the Glorious Sun.

--HRH Ashi Sonam Dechan Wangchuck
President, Bhutan National Legal Institute

It is very rare in the life of a nation and people to have the most gracious and benevolent presence of the past, present and future Druk Gyalpos.

-- Lyonpo Tshering Wangchuk, Chief Justice of Bhutan

The awaited news was a moment in timeless eternity and triumph over the excruciating anxiety. Birth of the Prince is the renewal of hope, and realization of our aspirations. As we offer our gratitude to the Triple Gem and to our unfailing grace of the Guardian Deities, we respectfully pray that His Royal Highness, The Prince will be successful in his ventures and his inherent goodness and supreme virtues will guide him as he discharges his personal and public duties to Bhutan reflecting the glory of the Wangchuck Dynasty, and greatness of Bhutan. I am truly blessed to live during the birth of our beloved Prince.

-- Justice Sonam Tobgye, Retd Chief Justice

On the joyous occasion of the birth of His Royal Highness The Gyalsey, I would like to offer my heartfelt Tashi Delek to His Majesty the King and Her Majesty the Gyaltsuen. May the Royal birth usher in eternal peace, tranquility and prosperity in the Kingdom. Palden Drukpa Gyalo!

--Kesang Choden, Senior Attorney, Office of the Attorney General

The Royal Birth of our Gyalsey on this Most Historic and Auspicious Year of Guru Rinpoche and Zhabdrung Ngawang Namgyel is a Tendrel for everlasting blessings of The Wangchuck Dynasty and a propitious Losar Gift for the Nation.

--Phuntsho Wangdi, Former Attorney General

I'm very fortunate to witness the Royal birth of the Gyalsey in the august presence of the Fourth Druk Gyalpo and His Majesty. Future of Bhutan is further defined and secured by His Royal Highness The Gyalsey. I love my Monarchs and Pray for the good health of Dungsey.

--Drangpon Pema Wangchuk, Director, Bhutan National Legal Institute

Extremely exhilarated to know this beautiful country will be guided by the blessed Gyalsey.

--Drangpon Duba Drukpa, Dzongkhag Court, Haa

We, the people of Bhutan would like to offer our humble and heartiest Tashi Delek to Their Majesties for rewarding us with the wonderful Gyalsey as the Losar gift. The birth of the Gyalsey has renewed the assurance of greater and perpetual Wangchuck lineage, and also strengthened the trust and confidence of the Bhutanese people to the Wangchuck Gyalzin. May the Wangchuck Gyalzin live for eternity and bring continued peace, happiness and prosperity to the Land of Thunder Dragon.

--Drangpon Chador Phuntsho, Dzongkhag Court, Pemagatshel

It is a momentous occasion for the people of Bhutan to be blessed again with a precious jewel, the Royal Gyalsey. Hearty Congratulations to Their Majesties.

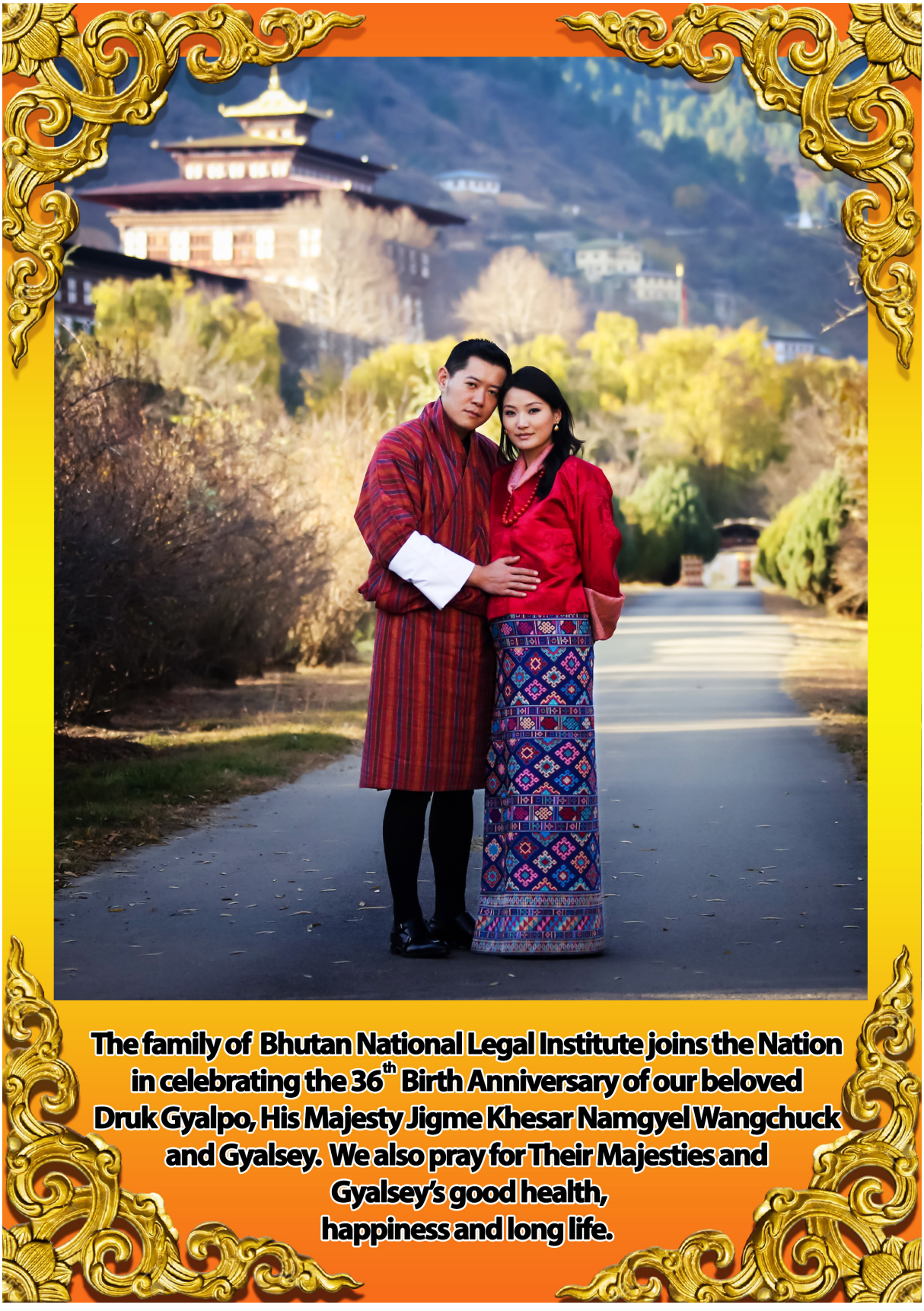
--Thongjay, Registrar, Supreme Court

The happiness of the people in this blissful land of Dragon, knows no bound in welcoming His Royal Highness The Gyalsey.

-- Chimi Dorji Shartsho, Registrar, Supreme Court

Nation's prayers and wishes have been heavenly rewarded. We cannot expect more than this precious gift from Their Majesties. Future is secured. My heartiest congratulations and prayers for Their Majesties and Gyalsey's good health and long life.

-- Sangay Chedup, Legal Officer, Bhutan National Legal Institute


The family of Bhutan National Legal Institute joins the Nation
in celebrating the 36th Birth Anniversary of our beloved
Druk Gyalpo, His Majesty Jigme Khesar Namgyel Wangchuck
and Gyalsey. We also pray for Their Majesties and
Gyalsey's good health,
happiness and long life.

To the People's King, We Offer Our Heartiest Tashi Delek.

Namgay Pelzang, Internal Auditor,
Dzongkhag Administtration,Chhukha,
BBA,Sikkim Manipal University of Health,
Medical & Technological Sciences, India,
PGDFM,RIM, Thimphu.

"February 21, 1980,
Embarked an unprecedented historic era;
The curious awaited day filled with a new smile to the Drukpas,
Yes, the people's King was born in Bhutan!"

Erstwhile to His Kingship, Crown Prince Jigme Khesar Namgyel Wangchuck's contribution to the nation, and world at large was immense! Accompanying his father to the remotest places, he understood the trails which the grass root level faced and always raised voices to see people's happiness. Additionally, his first speech during the 27th UN General Assembly drew greater attention of the world leaders on the Children's welfare issues. Moreover, the Trongsa Penlop title on October 31, 2004 holds a significant position which made alive the culture propounded by Zhabdrung Ngawang Namgyel in 1647. Further, *'The Charming Prince'* attended King Bhumibol Adulyadej's 60th Birth Anniversary thereby promoting the friendly ties with Thailand. To sow and bloom the seed of democratization, he travelled extensively to explain and discuss with people the Draft Constitution of Bhutan. He encouraged the people to come forward as an ambassador to take care and develop their beautiful Dzongkhag.

Aftermath of his enthronement on December 9, 2006, King took office instantly to achieve the unfulfilled dreams of his father and targeted economic development in keeping with Gross National Happiness (GNH) values. Firstly, Democratization was made strong by presiding over Parliament's session. Secondly, Bhutan India-Friendship Treaty was signed in February 2007 which replaced the earlier treaty of 1949. Thirdly, land reforms were initiated with the launching of National Cadastral Resurvey in March 2009 which resolved the excess land issues. A typical example can be Pilot Rehabilitation Project at Khinadang in Pemagatshel. Fourthly, Kidu Services, a tradition of *Dharma King* were provided. Fifthly, an active initiative was taken in the reconstruction of Wangdue Phodrang Dzong which caught fire on 24th June, 2012. Sixthly, initiated Dessung *(Guardian of Peace)* Training Programme in 2011 to build the sense of volunteerism to assist and provide services during emergencies. Seventhly, provides scholarship to promote Education System; and finally, as empowered by the Constitution of Bhutan on amnesty, freed 45 prisoners in 2014 after the amendment of Tobacco Control Act of Bhutan by the Parliament of Bhutan.

November 11, 2015 was an unforgettable memory in the heart of every Bhutanese. That was the day where our past, present and future Kings were present to mark the 60th Birth Anniversary of our Fourth Druk Gyalpo, His Majesty Jigme Singye Wangchuck.

"I am pleased to announce that Jetsun and I look forward to the birth of our son in the coming losar" was not only a special gift on the Fourth King's Birthday but also a new chapter for a glorious future. As a gesture of boundless appreciations, the day was observed by the people across the country with the offerings of butter lamps, prayers, *Zhapten,* hosting prayer flags, renovation of *Chortens,* games, tournaments, singing, dancing and displaying the portraits of their Majesties, inside the offices, and along the high-ways.

Zero Tolerance in Corruption and Working with Integrity was the important message which His Majesty always emphasized. He always reminds the 'words of advices' to those *'unknown citizens'* and a' reminder' to those *'known citizens.'*

Hence, I join the people of Bhutan to express the following lines with utmost respect, loyalty and dedication to His Majesty:

You are not only a charming price to the Thai Citizens,

but a noble heart in the eyes of Bhutanese.

You made the landless grab the soil,

And reap the fruit of self sufficiency.

You made the orphanage flip the pages,

And be a responsible citizen.

You implemented the Dessung programme,

And made the youth to be an Emergency Ambassador.

You are not only a friendly person to the foreigners,

but a frank gentleman in the hearts of every Bhutanese.

You announced the sixth heir to the throne,

And made us filled with boundless joy.

You presented It as a special gift to our fourth king,

And made us feel the compassionate relation between father and son.

You commented that it will be our nation's son,

And made us feel, love and care like our own son.

On this 36th Birth Anniversary,

With a boundless prayers filled with ample butter lamps,

I join the nation in praying for Their Majesties and Gyalsey's

good health and long life.

Bhutan's WTO Decision: Being Penny Wise, Pound Foolish?

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

"With development Bhutan will have to interact with and engage in trade and business with other nations. We must aspire to promote the image of Bhutanese as smart, intelligent, knowledgeable and capable. The Bhutanese must develop expertise in drafting agreements involving international trade and relations. Expertise in drafting international treaties must serve to protect the sovereignty and security of the nation."

- **His Majesty the Druk Gyalpo, 21st Annual Judicial Conference, 3rd July, 2014**

Introduction

The debate as to whether Bhutan should join the World Trade Organization (WTO) has resurfaced again. A workshop on capacity building for WTO accession and trade was held in Thimphu on 23rd November, 2015. During the workshop, the UN Economic and Social Commission for Asia and the Pacific (UNESCAP), Dr. Mia Mikie is reported to have said that "*there is nothing to fear; it is beneficial to join WTO.*"[1] The media reported that the officials who attended the workshop reached a unanimous conclusion that "*joining the WTO would not have much an impact on GNH goals*."[2] The Minister for Economic Affairs is reported to have said that very soon the Ministry would be making a presentation to the Cabinet,[3]and the Government would soon take a decision to whether join the WTO. Will Bhutan join WTO? Are we being Penny wise, but Pound foolish?

Bhutan's application to WTO began in 1999. Bhutan was granted the status of the observer nation in the following year. Ever since Bhutan became an observer nation, much has been written about the value and significance as well as the disadvantages and negative impacts of Bhutan joining the WTO.[4] In the analyses of the benefits and challenges of Bhutan's accession to WTO, various issues such as market access, sovereignty, Special and Deferential Treatment, impact on agricultural and service sector, socio-cultural impact, etc have been examined. But to the author's knowledge, no one has written about or analysed in detail the Dispute Settlement System (DSS) of the WTO. Will a small developing country like Bhutan gain or lose in and from the WTO dispute settlement system, and ultimately from the WTO? Is the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) of the WTO biased against the developing countries?

The WTO's primary mission is to "develop an integrated, more viable and durable multilateral trading system" with a view to "raising standards of living, ensuring full employment, and a large and steadily growing volume of real income."[5]The

1 Tshering Dorji, *Free Trade is Compatible with GNH*, The Kuensel, Dec 3 (2015).

2 Deki Lhazom, *WTO Market Principles Doesn't Have a Bigger Impact on National Goals*, Bhutan Times, Vol. VIII, No. 48, 1-2 (2015).

3 Tshering Dorji, *WTO Quandary expected to End Soon*, The Kuensel, March 26 (2015).

4 *See, e.g.,* Tashi Wangyal, *Rhetoric and Reality: An Assessment of the Possible Impact of WTO on Bhutan,* in THE SPIDER AD THE PIGLET 413 (Karma Ura and Sonam Kinga eds., 2004): Prabhat B. Pankaj, *Linking Trade with Environment in the Context of WTO: Why is this Option Good for Bhutan* in THE SPIDER AND THE PIGLET 466; Mark Mancall, *Bhutan's Quadrilemm: To Join or Not to Join the WTO, That is the Question* GROSS NATIONAL HAPPINESS AND DEVELOPMENT 260 (Karma Ura and Karma Galay eds., 2004); Pawan Kumar Sharma, *Should Bhutan Join WTO: A SWOT Analysis,* International Journal of Multidisciplinary and Academic Research 4 (2012).

5 Marrakesh Agreement Establishing the World Trade Organiza-

WTO promotes trade by reducing trade barriers and offering equal trade terms to all members. An essential element of the WTO's structure is a strong, rule-based dispute settlement system.[6] The DSS of the WTO, which is officially known as the Dispute Settlement Understanding (DSU) was introduced in 1995 and has been hailed as "*the victory of law over politics*" in international trade.[7] It is largely acclaimed as the "*Jewel of the Crown*"[8] and as the backbone of the rules-based multilateral trading system. An indication of the importance and respect assigned to the DSU and the Dispute Settlement Body (DSB) is the moniker of "world trade court" used to describe its function.[9] In fact, the dispute settlement mechanism is said to have worked so well that it is often seen as one of the major achievements in the World Trade Organization.[10]

A burgeoning literature exists on WTO DSU and its impact on the developing countries. One set of scholars maintain that developing countries have increased initiations of dispute proceedings against their trading partners in the WTO and that the WTO system is not biased against developing countries.[11]They consider the formation of the DSU as a huge achievement for developing countries. By providing a single, integrated system for the settlement of disputes arising under the various multilateral trade agreements rather than having them subjected to endless negotiations, diplomacy and, potentially big-power politics, the reformed Dispute Settlement System that emerged from the Uruguay Round has increased predictability in world trade and facilitated an order for fair dispute settlements open to every member. It improved the situation of developing countries by better insulating them against the pressures of power politics.[12] The neutral adversarial dispute settlement system helps limit the scope of the debate to the legal merits, and thus offers increased judicial protection to a developing country against more powerful developed countries.[13]

However, a second set of scholars criticize the WTO Dispute Settlement System for its failure to address the needs of the developing and the least developed countries. These scholars argue that the developing countries are disadvantaged and that the likelihood of developing countries initiating dispute settlement under the WTO has in fact decreased.[14] They point out that even with the movement to an adjudicatory-based system and its emphasis on impartial and unbiased dispute settlement, because of the difference in resources between developed and developing countries, there is still a widespread sentiment that the fight is not fair. They argue that the developing countries have hardly made adequate use of the system and that the overall participation by developing countries has been very low. In a recent study conducted for World Bank, Horn and Mavroidis made the following observation of the developing country participation in the WTO dispute settlement system: "A first observation, and there is no surprise here, is the almost complete absence of the large LDC group. One could add to this group a large number of

tion, pmbl., Apr. 15, 1994, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 4 (1999) (hereinafter WTO Agreement).

6 *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 354 (1999) (hereinafter DSU).

7 Don Moon, *Equality and Inequality in the WTO Dispute Settlement (DS) System: Analysis of the GATT/WTO Dispute Data*, 32 International Interactions 201 (2006).

8 John Ragosta et al., *WTO Dispute Settlement: The System is Flawed and Must be Fixed,* 37 Int'l Law 697 (2003).

9 *See* discussion in John A. Ragosta, *Unmasking the WTO-Access to the DSB System: Can the WTO DSB Live Up to the Moniker "World Court"?,* 31 Law & Pol'y Int'l Bus. 739 (2000).

10 Donald McRae, *What is the Future of WTO Dispute Settlement?*, 7 J. Int'l Econ. L. 3, 4 (2004).

11 *See, e.g.,* Robert E. Hudec, ESSAYS ON THE NATURE OF INTERNATIONAL TRADE LAW (1999); Pretty Elizabeth Kuruvila, *Developing Countries and the GATT/WTO Dispute Settlement Mechanism,* 31 (6) Journal of World Trade 171 (1997); Peter Holmes, Jim Rollo and Alasdair Young, *Emerging Trends in WTO Dispute Settlement: Back to the GATT?,* 3133 World Bank Policy Research Working Paper (2003).

12 *See, e.g.,* Constantine Michalopoulos, DEVELOPING COUNTRIES IN THE WTO 34 (2001); Thaddeus McBride, *Rejuvenating the WTO: Why the U.S Must Assist the Developing Countries in Trade Disputes,* 11 Int'l Legal Persp. 65, 81 (1999)

13 Michapoloulos, DEVELOPING COUNTRIES IN THE WTO, *Id.*

14 Palitha T.B. Kohona, *Dispute Resolution Under the World Trade Organization--An Overview*, 17 J. World Trade 23 (1994); Moonhawk Kim, *Costly Procedures: Divergent Effects of Legalization in the GATT/WTO Dispute Settlement Procedures,* 52 International Studies Quarterly 657 (2008); Asoke Mukerji, *Developing Countries and the WTO: Issues of Implementation,* 34 (6) Journal of World Trade 33 (2000); Jose Luis Perez, *Developing Countries in the WTO Dispute Settlement Procedures: Involving their Participation,* 35 (4) Journal of World Trade 483 (2001); M.A Taslim, *Dispute Settlement in the WTO and the Least Developed Countries: The Case of India's Anti-Dumping Duties on Lead Acid Battery Import from Bangladesh,* ICTSD Working Paper (2006); Henrik Horn and Petros C. Mavroidis, *The WTO Dispute Settlement System 1995-2006: Some Descriptive Statistics*, (2008) available at http://siteresources.worldbank.org/INTRES/Resources/469232_1107449512766/DescriptiveStatistics_031408.pdf; Kim Van der Bordght, *The Review of the WTO Understanding on Dispute Settlement: Some Reflections on the Current Debate,* 14 Am. U. Int'l. Rev. 1223 (1999); Marc Busch & Eric Reinhardt, *Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes*, 24 Fordham Int'l L. J. 158 (2000); Marc Busch and Eric Reinhardt, *Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement*, 37: 4 *Journal of World Trade* 719 (2003).

countries in DEV that have never been active neither as participants in disputes, nor in the adjudication process. It is therefore hard to escape the conclusion that a large fraction of the WTO Membership is passive as it comes to the WTO DS system."[15]Some observers have used this 'absences from the game' to criticize the whole WTO as a 'rich-country product' not in the interest of developing countries.

Today, the relationship between the WTO Dispute Settlement System and developing countries continue to receive much attention in the literature and remains a much debated topic. Therefore, the WTO Dispute Settlement System provides an excellent analytical framework to study the place of a small developing country like Bhutan in the world trading system and their relationships with developed countries. The study has become more relevant for Bhutan who is on the verge of deciding whether to join or not join the WTO.

This article will analyze the WTO Dispute Settlement System from the perspective of a small developing country like Bhutan, and examine whether the developing countries have an advantageous position in the WTO Dispute Settlement System, and whether the System is biased against the developing countries as claimed by many observers, and whether Bhutan is being Penny wise, but Pound foolish, if the Government decides to join the WTO?

Overview of the WTO Dispute Settlement Mechanism

The dispute settlement mechanism of the General Agreement on Tariffs and Trade was based on Articles XXII and XXIII of GATT 1947. Article XXII required GATT member states to use consultation to settle their disputes, and if this was unsuccessful, it empowered the whole membership as an organ to consult with the disputing parties in order to end the dispute. Article XXIII specified what constituted a dispute and how such matters should be raised. GATT's dispute settlement system had some systematic shortcomings.[16]For example, there were several opportunities for the parties in a trade dispute 'to block the implementation of dispute settlement procedures, including the formation of a panel, the adoption of a panel report, or agreement as to rights to retaliate'.[17] Dispute settlement under the GATT was based on the consensus principle.[18] The losing defendants were able to veto decisions they found to be unacceptable. There were no deadlines for the settlement process, and the "disputes could drag on for years and parties were free to engage in "forum shopping".[19] The binding nature of the rulings could be disputed and their quality was often considered inadequate. Finally, eight of the GATT's nine 'Codes' had their own system of dispute settlement. Therefore, efforts were made to bring about improvements in the WTO's dispute settlement mechanism.

During the Uruguay Round, the idea of a formal system, which could also deal with disputes in new areas such as trade in services and intellectual property rights, was tabled by the US. In part, because of some positive experience with cases, it had initiated under the GATT and also because of its aim of limiting US unilateralism, the EU abandoned its opposition to a legalized system.[20] Subsequently, a formalized dispute settlement system became a realistic outcome, and at the conclusion of the Uruguay Round, the Dispute Settlement System was officially established in 1995 with the declared objective of ensuring that WTO rules would be observed and applied.

Although the cornerstone of the WTO dispute settlement mechanism remains, Articles XII and XIII of the GATT, the DSU brought about a substantial change in the working of the system.[21]The DSU changed the nature of the dispute settlement process from a diplomatic to a legalized process, and from a power-based to a rule-based procedure.[22] The DSU introduced a series of features to deal with the problems of the past, and established detailed procedures to be adopted, stipulated strict timelines for the progress of a dispute through the process, set out an automatic process that can be initiated only by the consensus of WTO members, and established an appeal process.[23]The key feature of the DSU is that,

15 Horn and Mavroidis, *The WTO Dispute Settlement System 1995-2006: Some Descriptive Statistics*, *supra* note 9 at 33.

16 *See, e.g.,* John Howard Jackson, THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE (1998).

17 John Whalley & Colleen Hamilton, THE TRADING SYSTEM AFTER THE URUGUAY ROUND 129 (1996).

18 Bernard M. Hoekman and Michel M. Kostechi, THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: WTO AND BEYOND 74 (2nd ed. 2001).

19 Susan K. Sell, *Big Business and the New Trade Agreements: The Future of the WTO*, *in* POLITICAL ECONOMY AND THE CHANGING GLOBAL ORDER 180, 183 (Richard Stubbs and Geoffrey R.D. Underhill eds., 2000).

20 *Id*.

21 Valentina Delich, *Developing Countries and the WTO Dispute Settlement System*, *in* DEVELOPMENT, TRADE, AND THE WTO: A HANDBOOK 71 (Bernard Hoekman *et al*. eds., (2002).

22 *See generally* M.B Rao & Manjula Guru, WTO DISPUTE SETTLEMENT AND DEVELOPING COUNTRIES (2004)*;* Judith Hippler Bello, *The WTO Dispute Settlement Understanding: Less is More,* 90 Am. J. Int'l L. 416 (1996); Thomas Dillon Jr., *The World Trade Organization: A New Legal Order for World Trade?,* 16 Mich. J. Int'l L. 349 (1995) (discussing the evolution of the WTO and its dispute settlement mechanism).

23 Palitha T.B. Kohona, *Dispute Resolution Under the World Trade*

it is an exclusive and mandatory system of dispute resolution. And, unlike the other covered agreements, the provisions of the DSU are horizontal in nature because they can be invoked to settle disputes arising under any of the covered agreements.[24] Any WTO member can complain about the conduct of any other member through a formalized process that includes consultations, a panel decision, an appeal, adoption, and implementation.[25]

(i) Consultations

Under the WTO dispute settlement system, a member may ask for consultations with another WTO member if the complaining member believes that the other member has violated a WTO agreement or otherwise nullified or impaired benefits accruing to it, and the offending member must reply within ten days of receiving the request.[26]The request for consultations are to be made in writing but are to be confidential.[27] The parties are required to enter into consultations "in good faith" within thirty days after the request is received.[28] The parties have between thirty and sixty days to settle their differences by themselves.[29] If consultations fail to resolve the dispute within 60 days of the request (in cases of urgency, a panel may be requested after 20 days), the complaining WTO member may request the WTO DSB to establish a panel to rule on the dispute.[30] The DSB oversees the dispute resolution process, thus 'effectively ending the forum shopping option.'[31]

(ii) The Panel Process

The complaining member must submit in writing the request to establish a panel, which must indicate whether consultations were held, identify the specific measures at issue, and provide a brief summary of the legal basis of the complaint.[32] The DSU provides standard terms of reference to be used by the panel unless the complaining member requests otherwise and provides the proposed text for special terms of reference.[33] The DSB must consider the request at the latest meeting held after the request is submitted and establish a panel, unless the DSB decides by consensus not to do so.[34]The DSB sets as a goal that the final report should be issued to the parties within six months of the panel's composition, and in cases that require urgent consideration, including cases involving perishable goods, the final report of the panel should be produced within three months.[35] At the latest, the report should be circulated to all members within nine months of the panel's establishment.[36] Davey notes that occasionally, the panel's recourse to outside experts, "where there were translation delays, and where the cases were extraordinarily complex", has brought about some occasional delay in the process.[37]

The final report should be referred to the DSB for formal adoption within 60 days after its circulation to the WTO members, unless there is a consensus not to adopt the report.[38]Any one of the disputing parties may notify the DSB of its intent to appeal.[39]

(iii) The Appeal

The DSU creates a standing Appellate Body to hear appeals from panel cases.[40] The WTO's Appellate Body has been created to counterbalance the removal of the blocking option for losing parties and can be asked to consider challenges regarding the legal interpretations developed by a panel.[41] An appeal is limited to issues of law covered in the panel report and legal interpretations developed by the panel.[42]As a general rule, appellate proceedings are not to exceed sixty days from the date a party notifies the DSB of its intent to appeal.[43]At its request, the Appellate Body may request up to ninety days.[44] An Appellate Body report must be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus to reject the report.[45] Therefore, the winning party may veto any attempt by other nations to reject a particular decision.[46]

Organization--An Overview, 17 J. World Trade 23, 24 (1994).
24 South Center, *The WTO Dispute Settlement System: Issues to Consider in the DSU Negotiations,* South Center Trade Analysis Series 6 (2005) available at http://www.southcentre.org.
25 Andrew T. Guzman & Beth A. Simmons, *International Dispute Resolution: Power Plays and Capacity Constraints: The Selection of Defendants in World Trade Organization Disputes,* 34 J. Legal Stud. *557*, 558 (2005).
26 DSU, *supra* note 6, art. 4.3.
27 *Id.* art 4.6.
28 *Id.* art. 4.3.
29 *Id*. art. 4.7.
30 *Id.* art. 4.7.
31 Muhammad Ijaz Latif, *The WTO Dispute Settlement System: Its Analysis and Implications for Pakistan,* 42 Journal of Asian and African Studies 447, 449 (2007).
32 DSU, *supra* note 6, art. 6.2.
33 *Id.* art. 6.2, 7.
34 *Id*. art. 6.1.
35 *Id*. art. 12.8.
36 *Id*. art.12.9
37 William J. Davey, *The WTO Dispute Settlement System*, *in* TRADE, ENVIRONMENT, AND THE MILLENNIUM 126 (Gary P. Sampson and W. Bradnee Chambers eds., 2000).
38 DSU, *supra* note 6, art. 16.4
39 *Id.* art. 16.4.
40 *Id*. art. 17.1.
41 Hoekman and Kostechi, *supra* note 18, at 78.
42 DSU, *supra* note 6, art. 17.6.
43 *Id.* art. 17.5.
44 *Id.*
45 *Id.* art. 17.14.
46 Sell, *supra* note 19, at 180.

(iv) Implementation

The DSB is also empowered to monitor compliance to make sure that defendants carry out their obligations within a reasonable period of time, and this surveillance stage is the final phase of the WTO dispute settlement process. Once a panel or the Appellate Body concludes that a measure is inconsistent with a WTO commitment it must "recommend that the Member bring the measure into conformity" with its obligations.[47] For this the member concerned is to be given reasonable time to implement the recommendations and is required to inform the DSB of its intentions in relation to the implementation of the recommendations.[48] If unable to agree on a "reasonable" timeframe for implementation, the members can request the assistance of the DSB which will appoint an arbitrator.[49]The DSB is charged with keeping "under surveillance the implementation of the adopted recommendations," and an unresolved matter can be placed on the agenda of a DSB meeting by any member and kept there until addressed. [50]

If the offending member fails to comply with the recommendation within the agreed time frame, the injured member is allowed to seek compensation or temporarily suspend its concessions to the offending member.[51] The parties must first enter into negotiations to determine mutually-acceptable compensation.[52] If unable to agree, within twenty days after the reasonable time period expires, the injured member is authorized to request permission from the DSB to suspend concessions.[53] While implementation timeframes will naturally vary, time remains imperative to ensure that a measure that deprives a member of a trade concession does minimal damage to the injured party's economy. Nevertheless, a determined opponent can use the mere passage of time to undermine the other party's position. This is very much true when the disputing parties are of disparate political and economic weight.

Challenges Faced by the Developing Countries

The changes to the WTO dispute settlement process enshrined in DSU introduced into the area of multilateral trade a legally-binding method of dispute resolution.[54]The DSU created a single integrated dispute settlement system, greatly strengthened its judicial nature from its previous diplomatic days, and solidified its status as an objective, mandatory, rule-oriented system.[55]

In spite of its widely recognized efficacy, there are inherent problems with the DSU and the WTO dispute settlement system has not been favourable to the developing countries. Some go to the extent of saying that the WTO dispute settlement process is conceptually and institutionally flawed.[56]

The very nature of the WTO Agreements makes the prospect of binding dispute resolution very dubious. Most of the negotiated provisions themselves are ambiguous, which gives the arbitrator wide discretionary power to give his own interpretation. In the domestic context, such judicial discretion or judge made law is kept under check through appeal system, legislative oversight and amendment, reprimand and impeachment of judges, democratic process of selection of judges, etc. The courts make law under strict, well-developed, and fundamental procedural rules, which protect the interests of the parties and the citizenry.

However, in the WTO context, there are no such system of checks and balance. Panels and the Appellate Body lack the procedural and jurisdictional controls that constrain judicial bodies. Panellists are appointed *ad hoc*, and are often linked to Member nations or the Office of the Secretariat, and active lobbying by foreign diplomats behind closed doors is also common at the WTO.

There is also the issue of sovereignty. International agreements involve the giving up of some sovereignty in return for the benefits of the agreement. In the domestic context, citizens give up sovereignty to participate in the democratic society. In the WTO context, countries give up sovereignty without knowing precisely what, and how the WTO would benefit. Ragosta notes that "with unclear codes and binding dispute settlement, the sacrifice of sovereignty was substantially open-ended."[57]

In addition to the above, some of the specific problems faced by the developing countries are:

47 DSU, *supra* note 6, art. 19.1.
48 *Id*. art. 21.3.
49 *Id.*
50 DSU, *supra* note 6, art. 21.6.
51 *Id.* art. 22.1.
52 *Id.* art. 22.2.
53 *Id.*
54 *See, e.g*., Palitha T.B. Kohona, *Dispute Resolution Under the World Trade Organization--An Overview*, 17 J. World Trade 23, 24 (1994).
55 Freidl Weiss, *Improving WTO Procedural Law: Problems and Lessons from the Practice of Other International Courts and Tribunals*, *in* IMPROVING WTO DISPUTE SETTLEMENT PROCEDURE: ISSUES AND LESSONS FROM THE PRACTICE OF OTHER INTERNATIONAL COURTS AND TRIBUNALS 23 (Freidl Weiss ed., 2000).
56 Ragosta, *Supra* note 9, at 743.
57 *Id.*

(i) Lack of Economic Power and Political Pressure

Developing countries and their supporters often claim that "the existence of disparate economic power may deter some developing countries from bringing complaints against major trading nations."[58] In spite of the move from negotiation-based dispute settlement to adjudication-based dispute-settlement, it still requires significant "political will" and "political courage" for a developing country to bring a case "because the power of developed countries to dissuade developing countries from requesting WTO consultations remains great."[59]

The consultation phase of the dispute settlement process involves a significant percentage of WTO complaints. It is this consultation phase which triggers the greatest amount of market access concessions. However, Busch and Reinhardt found that developing countries have been less able to settle complaints advantageously during the consultation phase.[60]Their analysis shows that developed country complainants in WTO cases saw defendants fully liberalize disputed measures 74 percent of the time, compared to only 50 percent for developing country complainants.[61] The developing countries are less able to convince a defendant of the eventual success of their case at any early stage, and that a defendant may more likely drag out a legal case against a developing country plaintiff in order to impose legal costs that it is better-positioned to absorb. Busch and Reinhardt maintain that "*the WTO has exaggerated the gap between developed and developing complainants with respect to their ability to get defendants to liberalize disputed policies. In short, wealthy complainants have become significantly more likely to secure their desired outcomes under the WTO, but poorer complainants have not.*"[62]

There is also evidence to suggest that developed countries use their political and economic muscle during the consultation phase to dissuade developing countries from even initiating consultation requests.[63] A classic example is the case brought by Pakistan (*United States-Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*)[64]against the United States. The case underscores the extent to which the unique circumstances facing a developing country nevertheless can deprive it of the true benefit of WTO rulings in its favor. In this case, United States alleges that the Pakistani exports were causing verifiable harm to its textile sector. The phase-out of the Multi-Fibre Agreement (MFA), which had placed quota restraints on textile and clothing exports from developing countries, had encouraged Pakistan to expand its manufacturing capacity and between 1995 and 1998, it had become the second-largest exporter of combed cotton yarn to the United States.[65] The legal challenge employed by the United States was the transitional safeguard measures sanctioned under Article 6 of the Agreement on Textiles and Clothing (ATC).[66]After the failure of bilateral consultations, on March 5, 1999, the United States notified the WTO's Textile Monitoring Body (TMB) that it had decided to impose quota restraints on Pakistani imports for three years.[67]

Pakistan had to first make its case against the U.S. action before the TMB, where the TMB ruled in Pakistan's favor and recommended the immediate lifting of the quota restrictions. The United States appealed the decision. The appeal was rejected, and the TMB panel reiterated its recommendation that the United States lift the quota restraints.[68]After the United States refused to comply with the recommendation of the TMB review, the only course of action left for Pakistan was to take the case to the DSB. However, it took Pakistan almost one year to marshal the resources to bring the case.[69] Contributing to the delay in filing the case before the WTO was bilateral consultations between the United States and Pakistan held in November 1999 and then in January 2000. However, the consultations between the United States and Pakistan ended without mutual agreement.[70]The Pakistani consultant representing the government during these proceedings observed

58 T.N. Srinivasan, *Developing Countries & the Multilateral Trading System: From the GATT to the Uruguay Round & the Future* 56, 72 (1998).

59 C. Christopher Parlin, *WTO Dispute Settlement: Are Sufficient Resources Being Devoted to Enable the System to Function Effectively?,* 32 Int'l Law. 863, 868 (1998).

60 Busch & Reinhardt, *Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes*, *supra* note 14, at 162.

61 Busch and Reinhardt, *Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement*, *supra* note 14, at 725.

62 *Id.* at 728-729.

63 Parlin, *supra* note 59, at 868.

64 Appellate Body Report, *United States--Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R (Oct. 8, 2001).

65 Turab Hussain, *Victory in Principle, Pakistan's Dispute Settlement Case on Combed Cotton Yarn Exports to the United States*, available at http:// www.wto.org/english/res_e/booksp_e/casestudies_e/case34_e.htm (last visited April 16, 2009) (discussing United States--Transitional Safeguard Measures on Combed Cotton Yarn From Pakistan, WT/DS192 (Apr. 3, 2000)).

66 *Id.*

67 *Id.*

68 *Id.*

69 *Id.*

70 Panel Report, United States--Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan, 2.4, WT/DS192/R (May 31, 2001).

that the consultations were more likely a delaying tactic employed by the United States. The quota restraints had been imposed for the maximum three years allowable under the ATC, and he theorized, in retrospect, that the United States was only buying time to cover as much of this period as possible.[71]

Many scholars have also noted the weakness of the consultative mechanism itself, which is only as effective as the parties' willingness to negotiate in good faith.[72] As Van der Borght notes, "not all WTO Members appear to attach the same importance to this commitment," but rather "abuse the flexibility inherent in the system to avoid real consultations."[73]

The power politics or power disparity is said to have significant effect on determining procedural and substantive outcomes of the WTO legal decisions even at Appellate Body level. In a case study of the Appellate Body of the WTO, Garrett and Smith found the "the Appellate Body to be reluctant to make strong and unequivocal adverse rulings against powerful WTO members"[74] Because of the risk of blatant noncompliance, WTO judges are more likely to make conciliatory (explicit or implicit) decisions as the defendant's political and economic clout increases.

(ii) Lack of Transparency

One of the principal deficiencies of the DSU is the lack of transparency. Numerous proposals to increase transparency such as opening the dispute settlement hearings to the general public, requiring parties to make their submissions public, etc have not been successful. In August 2002, the United States emphasized the need for greater transparency in dispute settlement as a priority in the negotiations concerning reform of WTO dispute settlement rules and procedures.[75] The United States noted that other international fora such as International Court of Justice, the International Tribunal for the Law of the Sea, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the European Court of Human Rights, etc, are each open to the public.[76] There is no reason for WTO disputes, the outcomes of which significantly impact civil society, to be any different.

(iii) Bureaucratic Hurdles

The developing countries also face considerable internal bureaucratic hurdles such as the tradition of foreign affairs ministries assuming the lead role on trade dispute in which they have limited background. The developing countries have traditionally tended to assign a lower importance to trade matters within governmental hierarchies.[77] While the United States Trade Representative (USTR) and the EC Trade Commissioner hold cabinet level positions, most developing countries do not assign a cabinet position for international trade matters. As a result, many developing countries still have a single diplomatic mission for handling matters before the WTO, and the United Nations (UN) in Geneva. The mission is led by an official from the foreign affairs ministry, since, generally, individuals from that ministry alone may hold the rank of ambassador. Even where a country has created a separate "head of mission" for WTO matters from a department that specializes in trade, such individual generally holds a lower level position in the government hierarchy.

(iv) Lack of Legal Capacity and Financial Resources

One of the fundamental problems faced by the developing countries is the lack of financial resources or the legal expertise to operate as effectively as developed countries.[78] Hudec writes that, to be effective, WTO panel proceedings require full development of the legal side of the case, including a good foundation in the submission of the parties and careful preparation of the materials.[79] Way back in 1996, a joint report by UNCTAD/WTO cited this problem as part of the bigger problem related to the implementation of WTO Agreements, owing to the weakness in the human and physical infrastructure and institutions related to trade in so many developing countries.[80] The poor infrastructure and lack of resources are cited as key impediments to the capacity of developing country members to benefit from international trade and technical assistance support by developed countries and international institutions.

71 Hussain, *supra* note 65.
72 Bordght, *supra* note 14, at 1233.
73 *Id.*
74 Geoffrey Garrett & James McCall Smith, *The Politics of WTO Dispute Settlement*, A paper presented at the 1999 annual meeting of the American Political Science Association, Washington, D.C. 44 (1999)
75 U.S. Paper on Transparency Submitted for WTO Dispute Settlement Negotiations (Aug. 9, 2002), *at* http://www.ustr.gov/enforcement/dispute.shtml.
76 *Id.*
77 *See*, Gregory C. Shaffer, DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION (2003).
78 Parlin, *supra* note 59.
79 Robert Hudec, *Broadening the Scope of Remedies in WTO Dispute Settlement*, *in* IMPROVING WTO DISPUTE SETTLEMENT PROCEDURES: ISSUES AND LESSONS FROM THE PRACTICE OF OTHER INTERNATIONAL COURTS AND TRIBUNALS 369 (Friedl Weiss & Jochem Wiers eds., 2000).
80 *Strengthening the Participation of Developing Countries in World Trade and the Multilateral System* TD/375/Rev.1, (UNCTAD/WTO, Geneva, 1996).

In a recent comprehensive study conducted by Bush, Reinhardt and Shaffer to see whether legal capacity – the institutional resources to prepare and prosecute disputes – mattered in the WTO, they found that legal capacity played a very powerful role in predicting whether a member is able to bring suit against adverse trade actions by its partners.[81] They concluded that "*even modest gains in legal capacity can result in greater use of WTO dispute settlement by poorer complainants and greater deterrence of protectionist procedures against their exports. In our view, legal capacity is thus a crucial clue in explaining why developing countries file WTO complaints less frequently then developed countries do when confronted with potentially challengeable protectionist measures by their partners."*[82]

Most developing countries lack the requisite expertise in both substantive WTO law and in DSU procedure to advocate a claim effectively before a panel or appellate body.[83] They do not have the personnel with the required knowledge and experience in either foreign trade or trade law.[84] While developed countries such as United States and EU has between 20 and 30 WTO specialist lawyers, and a large number of other "in-house" WTO specialists, developing country such as St. Lucia, which can reasonably foresee only one WTO case every few years (in the event, *Bananas*), does not even have a mission in Geneva and could not reasonably hire as permanent staff a large core of WTO specialists.[85] Developing countries also typically lack the ability to gather the extensive information and documentation that must be gathered to support their legal arguments.[86]

Most developing countries complain about their inability to bear the high costs of WTO litigation. Even for a simple case, the cost of litigation in front of the WTO, even by conservative estimates, is very high. In some estimations, private law firms can charge anywhere from $250 to $1,000 per hour in fees, leading to total fees anywhere between $100,000 to over $1,000,000.[87] The ACWL time budget contemplates that a complicated case (including recourse to Article 21.3, 21.5, and 22.6 proceedings) requires a maximum of 1,452 hours. The prices only increase for complex cases, such as *Japan - Photographic Film*, where legal fees charged to Kodak and Fuji were reportedly in excess of 10 million dollars.

In addition, the work of the panels has become increasingly technical and legal arguments must be supported by data.[88] In a complex agricultural subsidies case that went before both the panel and the Appellate Body, a Washington D.C based law found it necessary to hire an economic expert. Given the complicated factual nature of the case, the lawyers needed the expert to conduct economic modeling and projections. For his services, the expert charged USD $250,000 in fees. With regular legal fees in this case in excess of a million dollars, the client obviously paid a hefty bill. As Shaffer maintains, "*the WTO Appellate Body and WTO panels employ a highly contextualized, case-based approach, based on jurisprudence where individual case opinions average in the hundreds of pages. As a consequence, the demand on lawyer time, and thus the cost of specialized legal expertise, has skyrocketed*."[89]Moreover, "*the jurisprudence of the WTO grows with each passing year, making it necessary to read numerous book-length panel and Appellate Body decision*."[90] And in the absence of the funds and the systems to collect the data needed to substantiate a complaint, or to defend against one makes it very difficult for the developing countries, especially in the face of very technical complaints by a developed country.[91]

Some members of developing country delegations to the WTO have expressed the view that, more than any other factor, the WTO dispute settlement system is about money, and "whoever has the most wins."[92]

81 *See* Marc L. Busch, Eric Reinhardt and Gregory Shaffer, *Does Legal Capacity Matter? Explaining Dispute Initiation and Anti-dumping Actions in the WTO,* 4 ICSTD Working Paper (2008).
82 *Id.* at 14.
83 Bordght, *supra* note 14, at 1233-31.
84 Richard L. Bernal et al., *Key Procedural Issues: Resources*, 32 Int'l Law. 871, 872 (1998).
85 Gary N. Horlick, *The WTO and Developing Countries,* 100 Am. Soc'y Int'l L. Proc. 220 (2006).
86 *See* Carl, *supra* note 50, at 88; Michalopoulos, DEVELOPING COUNTRIES IN THE WTO, *supra* note 7, at 170; Srinivasan, *supra* note 65, at 102 (noting that "realistically speaking, the administrative and information-gathering capabilities of many developing countries are likely to prove inadequate even with the assistance of the WTO secretariat to present a strong case before the DSB").
87 Kristin Bohl, *Problems of Developing Country Access to WTO Dispute Settltment,* 9 Chi.-Kent J. Int'l & Comp. L. 130, 144 (2009).
88 Leah Granger, *Explaining the Broad-Based Support for WTO Adjudication,* 24 Berkeley J. Int'l L. 551, 531 (2006).
89 Gregory Shaffer, *How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies,* 5-I ICTSD Resource Paper 16 (2003).
90 Andrew T. Guzman and Beth A. Simmons, Plays *and Capacity Constraints: The Selection of Defendants in World Trade Organization Disputes,* 34 (2) Journal of Legal Studies, 557, 567 (2005).
91 Granger, *supra* note 88, at 533.
92 Bohl, *supra* note 87, at 151.

(iii) Lack of Public-Private Partnership

In addition, a study of the trade policy infrastructure of the US and the EU found that an institutionalized linkage between private companies and officials is a key characteristic of the major users of the system. While under existing WTO rules only member states may initiate a case, this generally occurs on the basis of persuasion from private companies. This is facilitated where local private companies are strong and where the established infrastructure gives private companies a voice and the chance to lead their case informally through the initial stage.[93] But in the developing countries, the private sector has typically viewed WTO dispute settlement as the government's job. This perspective can pose a serious problem for developing country trade officials who have fewer public resources than their US and EC counterparts, counterparts who have already developed mechanisms to work with their own private sectors.[94]

(iv) Problems of Remedies and Enforcement

Another major complaint of the developing countries is that the WTO remedies are unsatisfactory and their concerns and complaints have been well documented in the literature.[95]It is believed that it is a waste of time and money for developing countries to invoke the WTO's dispute settlement procedure against developed countries. Even if a developing country obtains a clear legal ruling against a developed country, the developing country has no effective way to enforce the ruling. The only enforcement sanction provided by the WTO dispute settlement procedure is trade retaliation.[96] In the *Online Gambling* case between Antigua and United States, Antigua and Barbuda successfully challenged the United States protectionist trade policy and got the WTO rulings in its favour.[97] However, the US refused to comply with the rulings and walked away from the process. Antigua and Barbuda, a small developing country with virtually no resources invested three years and millions of dollars in the litigation against US who simply took his ball and went home after losing the case.

The centrality of retaliation to the WTO's enforcement scheme is somewhat one-sided in that developing countries are the most disadvantaged by reliance on retaliation. Due to their smaller size and fragile economies, developing countries will be even more adversely affected by those cases where retaliation is self-defeating. Developing country retaliatory counter measures against a developed country will also tend to have a relatively smaller impact than developed country retaliatory counter measures against a developing country. Therefore, retaliation is not an ideal remedy.[98] In fact, it is ironic that the WTO, an institution that preaches trade liberalization, relies on trade protectionism in the form of retaliation as a means of neutralizing the effect, or forcing the disappearance, of illegal trade restrictions. The *EC – Bananas* case also recognized the problematic nature of retaliation when the arbitrators stated that:

"Given the difficulties and the specific circumstances of this case which involves a developing country Member, it could be that Ecuador may find itself in a situation where it is not realistic or possible for it to implement the suspension authorized by the DSB for the full amount of the level of nullification and impairment estimated by us in all of the sectors and/or under all agreements mentioned above combined. The present text of the DSU does not offer a solution for such an eventuality."[99]

93 Amin Alavi, *African Countries and the WTO Dispute Settlement Mechanism,* 25 Development Policy Review 25, 29 (2007)

94 Shaffer, *supra* note 77, at 115

95 *See*, e.g., Kym Anderson, *Peculiarities of Retaliation in WTO Dispute Settlement,* 1 World Trade Review 123 (2002); Marco Bronckers and Naboth Van Den Broek, *Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement,* 8 J. Int'l Econ. L. 101 (2005); Chi Carmody, *Remedies and Conformity under the WTO Agreement*, 5 J. Int'l Econ. L. 307 (2005); Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 Am. J. Int'l L. 792 (2001) ;Bernard M. Hoekman and Petros C. Mavroidis, *WTO Dispute Settlement and Surveillance*, 23 World Economy 527 (200); Steve Charnovitz, *Adjudicating Compliance in the WTO: A Review of DSU Article 21.5,* 5 J. Int'l Econ. L. 331 (2002); Kofi Oteng Kufuor, *From the GATT to the WTO: The Developing Countries and the Reform of the Procedures for the Settlement of International Trade Disputes*, 31 Journal of World Trade 117 (1997); Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules - Toward a More Collective Approach,* 97 AM J. INT'L L. 335 (2001); Gregory Shaffer, *How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies*, *in* TOWARDS A DEVELOPMENT SUPPORTIVE DISPUTE SETTLEMENT SYSTEM IN THE WTO, ICTSD Resource Paper No. 5, 1-65 (2003), available at http://www.ictsd.org/pubs/series.htm.

96 The other two remedies are cessation (the removal of a measure that has been found to be WTO-inconsistent) and compensation (in the form of trade concessions). However, withdrawal of inconsistent measures does not recompense the loss incurred from the moment that the measure was introduced to the point of withdrawal. Secondly, trade compensation depends on the consent of the party found to be violating the rules. Thirdly, some members do not have the capacity to use any enhanced market access they may obtain as trade compensation. This is especially so when the complainant is a developing country.

97 Recourse to Article 21.5 of the DSU by Antigua and Barbuda, United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services, 1.1, WT/DS285/RW (Mar. 30, 2007).

98 See, e.g., Robert E. Hudec, *The Adequacy of WTO Dispute Settlement Remedies, in* DEVELOPMENT, TRADE, AND THE WTO: A HANDBOOK 81, 84 (Bernard Hoekman et al. eds., 2002).

99 *EC—Regime for the Importation, Sale and Distribution of Bananas*—Recourse to Arbitration by the EC under Article 22.6 DSU, WT/DS27/ARB/ECU, 24 March

The developing countries also fear political and trade reprisals if they bring an action against the developed countries. They fear that they could face a bad economic outcome even if they legally win a case, if the respondent engages retribution outside of the WTO, for example, through reduction of bilateral assistance or reduction in preferential access under the preferential trade agreement. When facing "trade and aid friends" as potential respondents, developing countries may prefer to avoid upsetting that relationship. For example, in the *EU-Banana Regime,* despite Ecuador being authorized to do so, it did not retaliate on intellectual property rights against the EC because of such concerns. As Hoekman and Mavroidis state, "concerns that bringing a case would 'disturb' a country's relationship with a major trading partner to some extent nullifies the raison d'être of the WTO - the establishment of a rule-based as opposed to a power-based system of trade relations."[100]

The possibility of retaliation through the reduction in preferential access under the Generalized System of Preferences (GSP) or another preferential trade agreement is an added cause of concern for developing countries.

Another problem is that the DSU enforcement provides only prospective remedies. This creates an incentive to violate WTO obligations since an offending Member only has to stop violating after it is caught, and "an illegal measure will have been maintained 'for free' throughout the dispute settlement proceedings at least." Again, developing countries are more vulnerable to suffering serious harm in this time period than developed countries.

Special and Differential Treatment for Developing Countries

WTO Agreements contain "special and differential treatment" (SD&T) provisions, which are, especially-crafted rules that deviate from the general rule as exceptions or exemption and impose specific rights and obligations on developed country members. For instance, under Article 3.12, if a developing country member brings the complaint, it has the option of invoking the provisions of the GATT Decision of 5 April 1966 as a partial alternative to the DSU. This entitles the developing country complainant to the good offices of the Director-General, and a shortened panel procedure. In addition, if the dispute is between a developing country and a developed country, the panel has to include one panelist from a developing country at the request of the developing country.[101]

Some of the other SD & T provisions are Article 12.10, 12.11, 21.2, 21.7 and 21.8. Article 12.10 allows developing countries to extend the time limits for consultations and requires that the panel accord the developing country sufficient time to prepare and present its argumentation. Under Article 12.11, the panel has to indicate how it took into consideration any and all relevant WTO provisions on differential and more-favorable treatment for developing countries. Once the process has moved beyond the panel stage, Article 21.2 states that particular attention should be paid to matters affecting the interests of developing countries in the implementation of any rulings or recommendations. According to Article 21.3 of the DSU, once a Panel or Appellate Body Report has been adopted by the DSB, the members concerned in the dispute must indicate the manner in which they intend to implement the recommendations and rulings of the DSB. In the event that it is impracticable to comply immediately with those recommendations and rulings a member may be granted "a reasonable period of time" in which to do so. One of the options is to allow for an arbitrator, within 90 days after the adoption of the report by the DSB, to determine the "reasonable period of time" under Article 21.3(c) of the DSU. Unfortunately, such provisions have not been of much use to the developing countries. For example, in *EC—Bananas III*[102], the four complainants (Ecuador, Guatemala, Honduras and Mexico) argued before Arbitrator that Articles 21.2, 21.7 and 21.8 of the DSU require that special attention be paid to the interests of complainant developing countries. The Arbitrator asked those complainants whether "the interests of other developing countries, and in particular the banana producing ACP States, were also not affected". They replied that their interests carried greater weight since they were the ones requesting implementation of a WTO-consistent import regime and the country allocations and export certificates, provided in the "Banana Framework Agreement" could easily be amended by European Commission, rather than Council regulation.[103]Overall, the

2000, para. 177.

100 BERNARD M. HOEKMAN & PETROS C. MAVROIDIS, *WTO Dispute Settlement, Transparency and Surveillance*, *in* DEVELOPING COUNTRIES AND THE WTO: A PRO-ACTIVE AGENDA 131, 134 (Bernard Hoekman & Will Martin eds., 2001)

101 DSU, *supra* note 6, art. 8.10.

102 Request of 17 November 1997 by Ecuador, Guatemala, Honduras, Mexico and the United States, WTO Document WT/DS27/13, G/L/209 (20 November 1997). An arbitrator was appointed by the Director-General, pursuant to footnote 12 to Article 21.3(c) of the DSU on 8 December 1997.

103 *European Communities—Regime for the Importation, Sale and Distribution of Bananas, Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settle-*

invocation of special and differential treatment appears to have had no impact whatsoever on the Arbitrator's decision, who was not persuaded that there were any "particular circumstances" that would lead him to justify a shorter period than the 15 months prescribed in Article 21.3(c). He ruled that the European Communities had a total length of 15 months and seven days for implementation.[104]

Similarly in *Indonesia—Certain Measures Affecting the Automobile Industry* (*Indonesia—Automobiles*),[105] Indonesia requested an additional nine months to implement the necessary measures on the ground that its domestic car industry needed to make structural adjustments. The Arbitrator in the ensuing binding arbitration refused to consider this argument.

Although, there are a number of other provisions in the DSU that give special treatment to developing countries, these SD&T provisions are vague and not all of them are mandatory or automatically applicable, which means that countries must actively ask for them.[106] Roessler categorizes these SDT measures into two categories. The first is those which modify a general provision when a case involves a developing country, for example providing for panelists from a developing country,[107]or making it incumbent on panel to state how they have considered any SDT provision which has been raised by a developing country in a dispute.[108] The second is those provisions that refer exclusively to developing countries, for example those providing for developing countries to use alternative dispute settlement procedures.[109] Roessler claims that, while the first type of SDT has been applied in a number of cases, developing countries have not used the second type, since in legal proceedings, they wish to face developed countries as equals and are therefore hesitant to invoke procedural privileges that their opponents do not enjoy. Moreover, they also fear that the application of procedural provisions biased in their favour may detract from the legitimacy of the result of the procedures, and hence reduce the normative force of the rulings they are seeking.[110]

Earlier in 2001, Mary E. Footer had carried out a comprehensive review and analysis of the special and differential treatment provisions, and the extent to which these have been applied in the first six years of WTO dispute settlement. She concluded that there was more to be done to assist the developing country members and suggested for greater observance of the special and differential treatment provisions.[111]A 2007 article by Amin Alavi has attempted to get to the "heart of the matter" by examining whether the SD&T provisions designed to assist the developing countries have fulfilled their role.[112] After reviewing all the cases in which SD&T provisions in all of the WTO Agreements have been raised, Alavi concludes that only a few of the SD&T provisions have been invoked, and of those invoked only a few have had a positive effect on rulings involving developing countries.[113] Alavi has identified as the primary reason for this poor application of the SD&T provisions their vagueness and failure to clearly identify. "Who is entitled to get what from whom, when and how?"[114] In other words, they lack procedures to guide their application. In turn, this vagueness means that the provisions are rarely invoked and even when invoked have failed to yield positive rulings for the invoking party.[115]

Similarly, Andrea in a recent article examined the Antigua-United States *Online Gambling* case in light of all the SD&T provisions in the DSU to determine to what extent the provisions were applied to the case.[116] The author found that the SD&T provisions were either not applied, or with no effect at all in this case, and that the reasons for this failure stemmed from the vagueness of the provisions. This in turn resulted in the failure of the developing country party to invoke the provisions and of the WTO panel to apply them when invoked.[117]Andrea concluded that in order to strengthen the SD&T requirement to safeguard developing country interests in the WTO/ DSM, the SD&T provisions need to be clarified

ment of Disputes, Award of the Arbitrator, WTO Document WT/ DS27/15 para. 16. (7 January 1998).

104 *Id.,* paras 19 and 20.

105 *Indonesia—Certain Measures Affecting the Automobile Industry*, WTO Documents WT/DS54/R (complaint by the European Communities), WT/DS55/R and WT/DS64/R (complaint by Japan), WT/DS59/R (complaint by the United States), (Report of the Panel), (2 July 1998), adopted on 23 July 1998.

106 *See* Frieder Roessler, *Special and Differential Treatment of Developing Countries Under the WTO Dispute Settlement System, in* THE WTO DISPUTE SETTLEMENT SYSTEM 1995-2003 89-90 *(*Federico Ortino & Ernst-Ulrich Petersmann eds., (2005)).

107 DSU, *supra* note 6, art. 8.10.

108 *Id.* art. 12.11.

109 *Id.* art. 3.12.

110 *Roessler, supra* note 106.

111 Mary E. Footer, *Developing Country Practice in the Matter of WTO Dispute Settlement,* 35 J World Trade 55 (2001).

112 Amin Alavi, *On the (Non)-Effectiveness of the World Trade Organization's Special and Differential Treatments in the Dispute Settlement Process*, 41 J. World Trade 319, 320 (2007).

113 *Id.* at 320.

114 *Id.*

115 Id. at 341-42.

116 *See,* Andrea M. Ewart, Esq., *Small Developing States in the WTO: A Procedural Approach to Special & Differential Treatment Through Reforms to Dispute Settlement,* 35 Syracuse J. Int'l. L. & Com. 27, 40 (2007).

117 *Id.* at 40-58.

with procedures that make them easier to quantify, measure, and monitor. Andrea proposed procedures that strengthen the consultation mechanism, reinforce the panel process, and outline a mechanism to guide DSB review of the panel process and oversight of the implementation phase in disputes between developed and developing country members.[118]

In *EC Antidumping Duties on Imports of Cotton-Type Bed Linen*, India repeatedly asked the European Communities to take into account its special situation as a developing country and provided detailed arguments demonstrating the importance of the bed linen and textile industries to India's economy. India claimed that the EC refused to explore constructive remedies in violation of a provision mandating that "special regard must be given to the special situation of developing country Members when considering the application of anti-dumping measures."[119] As a third-party in the dispute, the U.S. argued that this provision "does not require any particular substantive outcome or any specific accommodations to be made on the basis of developing country status," and that it "does not impose anything other than a procedural obligation to 'explore' possibilities of constructive remedies."[120] The panel ultimately agreed that this provision "*imposes no obligation to actually provide or accept any constructive remedy that may be identified and/or offered. It does, however, impose an obligation to actively consider, with an open mind, the possibility of such a remedy prior to imposition of an anti-dumping measure that would affect the essential interests of a developing country.*"[121]

Thus, even when the developing country does attempt to receive "special attention," the request is often ignored or given little weight.

Conclusion

The WTO is failing in its stated goals of supplying stable dispute settlement and stimulating growth in the developing world. The developing countries are disadvantaged, and the likelihood of developing countries initiating dispute settlement under the WTO has in fact decreased. As pointed out, the under utilization seems to be the result of problems relating to human capital, litigation costs, political economic costs, and retaliatory capacity. Andrea points out that, paradoxically, the move toward a more judicial system of dispute settlement under the WTO had heightened the disadvantages the developing countries face in this regard.[122] Kim points out that "*to conclude that there is a general satisfaction among all WTO Members that the dispute settlement is working well and is fair for all WTO Members would be a mistake. While developed countries can take an active part in the dispute settlement process, the majority of WTO Members are developing countries that in many cases have neither the financial means nor the expertise to effectively protect their rights under the covered agreements."*[123]

The complexity of WTO law has only compounded the problem. As WTO expands into non-traditional areas, from health and safety standards to technical barriers to trade, intellectual property rights, and rules governing services like banking, insurance, and transportation, the staff of trade related bureaucracies have had to broaden their expertise. Indeed, the agreements that took effect in 1995 added more than 30,000 pages of new law.[124] In addition, WTO jurisprudence has also become more demanding of contextualised factual analysis. Correspondingly, the voluminous body of WTO case law has grown accordingly, with individual rulings averaging hundreds of pages. As pointed out, Antigua and Barbuda, a small developing country with virtually no resources invested three years and millions of dollars in the litigation against US who simply took his ball and went home after losing the case. Therefore, the need of legal capacity and financial resources has become even greater. Does Bhutan have the required legal capacity and the financial resources? Is Bhutan capable of overcoming the problems of WTO highlighted above? Of course, this is not to say that Bhutan must completely give up the idea of joining the WTO or to look at WTO with admonition. It is only to induce debate, to ensure that the Government is aware of, reflect upon and bear in mind the problems of developing countries as the Government continues to engage in the discussion of joining WTO. It is only to ensure that Bhutan is not being ***Penny wise, Pound foolish.***

118 Id, at 68-73.
119 Delich, *supra* note 17, at 73-74.
120 *Id.*
121 *Id.*
122 Ewart, *supra* note 110, at 40.
123 Bordght, *supra* note 14, at 1226.
124 Busch, *supra* note 14, at 4.

The Defence of "Fair Use" under Copyright Laws

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Abstract

The international copyright instruments like the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of 1994, WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty of 1996 provide exclusive rights to the owner of the artistic and literary works or copyright owners as well as limitations or exceptions to the exclusive rights. Articles 8 to 14 of the Berne Convention provide exclusive rights to the copyright owners and Article 9(2) provides exceptions to the exclusive rights in the form of "three-step test". Further, Articles 1 to 8 of the WIPO Copyright Treaty (WCT) provide exclusive rights and Article 10 provides limitations or exceptions to the exclusive rights of the owner of literary and artistic works.

Copyrights are the exclusive rights granted to the author or creator of an original work including the right to copy, distribute, perform, communicate and adapt the work. In order to provide a fair balance between the rights of the copyright owners and the copyright users, the international conventions or treaties on copyrights have created what is commonly called the exceptions to the exclusive copyrights. "Doctrine of fair use", of all the exceptions, is the most important exception for maintaining the balance between the conflicting interests of the creator and the general public's use.

The courts in the United Kingdom, India, Thailand, Bhutan, and the United States have interpreted, and applied the fair use or fair dealing exception to cases differently, and variedly, due to lack of clear-cut directions in both the international and national copyright legislations.

The provisions on the exceptions to the exclusive rights or the fair use provisions in the above mentioned international copyright instruments are too broad, flexible and open-ended. It is good for the society because they can have access to certain copyrighted works without infringing the right but it has adverse affect on the copyright owner, and contradicts the traditional purpose of copyright law which is to protect the owners of copyright in order to encourage human creativity.

Moreover, the existing fair use exceptions in the Copyright laws of United Kingdom, India, Thailand and Bhutan are imposing more restrictions on the activities of copyright users and second generation creators than the fair use provisions that are there in the Copyright law of the United States i.e., 17 U.S.C. Maintaining the balance between the interests of the copyright owners and the copyright users is one of the main objectives or purposes of every copyright law. This balance is traditionally maintained in a number of ways in these international copyright instruments and domestic copyright legislations.

The balance can be struck or maintained only in two ways: it can be struck only if the member states of the international copyright instruments have open-ended or flexible provisions of exceptions to exclusive rights or fair use provisions in their respective copyright laws, and the courts in these States interpret the fair use provisions or the provisions on exceptions to exclusive rights liberally and broadly; or it can be struck or maintained only if the copyright owners allow, in return for the legal protection given by the copyright law, the general public to have reasonable access to their copyrighted works without their

permission and without having required to pay royalty to them.

These limitations or exceptions to the exclusive rights of copyright are imposed mainly for the purpose of maximizing the public interest. Fair use exception, of all the exceptions, is the best answer to achieve this goal.

Introduction

With the invention of movable type writers and advent of printing machines in the 13th century[1] and later, with the advancement of technologies had made the production and distribution of books much more easier, faster, and cheaper both domestically and internationally, especially in Europe and North America. Hence, the need for enhanced protection of authors and uniform international copyright standards became apparent.

The Convention for the Protection of Literary and Artistic Works

Such situation and necessity led to the movement for international uniformity of copyright, and the earliest one was the *Berne Convention* for the *Protection of Literary and Artistic Works*. The conferences on creation of international standard for the protection of literary and artistic works and creation of the *Berne Union* were initiated since 1884 and finally established in 1886. It was subsequently revised in 1896 (Paris), 1908 (Berlin), 1928 (Rome), 1948 (Brussels), 1967 (Stockholm) and 1971 (Paris).[2] The convention was specifically related to and for the protection of literary and artistic works.

The International Organizations and Copyright Instruments

Subsequently, the international organizations like World Trade Organization (WTO) and World Intellectual Property Organizations (WIPO) were established in 1995 and 1970 respectively. One of the main functions of these organizations is to administer and enforce international copyright instruments like the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of 1994, WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty of 1996.

Exclusive Rights and Limitations

The above mentioned international copyright instruments provide exclusive rights to the owner of the artistic and literary works or copyright owners as well as limitations or exceptions to the exclusive rights. For instance, Articles 8 to 14 of the *Berne Convention* provide exclusive rights to the copyright owners and Article 9(2) provides exceptions to the exclusive rights in the form of "three-step test". Similarly, Articles 10 and 11 of the TRIPS Agreement provide exclusive rights and Article 13 of the TRIPS agreement talks about the three-step test and limitations or exceptions to exclusive rights granted to the copyright owner. Further, Articles 1 to 8 of the *WIPO Copyright Treaty* (WCT) provide exclusive rights and Article 10 provides limitations or exceptions to the exclusive rights of the owner of literary and artistic works.

Fair Use as the Most Important Exception to the Exclusive Rights of the Creators

Copyrights are the exclusive rights granted to the author or creator of an original work including the right to copy, distribute, perform, communicate, and adapt the work. It means, copyright owners have the exclusive statutory right to exercise control over copying and other exploitation of their works for a certain period of time, after which the work is said to be entering the public domain.[3] In order to provide a fair balance between the rights of the copyright owners and the copyright users, the international conventions or treaties on copyrights have created what is commonly called the exceptions to the exclusive copyrights. Doctrine of fair use, of all the exceptions, is the most important exception for maintaining the said balance between the conflicting interests.

Application of fair Use in different jurisdictions

Today, although, there are some consistencies among nations' copyright laws, yet due to social, cultural and economic diversity, each jurisdiction has separate and distinct laws and regulations about copyright. Nevertheless, the notion of permitting some of the uses of a copyrighted work which is considered to be fair is common in many jurisdictions. For example, in the United States of America, the exception is known

1 Gutenberg's invention of movable type in 1436 and it's first used in 1455 and Caxton's development of printing press and publishing of books like the Chaucer's Canterbury Tales in 1478 have changed everything.

2 Paris Act of July 24, 1971 as Amended on September 28, 1979.

3 The Berne Convention for the Protection of Literary and Artistic Works, Article 7, TRIPS Agreement, Article 12; The owner of literary and artistic works shall enjoy the protection granted by conventions or statutes for the life of the author and fifty years after his or her death and after which the work shall enter into public domain.

by the term "fair use"[4] and in the Commonwealth countries like UK, the expression is known by the term "fair dealing" and "permitted acts"[5] and in India, it is termed as "fair dealing"[6] and in other jurisdictions like in Bhutan it is known by terms such as "permitted acts," or "personal purpose"[7] and so on. The courts in these jurisdictions have interpreted and applied the fair use or fair dealing exception to many cases differently and variedly due to lack of clear-cut directions in both international and national copyright legislations.

Problems of Application of Fair Use

When it comes to the application, the court experienced difficulties in drawing boundaries of fair use, and to ascertain whether the 'use' in question falls under fair use exception or not. The difficulty in claiming the defense of fair use is that there is no way to guarantee that your use of somebody's work will qualify as fair use. You may believe that your use qualifies, but, if the copyright owner disagrees, you may have to resolve the dispute in court. Even if you ultimately could persuade the court that your use was in fact a fair use, the expense and time involved in litigation may well exceed or outweigh any benefit of using the material in the first place. In other words, there is a sizable gray area in which fair use may or may not apply. There is no guarantee that your use will qualify as a fair use.

On the one hand, it is important to provide exclusive rights to the authors and creators for their creations. On the other hand, it is equally important to ensure that the members of the public or society at large get reasonable access to the copyrighted works and to ensure that the copyright does not hamper important public policy ends such as education and culture. Therefore, to strike a balance between the conflicting interests and to find a common ground on which the doctrine of fair use can be applied by courts in all the jurisdictions has become *sine quo non*.

The provisions on the exceptions to the exclusive rights or the fair use provisions in the above mentioned international copyright instruments are too broad, flexible and open-ended. In other words, the provisions on exceptions or limitations on exclusive rights in these international instruments are vague and ambiguous. To be precise, all these Conventions have left the terms like "certain special cases", "normal exploitation of the work" and "unreasonably prejudice the legitimate interest" open-ended. It is very flexible and lacks legal certainty. In other words, the fair use exception is tipped towards the benefit of general public or society at large. It is good for the society, because they can have access to certain copyrighted works without infringing the right, but it has adverse affect on the copyright owner and contradicts the traditional purpose of copyright law which is to protect the owners of copyright in order to foster creativity.

Problems of Interpretation of Fair Use

It is because of lack of clarity or existence of ambiguity in the fair use provisions of these international copyright instruments, we see some discrepancies or inconsistencies in the domestic legislation on copyright as well as in the interpretation and application of the doctrine in various jurisdictions. Some countries like the United Kingdom, India, Thailand and Bhutan have long lists of special cases (exhaustive) while other countries like the United States have short lists of cases (inclusive) and applied in different jurisdictions. Similarly, some jurisdiction like the USA had interpreted the provisions on exceptions to exclusive rights or the doctrine of fair use broadly so as to include the USE in question under the protection of fair use by considering four factors[8] enshrined under their Copyright law. While the courts in the UK, India, Thailand and Bhutan seem to be interpreting the exceptions to the exclusive rights or the provisions of the doctrine of fair use narrowly and strictly, to stick to the traditional or original purpose of the copyright law i.e., to exclude the USE[9] in

4 17 USC, Section 107; Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is **a fair use** the factors to be considered shall include;
(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.

5 The Copyright, Design and Patent Act, 1988, Sections 29 – 31.

6 The Indian Copyright Act, 1957, Section 52.

7 The Copyright Act of the Kingdom of Bhutan, 2001, Section 10.

8 The 17 USC (The Copyright Act of 1976, USA), Section 107.

9 It means the alleged act of the defendant in a copyright infringement case. It can also mean the access made to the copyrighted work without the permission of the copyright owner.

question from exceptions or fair use, and to provide continued protection to the copyright owners and foster creativity.

Measuring Fair Use

Moreover, the existing fair use exceptions in the Copyright laws of United Kingdom, India, Thailand and Bhutan are imposing more restrictions on the activities of copyright users and second generation creators than the fair use provisions in the Copyright law of the United States i.e., 17 U.S.C. Therefore, these restrictive provisions may be amended firstly to be in line with the objectives of the international laws on copyright, and secondly to allow the copyright users or general public to have reasonable access to the copyrighted works without permission or authorization or license, and without payment of royalty to the copyright owners. Similarly, as explained above, the courts in these countries while adjudicating the copyright infringement cases have put more emphasis on the original and exact purpose, and not enough emphasis placed on the broad purpose, which was envisaged by the copyright law i.e., whether the use or dealing was fair or not. Hence, it would be wise on the part of the courts in these countries to have balanced emphasis on the purpose of the doctrine and the use of the copyrighted work. It could be achieved by following the United States' four factors[10] while determining whether the USE in question is fair or not.

Copyright Protection is for the Greater Public Interest

The drafters or the creators, however, of the above mentioned international instruments and national legislations on the doctrine of fair use or on exception to exclusive rights of copyright have purposely maintained those provisions in generic terms or were intentionally kept open-ended so that the courts would be in a better position to interpret and fit in the cases under its protection for the wider interest, and greater cause of the society. The reason is that many different situations and circumstances may arise in a particular case and the creators of fair use exception or the exceptions to exclusive rights of copyright did not want to limit its scope of application by defining the terms like fair use, certain special cases, normal exploitation of the work, and unreasonably prejudice the legitimate interest.

Moreover, ever since the coming into existence of the copyright laws, it has been emphasizing that copyright protection does not exist for its own sake but rather to serve the greater public interest by allowing the public to have reasonable access to the copyrighted works without constituting infringement. The said greater public interest can be served in two ways: firstly, by giving authors and creators an incentive to create; and secondly, by encouraging the dissemination of new knowledge to the society at large. Creators enjoy the right to control over their creation and wanted to be remunerated for subsequent dissemination. If we do not provide these incentives, then most of the authors and creators might not be motivated to spend their time and effort in creating valuable original expression. However, it should also be noted that a significant number of creators or authors especially the academicians place a far greater, and higher value on dissemination of their creative works to the public than direct reimbursement for the use of the work. Thus, the society needs more and more of such creators in this digital age or age of rapid technological advancement.

In addition, it must be noted that the new ideas and knowledge will not readily benefit the society if their transmission is limited. In other words, new ideas and knowledge without dissemination will have very limited benefit to the society at large. True appreciation and value of creation is realized only when the knowledge is learned, discussed, added, and therefore enriched it by students, researchers, scientists and the ordinary citizens.

Recommendations

It is, therefore, very important for the member states of the above mentioned international copyright instruments in general and the member states like the UK, India, Thailand and Bhutan in particular to have flexible or open-ended fair use provision or exceptions to exclusive rights in their respective national copyright law. The reason is that in this age of globalization or digitalization or technology or information, dynamism of law or flexibility of law is preferred over rigidity or certainty of law. It is because one of the law's greatest strengths is its fexibility when society demands change.

10 The Copyright Act of 1976(17 USC), Section 107, "1)…the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2) the nature of the copyrighted work;
3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4) the effect of the use upon the potential market for or value of the copyrighted work."

In such situation, the courts can exercise their power to interpret the laws broadly so as to accommodate the changes brought about by the people, and the emerging circumstances. Rigidity or certainty means that the law is static, and there is no evolution. Such laws cannot cope with changed situations and courts will have no choice but to interpret them narrowly and strictly to exclude the changes. The copyright law, in particular, must develop and evolve in response to the changes brought by new technologies. Fundamental transformations in the way we communicate, teach, learn, conduct business, read, entertain, and live, are beginning to take hold. Thus, thoughtful attention to the possibilities and limitations of the fair use doctrine, coupled with a careful look at the equities involved with multimedia will facilitate the transition and if courts could remain faithful to the "equitable rule of reason," the society will benefit immensely.

Conclusion

Be the exception to the exclusive rights or the provisions on the doctrine of fair use open-ended or closed-ended or be the list of certain special cases exclusive or inclusive; there is a greater requirement of striking the balance of conflicting interests of copyright in this age of technology and information.

Maintaining the balance between the interest of the copyright owners, and the copyright users is one of the main objectives or purposes of every copyright law. This balance is traditionally maintained in a number of ways in the international copyright instruments and domestic copyright legislation. One of the most important ways of doing it is by the implementation of a series of limitations and exceptions like the fair use exception to the exclusive rights of the copyright owners. Similarly, other ways adopted by these international and national copyright laws for maintaining the balance between these conflicting interests are in the duration of the exclusive rights, limited suits right and subject matter of the copyright. The balance can be struck or maintained only in two ways: it can be struck only if the member states of the international copyright instruments have open-ended or flexible provisions of exceptions to exclusive rights or fair use provisions in their respective copyright laws and the courts in these States interpret the fair use provisions or the provisions on exceptions to exclusive rights liberally and broadly; or it can be struck or maintained only if the copyright owners allow, in return for the legal protection given by the copyright law, the general public to have reasonable access to their copyrighted work without their consent and without having to pay royalty to them.

These limitations or exceptions to the exclusive rights of copyright are imposed mainly for the purpose of maximizing the public interest. It is found that the only way to maintain the balance and maximize the public interest of having access to the copyrighted works is by allowing the free flow of ideas, information, and knowledge. Fair use exception, of all the exceptions, is the best answer to achieve this goal. It is the only exception which allows general public to have reasonable access or use copyrighted works without the permission or authorization of, and without payment of royalty to the copyright owners.

Delegated Legislation: Theory, Practice, and Application in Bhutan

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Abstract

The true democratic culture is the existence of independence of three arms of government: legislature, executive, and judiciary, which is based on doctrine of separation of powers. The separation of powers plays a vital role in upholding the rule of law, as each organ of the government operates independently, and provides for both vertical and horizontal check and balance of effective functioning of the sovereign. However, with the emerging modern concept of a nation state, shifting from a police state to a welfare state, a true separation of powers is no more a feature of democracy. One of the most prominent exceptions to the doctrine of separation of powers is the delegation of legislative power and quasi-judicial power to the executive. The object of such delegation is to fulfill the political commitments, and to ensure speedy justice, effective, and good governance. It is therefore, extremely important for the executive to exercise such powers with due diligence, and within the delegation, and not contrarily at any point of time. This article attempts to briefly examine the basic concept of delegated legislation in general, and its impacts, merits and demerits, and controls on delegated legislation with reference to the Bhutanese experience.

1. Introduction

The modern legal system of Bhutan is fairly a recent development, as the Bhutanese Constitution came into being less than a decade ago. With the institution of democracy, numerous new policies were introduced, and often, they were implemented through delegated legislation. In many cases, the practice was that the rules and regulations were framed or promulgated by the executive in the absence of a parent statute or an Act. Example of such rules consists of Tourism Rule and other rules governing Trade both within and outside the country. Though the practice of delegated legislation or subordinate legislation, as the secondary method of rule-making process existed as the mainstay in the country, thus far, there is no record to show that any such legislation being challenged to test its validity or its *vires*. Thus, an instance of challenging the validity of any delegated legislation or decisions of the administrative agency before a court of law by any person on the ground of violation of the Constitution or the parent Act, and principles of natural justice, is going to be a case of curiosity for the Bhutanese people.

As empowered by the legislature, the executive creates subordinate legislation and implement them as if they are the same provisions in the parent Act or the supreme law. In this light, it is important and appropriate to highlight on the issue of validity of delegated legislation, powers of the executive, in exercising such powers, and the mechanism of check and balance to ensure that the administrative agency operates within the limits of delegated powers by the legislature. This is because the law making powers exercised by the executive is not an inherent one, as its essential function is the administration and execution of the laws. As a test to measure the practical operation of the principle of delegated legislation, doctrine of Rule of Law and Doctrine of Separation of powers are the two most important principles that are essentially used and applied to determine the scope of the delegated legislation.

2. Concepts of Rule of Law and Separation of Powers

Rule of law may be defined as 'the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, or prerogative, or even of wide discretionary authority on the part of the government.'[1] The Rule of Law requires that 'legal rules be publicly known, consistently enforced, and even-handedly applied.'[2] The separation of powers is 'essential in maintaining the Rule of Law in large part because it ensures decisions are made non-arbitrarily.'[3]Thus, Dicey, propounded three doctrines, namely, the supremacy of law, principle of equality, and predominance of legal spirit. In the doctrine of supremacy of law, he emphasized that a man can be punished by rule of law and by nothing else. If any human being is punished on contrary to rule of law, it would constitute arbitrariness and abuse of discretionary authority. In the case of the principle of Equality, all classes of people of a nation are subjected to the ordinary law of the land administered by the ordinary court of law. For instance, any person found stealing must be treated equally in the ordinary court of law, irrespective of his class, status, race and colour. In the third doctrine of Predominance of Legal Spirit, he proposed that rights are only the result or outcome of the decision of the court or judgment rather than principles enshrined in the Constitution. He believed that a mere mentioning of the rights in the Constitution does not actually provide rights to the individuals unless it is enforced.

Wade described that "Government is a subject of the Rule of Law rather than the Rule of Law being subject of Government. Thus, government can function within the ambit of Rule of Law and not otherwise."[4] According to Khana, J. "Rule of Law is the antithesis of arbitrariness and is now the accepted norm of all civilized societies."[5] "Rule of law embodies the doctrine of supremacy, and it is the basic fundamental necessity for a disciplined and organized society as it serves the needs of the people without undoubtedly infringing their rights, instead recognizes the social reality and tries to adjust itself to time avoiding authoritarian path."[6]

An obligation on the Bhutanese government to govern the country through the Rule of Law is enshrined in the Constitution. Article 1(13) of the Constitution provides the doctrine of separation of powers and mandated that all the three branches of the Government operate within their respective areas of functions. And Article 21(1) of the Constitution mandates the judiciary to administer justice fairly and independently in accordance with Rule of Law.

The purpose of separation of powers "is not to promote efficiency but to preclude the exercise of arbitrary power."[7] "The accumulation of all powers, legislative, executive and judicial in the same hands, whether of one, a few or many and whether hereditary, self-appointed or elective may justify be pronounced the very definition of tyranny."[8]

However, with changing times, the role of state has shifted from conventional police state to the modern welfare state. Thus, a distinct independence from each of the three arms of the government has become impossible. Dixon, J. noted that 'logical difficulties of defining the power of each organ of government, and the practical and political consequences of an inflexible application of their delimitation"[9] as reason for the nexus of power among the three organs.

With increasing workload, and complexity of subject matters, delegation of legislative powers to executive is increasing, much at a rapid rate, and as well as certain judicial powers to the executive. The executive now exercises the legislative power by framing various rules, regulations, bye-laws, and orders with or without the parent Act, and quasi-judicial power through establishments or institution of quasi-judicial (tribunals) or Boards or committees in implementing

1 Albert Venn Dicey was a renowned Professor of English Law. Introduction to the Study of the Law of Constitution (8th Revised Edition, 2010) Gazelle Book Services Publication

2 Sandra Day O'Connor, Vindicating the Rule of Law: The Role of the Judiciary (2003)

3 Sandra Day O'Connor, Vindicating the Rule of Law: The Role of the Judiciary (2003)

4 Wade, W.R & C.F.Forsyth (11th Edition, 2014) Administrative Law, Oxford University Press

5 A.D.M. Jabalpur V. Shivkant Shukla, AIR 1976 SC 1207

6 Jain, M.P & Jain, S.N. (updated 6th Edition, 2013), Principles of Administrative Law, LexisNexis Publication

7 Popper, F. Andrew and et al (2nd Edition , 2010). Administrative Law: A Contemporary Approach (Interactive case book series), West Academic Publishing

8 Madison, J. (1788). He was the fourth President of United States and considered the Father of US Constitution. http://www.biography.com/people/james-madison-9394965

9 Victorian Stevedoring and General Contracting Company Proprietary Limited v. Dignan (1931)

these legislations. Thus, it is essential that executive or any administrative agency faithfully exercises such powers only to the extent as authorized by the legislature, and not to exceed the delegated authority. In case, any agency exceeds the powers so granted to the agency through delegated legislation, the subordinated legislation so made by it cannot stand the test of *vires* as regards the Constitution, parent Act and other statutes. Therefore, Rule of Law and Separation of Powers ensure the mechanism of check and balance among the vital instrumentalities of the government, and strive to maintain that each operates within their respective sphere of their functions.

3. The Concept of Delegated Legislation and its Nature

Delegated legislation or subordinate legislation is defined as 'that which proceeds from any authority other than the sovereign power, and is, therefore, dependent for its continued existence and validity on some superior or supreme authority.'[10] Thus, delegated legislation is a law made by the executive, as empowered by the legislature or policy adopted by the state. In Bhutan, delegated legislation mainly composes of rules and regulations, notices, orders, and notifications, and circulars.

All these Rules and Regulations can be framed by an agency or authority other than the legislature through the process of delegated legislation, in which case, the agency framing such rules draws legislative power through a parent Act or statute enacted by the legislature itself.

C.K. Tawani has captured the essence of delegated legislation, and described it as "a growing child called upon to relieve the parent of the strain of overwork and capable of attending to the minor matters, while the parent manages the main business."[11]

The framing or promulgation of these rules and regulations is also based on the doctrine of *Delegatus non potest delegare*. It means that "A person to whom an authority or decision-making power has been delegated to from a higher source, cannot, in turn, delegate again to another, unless the original delegation explicitly authorized it."[12] This maxim deals with sub-delegation. It means that the delegated authority cannot further sub-delegate the power unless the delegated authority is authorized to do so. If not, the sub-delegation is beyond the delegated power, and it cannot be allowed under the principle of sub-delegation. The rationale behind such a rule is to ensure that any prescribed act is to be done in a manner as directed, and by such a person as specified in the delegation. All such requirements are safeguards against the possible abuse of the delegated powers by the administrative agencies.

Parliament has to provide necessary policy guidelines for the executive in connection with delegated legislation so that the latter operates and functions within the sphere of the delegated authority. This is important for making the delegated legislation legal and lawful as Parliament does not have inherent power to delegate its legislative power to any administrative agency, as the making of law constitutes its essential and sovereign functions. Cartwright, J. said that "The fundamental rules that a municipal legislative body cannot delegate legislative power to any administrative branch or official or to anyone."[13] He further stated that the administrative authorities or its officials should not have ungoverned discretionary power or caprice or whim even to authorize licenses or permits, and imposing license or permit fees or taxes. Therefore, delegated legislation shall be exercised strictly within the limits set by the Parliament. One of the reasons is that since administrative authorities are not representatives of the people, unlike an Act enacted by the legislature, delegated legislations do not represent the voices and wishes of the people, and are unknown to the general public.

4. Need for Controls on Delegated Legislation

With numerous legislations and policies in place, the administrative authorities in Bhutan like in other countries are conferred with wide powers through delegated legislation. The main reason for the rapid growth of delegation is that, with the transition of Bhutan into parliamentary democracy, the delegated legislation plays a vital role in the nation's economic growth and development. Some of the advantages the delegated legislation has over the supreme legislation are summed up as under:

10 Salmond-Sir John William Salmond (1862-1924) was a great legal scholar, public servant and Judge in New Zealand

11 C.K Tawani, *Lectures on Administrative Law*, (Eastern Book Company Lucknow, 2008) at 67-68.

12 Duhaime's Law Dictionary http://www.duhaime.org/LegalDictionary/D/DelegatusNonPotestDelegare.aspx

13 Restaurant Inc.v. City of Montreal (1959) S.C.R.58

a. As Parliament convenes twice a year, it cannot address, and resolve emerging issues to meet the exigency of time. While the delegated legislation is equipped to meet such contingencies;
b. The subject-matters of some policy and legislation are too complex, and technical in nature, in which case, the legislatures will require assistance of experts in dealing with such matters. Hence, the delegated legislation is seen as a better option to deal with such matters;
c. Because of time constraints, Parliament may not be able to include every detail in the laws. Whereas the delegated legislation provides an extra avenue for clarity and details of the laws enacted by Parliament to effectively implement the laws and policy; and
d. Delegated legislation has "flexibility, elasticity, expedition and opportunity for experimentation."[14]

However, with an increasing delegated legislation, the exercise of delegated authority or powers as provided to the executive are not free of arbitrariness or abuse of discretionary powers by the delegate. It is also not spared from criticism, including questions on validity of decisions taken by various agencies, including the Cabinet. The following are few instances which brought out issues having bearing to the practice of delegated legislation in the country.

a. The Opposition Party questioning, and challenging the dismissal of the three government secretaries as "violation of due process of the Constitution, Civil Service Act, and Civil Service Rules."[15]
b. Declaration of every Tuesday as the Pedestrian Day across the country in 2012. This move was heavily criticized both by the public and the Opposition, which was lifted by the present government, soon after it came to power, citing that it caused "inconveniences to the general public especially in times of emergency."[16] Many people contended and posted on social media that the government failed to consult the people and take public opinion on implementation of such delegated orders.
c. To address the pollution issue and to uphold the clean environment policy and reduce dependence on import of fossil fuel, the Government made exceptions for import of second hand vehicle if they are electric, under Rules and Procedures for import from third countries of 2001. This move was challenged by the National Council on many grounds. National Council resolution stated that "… this was in direct violation of the resolution of the 53rd Cabinet meeting held on November 30, 1999, as well as clauses 45(h) and 33.2 of the Import Rules."[17]
d. A senior producer of the Bhutan Broadcasting Service Corporation filed a complaint to the Labour Protection Cell of the Ministry of Labour and Human Resources, challenging the procedure for appointment and recruitment of a Manager's post in his organization, were unfair and biased. Subsequently, the Ministry reported that the allegations were true, and levied fines as the Committee had violated the Recruitment and Selection Regulations, 2012. However, the Recruitment Committee defended that the Labour Department under the Ministry had power only to resolve dispute but not to pass judgment. They defended that it was done according to the internal rules. The matter is now in the court.[18]
e. Similarly, there are many instances, where some employees of private as well as government agencies lost their jobs had claimed or alleged that they were terminated unfairly or without the following due process of law.

The above instances clearly indicate that there are cases where the government agencies claimed that the decisions they had taken were as per the concerned rules and regulations. The validity of such delegated legislation unlike in other countries has

14 Jain & Jain, Principles of Administrative Law (6th Edition, 2013), P.47
15 Kuenselonline, Article titled "Cabinet violated rules, economic affairs minister misled nation: Opposition" dated March 3, 2015 http://www.kuenselonline.com/cabinet-violated-rules-economic-affairs-minister-misled-nation-opposition/
16 Executive Order (C-2/11) Dated 2nd August 2013, Prime Minister's Office, Royal Government of Bhutan.
17 Proceedings and Resolutions (Translation) of the 13th Session of the National Council of Bhutan
18 BBS management defends its decision. August 6, 2015 http://www.bbs.bt/news/?p=52571

not yet caught the attention of courts in Bhutan. And the executive agencies have also included certain provisions in the rules and regulations, protecting and safeguarding their interests, if challenged.

For examples, Rule 1.7 of Chapter 1(Preliminary: Authority for Amendment and Interpretation) of Bhutan Civil Service Rules and Regulations, 2012 states that "The authority for amendment and interpretation of any provision under the BCSR 2012 shall vest with the RCSC, and its interpretation shall be final and binding." Similarly, Chapter 10, Rule 10.3 of Bhutan Micro Trade Regulations, 2016 states that "The Ministry shall be sole authority responsible for interpretation of this Regulations and its decision shall be final and binding."

Such provisions in the delegated legislation actually undermine the rights of the affected parties particularly in cases where any action taken by the executive agency is not in consonance with the principles of natural justice, and due process of law. Therefore, it is of vital importance that any delegated legislation has to ensure that its provisions are in harmony with the Constitution and parent Act, and other statutes as well. This is necessary because, as per Article 1(11) of the Constitution, the Supreme Court is the final interpreter of the Constitution, and the delegated legislation cannot prevail over the Constitutional provisions. Therefore, the constitutionality of the delegated legislation thus far has not been tested before a court of law, and it cannot be assumed that the existing subordinate legislations are sound and well from the lens of the Constitution and parent Act, as the parent Act does not authorize such discretionary power to the executive. All these may be considered as the down side of the delegated legislation.

5. Need for Controls on Delegated Legislation

Although 'the delegation of law making power is [considered as] the dynamo of the modern Government,'[19] as it empowers the executive agency to make subordinate legislation, also necessary to ensure that such powers are exercised within the prescribed limits by the delegated agency. It means that the powers so conferred must be exercised within the jurisdiction of the enabling legislation or the Constitution. When the administrative authorities exercise these powers beyond the jurisdiction of the parent Act or the Constitution, it is termed as *ultra vires* to the enabling legislation or the Constitution.

Discretionary power or delegated legislation is considered *ultra vires* in circumstances such as misuse or abuse of power conferred, when it is used for improper purpose, mala-fide intention, irrelevant consideration, unreasonably not complying with procedural requirements, non-application of mind, acting under dictation, exceeding jurisdiction or not following principles of natural justice.[20]

Principles of natural justice broadly comprised of two principles: the principle of Audi ***Alteram Partem*** (opportunity of being heard including opportunity to introduce evidence, cross-examinations, reliable witnesses), and ***Nemo Debet Ersse judex in Propria Causa*** (No one is judge in his own case, where decision is based on record supported by reasons and findings of the fact, evidences and unbiased). Failure to uphold the principles of natural justice would render any action invalid.

Some of the administrative authority may justify their decision on the widely accepted general principle of **"Ignorantia Juris Non Excusat"** which means ignorance of law is no excuse. But unlike the laws passed by Parliament, the executive arm cannot apply this principle, unless the delegated legislations are published and made known to those concerned who are affected or likely to be affected by such rules.

The onus of bringing any law or rules to the knowledge of the people is on the government as the Constitution clearly provides that a "Bhutanese citizen shall have the right to information."[21]Therefore, it is the duty of the administrative agency to publish, and make all the delegated legislations available to the public before it is implemented. This is essential because unless they know their rights, duties and obligations under any statute, they would not appreciate and comply with them. Hence, the policy or rule on recent ban on hawkers from selling home cooked food in the streets, and change in filled LPG cylinder allotment system from two cylinders to one cylinder, being not known to the public, prior to enforcement, has not satisfied the "principle of law that the public must have access

19 Supra note 13 at 85.

20 Training Package on Administrative Law, Dr. Sunita Zalpuri , J&K IMPA (Jammu)

21 Article 7, section 3 of the Constitution of the Kingdom of Bhutan

to the law and they should be given an opportunity to know the law."[22] Therefore, the necessity and importance of the principle of publication cannot be underestimated, though the publication of delegated legislation is not of statutory requirement in Bhutan.

6. Main Modes of Controls on Delegated Legislation

Broadly, the delegated legislation may be controlled through the following measures:

a. Procedural Control

Since delegated or subordinate legislation are not made by Parliament, it is necessary that all such legislations must be published through appropriate mode and manner, and brought to the knowledge of the people. This is because unlike law made by Parliament, the people will have no access or opportunity to know the legislations enacted through delegated legislation as they were made in the secret chambers of the delegated agencies. Unless they know the law, they would not be aware of the duties and obligations cast upon them by such law. Therefore, to secure compliance with the law by the people and for easy enforcement, they should have access to the law and know the contents of the law. All these can be facilitated and make possible to the people through publication and consultation.

Publication essentially means making the delegated legislation accessible to the general public and make known to them before enforcement. If the delegated legislation is not publicize through any mode of publication, the affected people would not have any opportunity to know about it. When they are caught on violation of rules or regulations, they defend their act by pleading ignorance of law, and get first time opportunity to challenge the rules in question.

The technique of consultation with interested or affected groups of people, prior to drafting of delegated legislation is another effective safeguard against possible misuse of power by the delegated authority. It is a technique which affords an opportunity to the affected interests to take part in the rule-making process, and give their views on the proposed subordinate legislation. This would facilitate an exchange of mutual viewpoints between the parties and "is useful in balancing the individual interests and administrative exigencies."[23]

In Bhutan, generally, a few notifications are issued through media without details of contents of the delegated legislation in most cases. Even the Parliament has never made mandatory for the publication of delegated legislation in the parent Act. This has affected the general public, while implementing the laws. Thus far, however, no individual or body has challenged the principle of publication of delegated legislation.

With regard to consultation as well, the practice has been that only few stakeholders are consulted in framing the rules or regulations, and never discuss with the interest groups or those individuals who would be affected by such rules before framing them.

b. Legislative Control

The objective of legislative control through the requirement of laying before Parliament, essentially, is to enable the legislatures to know the types of rules that the delegated authorities have made under delegated legislation, and to create opportunity for the former to question, if anything is not clear in the rules. This kind of regulatory technique acts as "safety-valve", and enables the legislatures to oversee and supervise the making of subordinate legislation by the administrative agencies. Such mechanism promotes close and constant contact between legislature and administration.[24]

The Parliamentary control as one of the safeguards against the abuse of delegated power is also limited to the provisions in the enabling statute or parent Act. And there is no requirement in the parent Act for the executive to present or lay down the delegated legislation to Parliament before or after the implementation, in any form. However, it seems that the efficacy of this measure also depends on the provisions of the parent Act on laying.

c. Judicial Controls through Writs, and Applying the Doctrine of Ultra Vires

The judicial process is the most important and effective method of controlling delegated legislation. The judiciary, through application of doctrine of *ultra vires* or issuance of writs can decide the validity or soundness of the delegated legislation. An expression *ultra vires* is a Latin phrase, which means 'Ultra' means beyond and 'Vires' means powers. Simple

22 Supra note 13 at 143.
23 *Id at* 152.
24 Id. at 158.

meaning of this term is 'beyond powers'; In a strict sense, the expression is used to mean any act performed in excess of power of the authority or the person who performs the act.[25]

According to this doctrine, a delegate is not entitled to exercise powers in excess or in contravention of the delegated powers. If any order is issued or framed in excess of the powers delegated to the authorities, such order would be illegal and void.[26] The *ultra vires* action of the administrative agency through delegated legislation may be due to delegated legislation itself being *ultra vires* to the parent Act or the Constitution.

However, in Bhutan, such challenges are yet to be seen. But this does not mean that there is no misuse or has never been *ultra vires*. Though, no study has been done on the subject, but by the sheer criticism on various actions taken by the administrative authorities on various matters is of clear evidence that there are instances of either misuse or abuse of discretionary power or some delegated legislations are *ultra vires* in some way or other.

The Supreme Court in the first constitutional case stated that "The imposition of taxes by the Government without the approval of Parliament is not in accordance with the provisions of the Constitution, and so it has sabotaged the fundamental principles of constitutional law."[27] The Court further held that "under no circumstances the authority to impose or alter taxes may be delegated to the executive."[28] Therefore, any taxes imposed by executive in any form have not become unconstitutional and Parliament has no power to delegate the authority to impose taxes to the executive arm of the government.

7. Writs

The Supreme Court and High Court are conferred with powers to issue any kind of declarations, orders, directions or writs.[29] This principle enables an aggrieved party to approach either Supreme Court or High Court to seek remedies or challenge decisions of the administrative authorities or validity of delegated delegation. However, it is an interesting experience that, thus far, no person has knocked the doors of our appellative courts on the matters of delegated legislation.

8. Recommendations

While the need of delegated legislation has become inevitable because of the ever increasing complex and difficult nature of functions, and pragmatic needs of the government, appropriate mechanism of check and balance is required to ensure that executive exercises the delegated legislative powers as intended by Parliament and within the scope of the delegation. This may include:

1. Parliament may consider providing adequate pre-natal control on delegated legislation while enacting a parent Act or enabling legislation;
2. Setting up of a Parliamentary Committee for scrutinizing the delegated legislation;
3. Making presentation of delegated legislation to the Parliamentary Committee mandatory so as to ensure that delegated legislation is within permissible limits of the power both in spirit and letter;
4. Making mandatory that all delegated legislation are published for public feedback before endorsing, and also after endorsing through all forms of media as well as official websites;
5. It may be appropriate for the government to come up with a single website (Official Gazette) for publication of all delegated legislations for the knowledge of the general public;
6. Making mandatory to distribute all the delegated legislation to all the local governments before implementation, and entrust them to sensitize them to the people;
7. The Office of Attorney General must be obligated to inform any agency if their delegated legislation is found to be in conflict with the Constitution or the parent Act; and
8. The judiciary may adopt a mechanism whereby any individual could challenge validity of delegated legislation, and petition for writs to the High Court or Supreme Court, as the public are not fully aware of the principle of writ and operation.

25 B.C. Sarma, The Law of Ultra vires, (New Delhi: Eastern Book Company), 2004
26 District Collector, Chittoor v. Chittoor District Groundnut Trader's Assn (1989) 2 SCC 58
27 The Government of Bhutan v. Opposition Party, 2011 SC(Hung-11)
28 Ibid
29 Article 21(10) of the Constitution of Kingdom of Bhutan

Conclusion

Compared to other jurisdictions, the Bhutanese administrative authorities still enjoy wide powers on delegated legislation, their implementation and enforcement. However, as the Bhutanese people become legally literate, it may be a matter of time that such a situation would not remain the same for long in the near future.

Contempt of Court: A Bhutanese Experience

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As a Judge…… I would often tell the lawyers in open Court that they could criticize me as much as they liked, inside the Court or outside it, to their heart's content, but I would not initiate proceedings for Contempt of Court. Either the criticism was correct, in which case I deserved it, or it was false in which case I would ignore it. Some people deliberately try to provoke the Judge to initiate Contempt of Court proceedings, their whole game being to get publicity. The best way to deal with such persons would be to ignore them, and thus deny them the publicity which they are really seeking. I would often say in Court "Contempt power is a `Brahmastra' to be used only on a `patra' (deserving person), and I do not regard you as a `patra'.

– Justice MarkandeyKatju, Former Judge of Supreme Court of India.[1]

The subject of Contempt of Court was in a dormant state until recently when the High Court issued a press release to initiate a contempt proceedings aginst such persons who made unsolicited comments on social media. Until then, it was considered to be a tedious and boring subject for public discourse and comments. No paper was written and published on the subject; may be, because not many contempt proceedings were initiated, or because contempt of court occurs within the four walls of the courtroom. As a matter of fact, we, mostly remain aloof from what is happening, when a judicial order is being disobeyed or not respected. However, with the growing positive attitude towards judicial learning and understanding, there is a gradual shift in the urge to know what is happening in the courtroom. Information and Communications Technology has played a vital role in reaching out to the people the information on the day-day happenings in the courts. The positive development in this field has encoraged me to take up this issue.

On August 7, 2015, the High Court issued a press release which states that the Court may initiate a contempt proceeding for making unsolicited comments on social media. The press release was issued four days after a litigant Penjor posted his story of dissatisfaction and grievances against the court's proceedings in kuenselonline forum. As on 7 August 2015, Penjor's post was liked by 19 persons, and commented by 28 individuals. The press release stated that such contemptuous comments on social media not only misled the public, but also malign the institution of the judiciary and reputation of the judges.[2]

Like any other judicial decisions, this matter has become one of the top agendas of public gossip, and not surprisingly, media has written and shared various thoughts and opinions on the matter. The most pertinent questions raised were: Does the post on social media, of such nature, warrant judicial press release? Does such kind of expression amounts

1 MarkandeyKatju, *Contempt of Court: The Need for a Fresh Look.* Available at: http://www.lawyerindia.in/webadmin/attachment/1411967968_contempt%20of%20court.pdf (Accessed on 05/10/2015).

2 RinzinWangchuk, *High Court warns BNBL loanee for contempt of court*,(August 8, 2015). Published in Kuenselonline, available at: http://www.kuenselonline.com/high-court-warns-bnbl-loanee-for-contempt-of-court/(Accessed on 24/09/2015).

to contempt of court? There is always a dichotomy between the right to freedom of speech and expression on the one hand, and fear of contempt proceedings on the other. While the former guarantees the right to express freely, the latter restricts this right. If that is the case, where does the freedom of expression end? Does it terminate with contempt proceedings? Questions are many, and answers are few and limited.

Contempt of Court is deemed as a discretionary power of a judge. No legal principle, no philosophy, no norms, and no criteria, essentially guides the Bhutanese courts to initiate the contempt proceedings. It is purely up to a judge to say and decide what contempt of court essentially is. In this regard, this article makes an attempt to analyze judges' power to initiate contempt action under the existing legal framework. Necessary emphasis is also placed onto whether the contempt of court action or proceedings restricts the freedom of speech and expression guaranteed by the *Constitution*. In particular, this article will explore contempt laws and its application that restrict comments on judicial proceedings and criticism of judges. Besides, it will also seek to identify some of the problems or lacunas in the existing laws.

Connotations and Classifications

I opted to consider this topic for discussion and analyze how the power of contempt of court is understood and exercised in our context. At the outset, let me introduce the conceptual meaning of contempt of court. *Black's Law Dictionary* defines contempt of court as "[A]ny act which is calculated to embarrass, hinder, or obstruct the court in administration of justice, or which is calculated to lessen its authority or its dignity."[3] Contempt of court is committed by a person who does any act in willful contravention of its authority or dignity, or tending to impede or frustrate the administration of justice, or by one who, being under the court's authority as a party to a proceeding therein, willfully disobeys its lawful orders or fails to comply with an undertaking which he has given.[4] According to Dan B. Dobbs, contempt of court is "an act or omission substantially disrupting or obstructing the judicial process in a particular case."[5] Generally, contempt of court is a behavior that opposes or defies the authority, justice, and dignity of the court.

3 Black's Law Dictionary 288 (5th ed. 1979).

4 Ibid.

5 Dan B. Dobbs, *Contempt of Court: a Survey*, 56 Cornell L. Rev. 183, 185 (1971). Available at http://scholarship.law.cornell.edu/clr/vol56/iss2/1.

In common law jurisdictions, contempt of court has traditionally been classified as: a) being rude, disrespectful to the judge or other attorneys or cause a disturbance in the courtroom, particularly after being warned by the Judge which is known as *facie curia* (in front of the court); or b) willful failure to obey an order of the court which is known as *ex facie curia* (outside the court).[6] This type of classification is also known as direct and indirect contempt respectively. Generally, the distinction is not so clear, and it remains hard to contextualize. Since, indirect contempt occurs outside the presence of the court, extrinsic evidence must be utilized to prove indirect contempt.[7] Example of indirect contempt is seen mostly in enforcement of judicial orders issued for monetary cases,[8] child maintenance, matrimonial cases, and other civil orders.[9] Indirect contempt has been also found predominantly in contempt by publication (an act that occurs outside the courtroom.)

Unlike indirect contempt, direct contempt occurs in the very presence of the judge, making all elements of the offense, matter within the personal knowledge of the judge and tending directly to obstruct and prevent the administration of justice. It follows that extrinsic evidence is not necessary to provide contempt.[10] However, to determine direct contempt, there involves numerous terminologies to be guided of - being rude, disrespectful to the judge or other

6 See *Background Paper on Freedom of Expression and Contempt of Court*, for the International Seminar on Promoting Freedom of Expression with the Three Specialized International Mandates(29-30 November 2000). Available at:https://www.article19.org/data/files/pdfs/publications/foe-and-contempt-of-court.pdf. (Accessed on 08/10/2015). Myron Fink writes that contempt are implied two distinct functions to be exercised by the court: enforcing courtroom order, and enforcing judicial decree. See Myron Fink, *Basic Issues in Civil Contempt*, New Mexico Law Review, Vol.8 (1977).

7 See Robert G. Johnston & Kevin E. Bry, *An Overview of Illinois Contempt Law: A Court's Inherent Power and the Appropriate Procedures and Sanctions*, 26 J. Marshall L. Rev. 223 (1993). Available at http://repository.jmls.edu/cgi/viewcontent.cgi?article=1822&context=lawreview (Accessed on 23/10/2015).

8 See Section 43 of the Penal Code of Bhutan for example, which provides that "when the Court has ordered a convicted defendant to pay compensatory damages or a fine or make any other monetary payment as a result of the defendant's criminal conduct and the defendant defaults on such payment, the defendant shall be in contempt of court and may be imprisoned until the fine is either paid or recovered and the Court may also attach the property of the defendant."

9 For other jurisdictions on indirect contempt, see Margaret M. Mahoney, *The Enforcement of Child Custody Orders by Contempt Remedies,* University of Pittsburgh Law Review, vol. 68:835 (2007).

10 Supra Note 7.

attorney, disturbance in the courtroom – are all needed of judicial interpretation. How can a judge, for example, would define rude? What kind of behavior would consider disrespectful to the judge? What kind of activity will disturb the courtroom? These are some of the questions that we need to address during or before any contempt proceedings. Nevertheless, a direct contempt is an act that occurs in the presence of the court and is intended to embarrass or engender disrespect for the court. For instance, shouting in the courtroom and refusing to answer questions for a judge which will impair the proper administration of justice would amount to direct contempt of court.[11]

Contempt of court is also classified into criminal and civil. Despite the name, this classification has nothing to do with the underlying case.[12] The nature of the contempt is identified by the purpose of the sanction imposed by the court rather than the nature of the contemptuous act itself.[13] Civil contempt may occur in a murder trial as easily as criminal contempt stems from a divorce.[14] Civil contempt is also known as "coercive" or "remedial" contempt, because it seeks to remedy the violation of a court order.[15] Therefore, the punishment for civil contempt is remedial or coercive and for the benefit of the complainant.[16] The aim of the civil contempt sanction is to seek cooperation from the contemnor and not simply to get him to forebear other people's actions. Criminal contempt occurs mainly through publication (whether by words, spoken or written, or by signs, or by visible representation, or otherwise) of any matter or doing of any other act whatsoever which: (i) scandalizes or tends to scandalize, or lowers or tends to lower the authority of, any court; or (ii) prejudices, or interferes or tends to interfere with the due course of any judicial proceedings; or (iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner.[17] The punishment for criminal contempt, on the other hand, is punitive and for the vindication of the authority of the court, and therefore, it is also known as "punitive" contempt. The difference between the two, however, largely depends on the purpose of the contempt rather than the underlying case.[18]

Legislative Basis

Unlike in other jurisdictions, Bhutan does not have separate contempt legislation. It may be appropriate to have separate law despite the contemporary legal minds arguing that it does not have a space to fit in a free society. While the argument stands strong in a democratic setup, absence of clear law in this regard will certainly provide excessive judicial power. It is always appropriate to provide a proper guideline so that absolute power does not corrupt absolutely. The law will certainly create basis for court to initiate the contempt proceedings judiciously.

It is significant to uncover that the *Constitution of the Kingdom of Bhutan* does not provide contempt provision. However, *Civil and Criminal Procedure Code* (the "Code") of 2001 provides contempt provisions. The Code provides that "a person showing disrespect to the Court during Court proceedings may be subjected to civil or criminal sanction in accordance with the laws of contempt,[19] for: (a) interfering with a case, either orally or in writing; (b) failing to comply appropriately with the judicial order; or (c) otherwise obstructing the course of justice."[20] The Code, however, does not bifurcate civil and criminal contempt although Section 107 slightly defines civil contempt.[21] This particular provision is very vague and does not specifically says what constitute civil contempt. Similarly, the Code also does not provide which particular act or disrespect amounts to civil or criminal sanction. The words "subject to civil and criminal sanctions"

11 For more on direct and indirect contempt, see Robert G. Johnston & Kevin E. Bry, *An Overview of Illinois Contempt Law: A Court's Inherent Power and the Appropriate Procedures and Sanctions*, 26 J. Marshall L. Rev. 223 (1993). Available at http://repository.jmls.edu/cgi/viewcontent.cgi?article=1822&context=lawreview (Accessed on 23/10/2015).

12 Andrea L. Westerfeld, *A Prosecutor's Guide to Contempt of Court*, Volume 38, No. 3 (May-June 2008). Available at: http://www.tdcaa.com/node/2492 (Accessed on 02 August 2015).

13 See Laura A. Thornton, *Fines, Imprisonment or Both: Civil vs. Criminal Contempt,* FAMILY LAW SECTION | FEATURES (February 2001), p 34.

14 Ibid.

15 Id.

16 Id.

17 See, G.V. Mahesh Nathand AudhiNarayanaVavili, *Contempt of Court and Free Expression - Need for a Delicate Balance, (*December 5, 2008). Available at:http://dx.doi.org/10.2139/ssrn.1311828 (Accessed on 21/10/2015).

18 For more detail on difference between civil and criminal contempt, see Myron Fink, *Basic Issues in Civil Contempt*, New Mexico Law Review, Vol.8 (1977).

19 Section 102 of the Civil and Criminal Procedure Code 2001.

20 Section 102.1 of the Civil and Criminal Procedure Code 2001.

21 Section 107 of the Code states that: "an aggrieved party may initiate civil contempt proceedings." The subsequent Section [S.107.1 (Amended in 2011) of the Code] provides that "Finding of civil contempt shall result in fine/imprisonment until the civil order has been complied with. However, for the monetary case the person shall be imprisoned for a number of years calculated based on value based sentencing. "

have been used concurrently in every provision,[22] and therefore, it purely is the discretionary power of a judge to provide contempt sanctions, be it civil or criminal. However, the essence is that criminal contempt involves the obstruction of justice, such as threatening a judge or witness or disobeying an order to produce evidence.

Interestingly, the Code does not provide for trial procedure for contempt proceedings. The Bench Book for Judicial Process, although provides brief procedural aspects of contempt proceedings, it is not exhaustive. However, the generally accepted norms are that direct contempt are dealt with summarily, while indirect contempt demands some hearing.[23] The fact remains that the contempt of court proceeding contravene the natural justice and fairness principles. The court *suo motu* initiates the contempt proceedings. When a judge's order is contemned, for instance, the judge becomes the so called "injured party".[24] This makes the judge (who is a state official) absolutely worst person to make the decision to persecute, because he/she is an interested participants.[25] It is nothing different from judges having the power to decide in their own case. The judge in effect is the injured party, the prosecutor, the witness, and the judge.[26] It contravenes the maxim *nemo judex in sua causa,* which literally means "no one should be a judge in his own cause." Although, the courts have never abused the powers associated with contempt, however, it has the potentiality for its abuse. Given this unscrupulous procedural aspects and unguided discretionary power to initiate contempt proceedings, and Bhutan does not have separate legislation on the matter, it is only the time, which will guide us, and tell us about its development in the near future.

Contempt of court provisions are also incorporated in the *Penal Code of Bhutan, 2004.* Section 367 of the Code provides that:

A defendant shall be guilty of the offence of contempt of court, if the defendant:

> (a) Has been served with a Court order and fails to comply without any reasonable cause;
>
> (b) Purposely interferes with or interrupts a legal proceeding including a failure to respond to a Court directed inquiry, makes a public outburst, an antagonistic comment or directs a threat at a judicial official or person present in the courtroom, or engages in acts demonstrating a lack of *diglam namsha* befitting the Court; or
>
> (c) Refuses to abide or obey a direction rendered by the Court.

The grading of contempt of court offence is a petty misdemeanour[27] except that the Court may extend the period of imprisonment until the defendant complies with the Court order that is the subject of the contempt.[28] The substantive part of the law on contempt, quite clear.

When Contempt is Necessary Evil

The most important question that requires an immediate answer is that under what circumstances the contempt of court provisions in the *Civil and Criminal Procedure Code* and *Penal Code* are invoked? In other words, when does the contempt of court action become necessary evil? The straightaway response to this question is that it becomes necessary but evil when misconducts or acts of a person impair fair and efficient administration of justice. The

22 For instance, Section 103 of the Code says "failure of a party to a case to adhere to the hearing schedule may result in a finding of contempt and may be subjected to civil or criminal sanction." Similarly, Section 104 of the Code says "non-compliancewith-judicialordersmayresultinafindingofcontempt andsubjecttocivilor-criminalsanction." Subsequent Section 105 of the Code state that "where a person summoned fails to appear or present evidence at the order of the Court,he/she may be found in contempt of court and may be subjected to civilor criminal sanction". Also, Section 106 state that "once the hearing of a case has begun, if the litigant or other person summoned by the Court takes leave of absence without the permission of the Court, he or she may be subjected to civil or criminal sanction for contempt." If we clearly examine and study these provisions of the Code, we see that the words "civil and criminal sanction" are used concurrently.

23 In case of direct contempt the elements of due process and fair trial is compiled with. See *Bench Book For Judicial Process*, p. 119. Also see C. Gaylord, Watkins, *The Enforcement of Contempt to Law Through Contempt Proceedings,* Osgoode Hall Law Journal, Vol.5, No.2 (October 1967).

24 See Bruce Eden, *Contempt of Court - Arbitrary Excess of Power*, Council to Restore the Rule of Law. Available at: http://www.abolish-alimony.org/content/articles/Contempt-of-Court-Council-to-restore-rule-of-law.pdf (Accessed on 12/10/2015).

25 Ibid.

26 See Mriganka Shekhar Dutta &Amba UttaraKak, *Contempt of Court: Finding the Limit,* NUJS L. Rev. 2 (2009). Available at: http://www.commonlii.org/in/journals/NUJSLawRw/2009/3.pdf (Accessed on 21/10/2015).

27 A defendant convicted of a misdemeanour shall be sentenced to a term of imprisonment, a minimum of which shall be one year and a maximum of which shall be less than three years. (See Section 12 of the Penal Code).

28 See Section 368 of the Penal Code.

contempt power should only be used in a rare and in very exceptional situation where without using it, it becomes impossible or extremely difficult for the courts to function and administer justice. Modern judicial minds believe that even in such rare and exceptional situation, the contempt power should not be exercised if a mere threat to use it suffices. This eventually qualify that mere publication of materials against a judge would not amount to contempt of court, and that any publication should bear a disturbing weapon that destroys the spirit of justice.

In this regard, it is important that judiciary as an institution should not be reactive to what people say in a common forum. People in the judiciary often tell us that judges are never appreciated because "The winning party says that he or she won the case because the case was in their favour, and the losing party says that he or she lost the case because the Judge was not fair." Because there are two parties involved in a case, and that adjudication does not generate a win-win situation, the losing party ultimately blame and accuses judges for preferential treatment and favoritism. If the judiciary is to react to whatever the losing party expresses or critizes, then the state of judicial mind can be undermined. In a democracy, people will say all sorts of things, which a judge should learn to ignore as long as his conscience is clear. A reactive judge would mean that his/her conscience is not so clear, and that there has been one-sidedness, and partiality in his/her decision. Justice Markandey Katju, former Judge of Supreme Court of India, writes that any criticism is only an 'occupational hazard' of a Judge,[29] and as long as the Judge is allowed to function, the best course for him is to ignore baseless criticism, but pay heed to honest and correct criticism.[30]

When I say this, I do not mean that the recent press release of the High Court was erroneous, and it should not have been issued. My concern here is only to enquire whether the post on social media by Penjor has actually affected fair and efficient administration of justice or has it extremely disturbed the court's functioning and delivery of justice. The test is not that whether it has damaged the reputation of an individual judge, but whether has it made the functioning of the judge impossible or extremely difficult? If it did not, then it does not amount to contempt of court, even if it is a harsh criticism.[31]

29 Supra Note 1.
30 Ibid.
31 Id.

The best shield and armour of a Judge is his reputation of integrity, impartiality, and learning.[32] If a judge is known for his/her fairness and impartiality, his/her decision will be highly valued and respected in the society. Therefore, an upright judge will ever need to use the contempt power in his/her judicial career. It is only in a very rare and extreme case that such power will need to be exercised, and that too, only to enable the Judge to function, not to maintain and preserve his/her dignity or majesty.[33]

Often, it is felt that contempt is a fictional doctrine arbitrarily established by the courts to command respects. In a real sense, contempt power is not for upholding the judge's reputation and respect, but the focus of the court is on the maintenance of public respect and trust for judicial orders. Justice John Marshall, the former Chief Justice of American Supreme Court warned that "the power of judiciary lies, not in deciding cases, nor in imposing sentences, nor in punishing for contempt, but in the trust, confidence and faith of the common man."[34] Ronald L. Goldfarb writes that "contempt of a governmental authority should not be punishable; apparently recognizing that respect by compulsion is a contradiction in terms, and no means to a free, liberation government."[35] Similarly, the Supreme Court of India once opined that "Judges, like everyone else, will have to earn respect. They cannot demand respect by demonstration of 'power'….. Court should not readily infer an intention to scandalize courts or lower the authority of courts unless such intention is clearly established."[36] Thus, jurisdiction of contempt is not to be invoked unless there is real prejudice which can be regarded as a substantial interference with the administration and delivery of justice.

Free Speech and Contempt Clash

It is pertinent to analyze whether contempt proceedings undermine the fundamental right to free speech and expression. For the purpose of my analysis and argument, I relate the recent press release issued by the High Court. To put it simply,

32 Id.
33 Id.
34 Quoted in*Rajesh Kumar Sing v. High Court of Judicature of Madhya Pradesh*, (2007 AIR 2725.) Available at: http://indiankanoon.org/doc/559531/(Accessed on 23/10/2015)
35 Ronald L. Goldfarb,*The Contempt Power*. New York: Columbia University Press (1963) at 1. Cited in: C. Gaylord, Watkins*, The Enforcement of Contempt to Law Through Contempt Proceedings,*Osgoode Hall Law Journal, Vol.5, No.2 (October 1967).
36 Supra Note 34.

my argument is specific, and it is with reference to the question whether the High Court's Press Release undermined the fundamental right to speech and expression enshrined in the Constitution.

Freedom of speech and information is guaranteed under Article 7(2) of the Constitution.[37] Important international legal instruments like International Covenant on Civil and Political Rights (ICCPR) and United Nations Declaration on Human Rights (UDHR) guarantee right to free speech and expression as one of the fundamental basis of human rights. Although freedom of speech traditionally covers the right to communicate information and ideas, but article 19 of both the ICCPR and UDHR is to be interpreted in a broader sense. The freedom expressed in those articles does not merely encompass the right to express one's opinion. They both guarantee the right to receive and impart information and ideas, the two main subjects of protection. Moreover, there is an emphasis on ideas, rather than information.[38]

We have rich contexts which promote basic human right to speech and expression which is essential the part of a healthy democracy.[39] And on the other hand, maintenance of dignity of the court is one of the cardinal principles of rule of law in a democratic set up. One cannot imagine a state without a strong and independent judiciary. Then, how do we reconcile these conflicting two important democratic principles?

To enable us to reconcile the conflicting principles, it is important for us to understand the form and nature of government that our Constitution embraced. Article 1(2) of the Constitution provides that "the form of government shall be that of a Democratic Constitutional Monarchy", and similarly, Preamble of the Constitution states that "We the People of Bhutan…." which clearly emphasize the essence of democratic governance. It suggests that all power stem from the people and they are the supreme master; and all the state machineries are the servants of the people. Drawing the principle of, and relationship of master –servant nature from this logical analysis, I argue that master has the right to criticize or condemn the servant when the former is not satisfied with the latter's performance.

In this light, reconciliation can easily be struck by treating the right of citizens of free speech and expression under Article 7(2) to be primary, and the power of contempt of Court as secondary.[40]Any healthy and constructive criticisms are necessary features of the development of vibrant democratic institutions in the country. The court as a guardian of the Constitution must vigilantly safeguard free speech and expression even against judicial resentment.[41]

The freedom of speech and expression, like any other fundamental rights, has its limits and exception. Article 7(22) (a) of the Constitution empowers the State, by law, to restrict the fundamental rights when it concerns "the interest of the sovereignty, security, unity and integrity of Bhutan." The State can also limit the rights conferred under Article 7, by law, when it concerns "the interests of peace, stability and well-being of the nation."[42] Therefore, it can be well construed that any speech, expression or opinion is restricted, if it undermines the sovereignty, security, unity and integrity of the nation. It also bars people from making derogatory statements, if they invade into the fame and honour of the people. Therefore, certainly, we need to ascertain whether opinions expressed or comments made against the judicial orders, judgments or judicial processes really impact the sovereignty and security of the nation, so as to warrant contempt proceeding against offenders.

The courts in other jurisdictions hold that the right to freedom of speech and expression is not absolute, and no one is entitled 'under the guise of freedom of speech and expression' to make irresponsible accusations against the institution such as judiciary so as to affect public trust and confidence in the administration of Justice.[43] But in our jurisdiction, it is

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

38 G. Maliverni, *Freedom of information in the European Convention on human rights and in the international covenant on civil and political rights,*Human Rights Journal 4, 445(1983). As cited in: Sara Hugelier, *Freedom of expression and transparency: two sides of one coin,*Jura Falconis Jg. 47, (2010-2011), mummer 1.

39 Beatson and Cripps, *Freedom of expression and freedom of information: Essays in Honour of Sir A. Mason,* Oxford University Press, Oxford (2000) at 17. Cited in Sara Hugelier, *Freedom of expression and transparency: two sides of one coin,*Jura Falconis Jg. 47, (2010-2011), nummer 1.

40 For more detail on free speech and contempt argument, see MarkandeyKatju, *Contempt of Court: Need for a Fresh Look,* Available at: http://www.lawyerindia.in/webadmin/attachment/1411967968_contempt%20of%20court.pdf (Accessed on 08/10/2015).

41 N. Hanson, *A Paper on How to Challenge a Contempt of Court Postponement Order* (Regional Press News; 26 March, 20080), cited in: Chishimba Yvette Mulenga, *An Analysis of the Law relating to Contempt of Court and the Discretionary Powers of Judges: the Zambian Experience*, The University of Zambia, School of law, (2011).

42 See Article 7(22) (b) of the Constitution of Bhutan 2008.

43 See Jack Tsen-Ta LEE, *Freedom of Speech and Contempt by Scandalizing the Court in Singapore*. (2009). International Asso-

yet to decide whether contempt of court is justifiable restriction or limitation on the right to freedom of speech. Irrespective of our view on this issue, we should remember that by restricting or limiting criticisms against the judiciary, we are imposing an important restriction on freedom of speech.[44]

Conclusion

In a free society, nothing can restrict people from free expression. Public institutions should rather encourage free speech because comments and opinions are basis for perfection and improvement. Criticisms and applauses are must for a positive change. Justice is seen only in a free society. In a democracy, tyrant ways of supremacy and governance only lead to civil unrest and disobedience. Thus, there should be criticisms and applauses from general public without which there will be no positive changes.

It may be of the court's strong view that the dignity of court must be honored and upheld, and comments or public criticisms directed against the judiciary with a view to affect the sacrosanct of the Institution will be appropriately dealt with. In jurisdictions other than common law, the Courts manage its affairs without exercising contempt power.[45] In western countries like the United Kingdom and the United States of America, contempt jurisdiction is sparingly exercised, giving much scope to the fair and constructive criticism which is considered as the core values of modern democracy.[46]

Drawing inspirations and lessons from their practices, Bhutanese courts can effectively manage system of justice administration without resorting to contempt device. A country with limited judicial contempt is also an attempt to ensure that people are free to express their views without the risk of being charged for contempt even where the allegations put forward are done in public interest. If that is not possible, perhaps, the least we can strive to do, is to balance the right to freedom of speech against the need of administration of justice, one of which is to protect the integrity of the courts. Eventually, a judicial process without contempt proceedings will be labeled as one of possessing upright and learned judges.

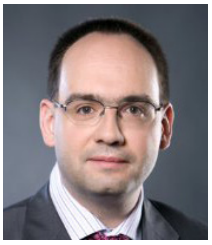
ciation of Law Schools (IALS) Conference on Constitutional Law, Washington DC, Research Collection School of Law, 11-12 (September 2009). Available at:http://ink.library.smu.edu.sg/sol_research/10.

44 Jacob S. Ziegel, *Some Aspects of the Law of Contempt of Court in Canada, England, and the United States,* McGILL LAW JOURNAL, p 256. Vol. 6, No. 4.Available at: http://www.lawjournal.mcgill.ca/userfiles/other/3251710-ziegel.pdf (Accessed on 07/10/2015).

45 Bruce Eden, *Contempt of Court - Arbitrary Excess of Power*, Council to Restore the Rule of Law. Available at: http://www.abolish-alimony.org/content/articles/Contempt-of-Court-Council-to-restore-rule-of-law.pdf (Accessed on 12/10/2015).

46 Supra Note 43.

The Swiss Federal Intelligence Service Law



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Abstract

The Swiss Parliament has recently adopted a new law on the Federal Intelligence Service (FIS). Besides granting more powers to the civilian intelligence service officials, the main features of the Act are the introduction of a new authorisation procedure for means of secret surveillance and increased judicial oversight. Not only the use of intrusive methods of gathering intelligence be submitted to prior two-tier approval bodies, both by an independent court and the executive government, but also the Act cast an obligation on the part of the FIS to disclose the intelligence collection activity after its termination, and provides for the possibility to appeal against the surveillance warrant once it has been disclosed by the FIS. In addition to more traditional executive and parliamentary oversight mechanism, the Swiss model shows how democratic control of the intelligence services could be enhanced through increased judicial controls at different stages of intelligence collection.

1. The New Intelligence Services Act

The Swiss Parliament, on 25th September, 2015, adopted a new Federal Act on the Intelligence Service (hereinafter called the Intelligence Service Act, ISA[1]). The Act defines precisely the tasks of the Federal Intelligence Service (hereinafter FIS), the civilian intelligence service of the Swiss Confederation. It contains provisions regulating the authorisation and use of special means for collecting intelligence within Swiss territory. As it might be submitted to an optional referendum, one should be aware that, it is not yet clear, if and when, it will come into force.[2] Despite this uncertainty, the Act is well worth a closer look in terms of the tasks assigned to the judiciary. Besides granting more powers to the civilian intelligence service officials, the main features of the Act are the introduction of a new judicial authorisation procedure for secret surveillance warrants, and increased judicial oversight. Not only the use of information both by an independent judge of the Swiss Federal Administrative Court (FAC) and by one member of the Federal Council, the executive government of Swiss Confederation, but also the ISA cast an obligation on the part of the FIS to disclose the intelligence collection activity by way of formal notification once the activity has been terminated. It also provides for the possibility of appeal against the decision, first to the FAC, and finally to the Swiss Federal Supreme Court (FSC). As we shall see, the mere fact that the secret surveillance operation must be formally disclosed, and can be submitted

1 There is no official translation of the Act in English, but the text is available in German, French and Italian in the Federal Gazette of October 6th 2015 (number 39): https://www.admin.ch/opc/fr/federal-gazette/2015/index_39.html.

2 As with any new Federal Act, it is still possible to oppose it by launching a referendum. This is known as an optional or facultative referendum, as legislation is not automatically contested in this way. If enough signatures of Swiss citizens are collected to support the referendum, the contested law is put to a popular vote. The Constitution requires that at least 50,000 people or 8 cantons have petitioned to do so within100 days of the law's official publication in the Federal Gazette.

to judicial review is quite remarkable, in the realm of intelligence, which is known for its secrecy and impunity than for its accountability in court. The new legal framework shows how democratic control of intelligences services can be enhanced through judicial controls at different stages of the intelligence collection process. In the following, we will briefly present the new law and focus on the role of the judiciary throughout different stages.

2. The Federal Intelligence Service and Scope of the Act

The civilian FIS is responsible for both foreign strategic intelligence, and certain aspects of internal security intelligence. The Act provides for a statutory basis for the FIS and its activities. Switzerland is a Federal State, and according to its constitution, the Confederation and its member states, the cantons, shall coordinate their efforts in the area of internal security.[3]Hence, the responsibility for domestic security is shared with the cantons, and the federal administration is only responsible for the tasks assigned to it specifically by law.

Chapter 2 of the Act strictly defines the tasks of the FIS. The main function of the FIS is to collect intelligence in order to detect and prevent threats to the national security. Its task is therefore to establish a comprehensive threat assessment for the Federal government. At the Federal level, the FIS primarily provides information for the Federal Council,[4] the departments and the military command. In relation to internal security intelligence, the new legal framework assigns the FIS the functions such as: detecting and preventing threats posed by terrorism; attacks on critical infrastructure; illegal intelligence; violent extremism; and the proliferation of nuclear, biological, and chemical (NBC) weapons. There is one important distinction to be made between a prosecution authority and intelligence of services, although there is a fine line between them, especially in the context of counter-terrorism.

In Switzerland, the role of FIS is strictly limited to intelligence gathering, and the corresponding threat assessment. Criminal prosecution is the task of the Office of the Attorney General, the Confederation's investigation and prosecution authority. The Office of the Attorney General is therefore responsible, with the help of police, for the prosecution of criminal acts, which fall under federal jurisdiction. Therefore, the FIS does not have the same task as that of the US FBI, for instance, it has no law enforcement or prosecution powers. On the other hand, the FIS's intelligence scope is broader than that of classical foreign intelligence agencies, such as the CIA or the UK's Secret Intelligence Service (better known as MI6), because, it also covers domestic intelligence. In fact, the current FIS has been in existence since the merger of the foreign intelligence service and the former domestic intelligence service in 2010.[5]

Although, FIS, as a government agency, is under the authority of the Federal Department of Defence, Civil Protection and Sport, it is purely a civilian and is separated from the Military Intelligence Service, MIS, which is not subject to the Act, and is regulated separately by the Armed Forces Act.

3. Special means of Collecting Intelligence and Investigation Powers

As such, secret surveillance is not new in Switzerland, but many surveillance methods now provided by the Act were hitherto, only engaged by the prosecuting authority and police forces in the course of criminal investigations.

The Act includes classical means of collecting intelligence, such as open source intelligence, and covert human intelligence sources with the use of a false identity if needed. In terms of the various intelligence gathering techniques, the new law distinguishes between means of surveillance submitted to authorisation and others which can be used without prior judicial approval. The latter is less intrusive. For example, the FIS can observe activities taking place in public space, and record them, as long as it does not infringe on the private sphere. The ISA also permits issuing of a search notice against a person or a vehicle in the police databases in order to locate, and collect additional information about a person's identity. The law also places an obligation on some private individuals or businesses to disclose certain information. For example, professionals working in the transportation sector may have to

3 Article 57 of Federal Constitution of the Swiss Confederation of 18 April 1999: Paragraph 1) The Confederation and the Cantons shall within the scope of their powers ensure the security of the country and the protection of the population. Paragraph 2) They shall coordinate their efforts in the area of internal security.

4 The Federal Council is the executive government of Switzerland.

5 The current FIS has been in existence since the merger in 2010 of the former strategic intelligence service and the internal affairs service. Both were already civilian intelligence services.

disclose information about the kinds of services they provide like disclosure of passengers' lists. This gives the FIS the power to obtain information quickly to enable them to locate or monitor the movements of individuals under suspicion.

In the following, we concentrate on the collection of intelligence in internal affairs with special means submitted to prior approval. These new intrusive and secret intelligence gathering methods are exhaustively listed in the Act. Amongst them, are the monitoring of postal and telecommunications traffic, the use of tracking devices to track people or objects, the use of listening devices to listen, and record private conversations, the use of surveillance devices to observe, and record private activities, infiltration of computers and networks, and the searching of premises, vehicles or containers.

The common thing that these methods embodied is that they are especially intrusive, and infringe upon the private lives of the individuals placed under surveillance.

4. Approval Process

4.1 Issue of a Warrant by the Court - Procedural Rules

Before engaging any special means of collecting intelligence as described above, the FIS has to seek prior approval from an independent court, and then from the executive government. This judicial authorisation procedure by a single Judge of the Swiss Federal Administrative Court is new, and it has to be strictly distinguished from normal criminal procedures. The Swiss Federal Administrative Court is not a prosecution authority but a specialised administrative court at the Federal level.[6] The Court can make complaint against the decisions of federal authorities. In certain matters, the FAC is also authorised to examine cantonal decisions of the member states of the Swiss Confederation, and issue judgments in individual litigation proceedings against the federal authorities. In cases, in which the FAC is not the highest court of the land, its judgments may be appealed to the Federal Supreme Court (FSC). All the FAC proceedings are subject to the provisions of the Administrative Procedure Act (APA, SR 172.021), unless specified in the Federal Administrative Court Act (FACA, SR 173.32) (see Art. 2 para. 4 APA and Art. 37 FACA).[7]It is important to note that the provisions of federal law that regulates a procedure in more detail apply, provided that the said provisions are not contradictory to the APA provisions (Art. 4 APA). In addition, more recent procedural regulations contained in other Federal Acts take precedence over the APA, if stated explicitly. For this reason, answers to procedural questions can be found not only in the APA, but also in the procedural provisions contained in the corresponding special legislation, as is the case with ISA. The main difference, in comparison to normal administrative cases, is the absence of a counterpart. Individuals, who are the objects of the surveillance, will only be part of the procedure, once the measure has been disclosed, and they have brought a claim.

The FIS has to file a written request, and deliver any document necessary for the judge to assess the need for surveillance. The request shall contain the type of intelligence collection method requested, why the said means is needed, the aim of the surveillance, the personal data of the person to be placed under surveillance, the start and the end dates of the requested intelligence collection means, and all the documents needed to assess the request. Although the administrative procedure is primarily written, the new Act also allows the designated judge to summon FIS to a hearing before he decides on the matter. The idea of hearing is that a senior officer of FIS will be able to outline the case orally, and present the documents. It will also allow FIS to answer directly the questions the judge may have before he decides. The treatment of the request must be quick. Therefore, the Act allows a judge a maximum of five working days to decide once the request for surveillance has been received.[8]

Obviously, the cases are very sensitive, and secrecy is of utmost importance. This has implications for the management of the approval requests within the court. It requires special measures in terms of data protection and security throughout the life cycle of a case.

6 Based in St Gallen, the FAC has five divisions and a General Secretariat. With 75 judges and 320 support staff, it is the largest federal court in Switzerland.

7 Translations of the acts are provided on the official website of the Swiss government under https://www.admin.ch/opc/en/classified-compilation/1.html

8 Article 29, paragraph 2 of the ISA.

4.2 Final Decision at Ministerial Level

Once a request has been approved, and a warrant is issued by the judge, it shall be the Head of the Federal Department of Defence, Civil Protection and Sport (DDPS) decide if the surveillance order will finally be approved. This is to be done only after consultation with two other members of the Federal Council,[9] which is the highest executive authority of the Swiss Confederation. Even if the Court has issued a valid surveillance warrant, the Head of the DDPS could also decide to cancel the order. This is one of the specific features of the new Act, the executive government – at ministerial level – shall decide only after the judge has granted a warrant.

4.3 Validity, and Termination of the Surveillance Warrant

The validity of a warrant is limited to three months, and if the FIS wants to continue intelligence collection after the expiry of the duration of the first surveillance warrant, a new request for an extension must be filed. The same procedure will have to be followed just like the first instance.

4.4 Approval Procedure in case of Emergency

According to Article 31 of the Act, in case of emergency, an intelligence gathering operation could be initiated without prior approval, but only on the basis of an order by the Director of the FIS, provided that the Director immediately informs the judge in-charge, and the Head of the Federal Department. The latter could then decide to stop the intelligence collection immediately. Within 24 hours, the Director of the FIS has to submit a request to the court with justifications. The judge has three working days to decide on the matter. If the decision is negative, the surveillance shall cease immediately, and the data already collected must be destroyed.

5. Termination and Disclosure of the Secret Surveillance

When warrant expires, the intelligence collection has to be terminated. Within a month, the surveillance must be disclosed to the concerned by way of a formal notification transmitted by the FIS.[10]In many cases, the said disclosure could affect ongoing or even past intelligence operation as well as threaten the lives of covert sources, for instance. For this reason, the FIS can request that the disclosure be delayed, and that the notification be postponed to a later date. The Act exhaustively lists the reasons for a delay. However, the possibility of postponing the notification bears the risk that some operation will never be disclosed on the pretext of security. Therefore, a safeguard was built into the Act. The request for postponing the notification is subject to the same approval procedure as the initial warrant for surveillance. A single judge of the Federal Administrative Court will have to weigh the public interest for secrecy against the private interest of the individuals placed under surveillance. At its request, the FIS will have to establish an overriding public interest for secrecy. Here again, once approved by the Court, the postponement must be confirmed by the Head of the Department, who could instead, for instance for political reasons, decide that the surveillance disclosure should not be delayed any further.

6. Possibility of Appeal and Judicial Review

After disclosure, individuals who were subject to surveillance can appeal against the warrant, and seek a judicial review by the Federal Administrative Court. Pursuant to Article 30, paragraph 3 of the FIS, notification of the surveillance by the FIS triggers a 30-day legal deadline to appeal against the surveillance warrant. Once the appeal is filed, the case will follow the same proceedings as in a normal administrative trial, in which, a citizen appeals against a decision of a federal authority. The Court – comprising three or even five, if necessary–will review the legality of the decision at the time of the issuance of warrant, against whose judgement can be further appealed to the Federal Supreme Court of Switzerland.

The possibility of judicial review goes even further, since, pursuant to article 83, paragraph 1 of the ISA, not only the surveillance warrant, but also any decision issued by a federal authority on the basis of the ISA can be appealed to the FAC.

7. Judicial control as a means of Democratic Control of Intelligence Services

7.1 Justifiability of Intelligence?

At first glance, the new surveillance warrant procedure described above does not seem much different from that of the criminal law. The role of a judge assigned by the ISA appears like that of a

9 The Heads of the Federal Department of Foreign Affairs (FDFA) and of the Federal Department of Justice and Police (FDJP), two of the seven members of the Federal Council.

10 Article 33, paragraph 1 of the ISA.

magistrate, who issues a warrant or establishes a compulsory measure in pre-trial stage of a criminal case. Even though these two functions are very similar, the fact that, an independent magistrate has to issue a warrant outside a criminal case is not a simple matter. Firstly, in intelligence and domestic security matter, prior judicial scrutiny of surveillance is the exception not the rule. Secondly, as stated above, there is a possibility of judicial review. This again is quite exceptional, because in most cases, secret surveillance will never be disclosed by the intelligence service, and claims can be brought to court, on the ground of breach of constitutional rights only when a whistleblower, for example, has released the information. Besides, intelligence services are often granted immunity from the courts. This can quickly become synonymous with impunity.

7.2 Best Practice

According to a best practice, democratic oversight of intelligence services can be divided into five different areas: executive control, parliamentary oversight, judicial review, internal control, and independent scrutiny.[11]

A short overview of the way intelligence services are put under democratic control shows that judicial control is not as common as one might expect.[12]In many countries, electronic surveillance, and other types of surveillance do not require a warrant, and can be ordered by the government or even an executive officer of the intelligence services. The major exception is the USA, where it is the task of a special federal court to approve surveillance activities within the US territory. This is the United States Foreign Intelligence Surveillance Court (FISC Court). It was introduced in accordance with the Foreign Intelligence Service Act (FISA) of 1978,[13] a reaction to the 1975 congressional investigations of intelligence abuse, after certain activities had been revealed by the Watergate affair.[14] The role of the FISA in allowing NSA surveillance is controversial, and it is not a topic to discuss here. Strictly speaking, FISA covers only "foreign intelligence" issues. For domestic issues, the U.S. Supreme Court held in 1972 that a judicial warrant was required before beginning electronic surveillance even if domestic security issues were involved, overruling the government's objection, which had argued that the special circumstances applicable to domestic security surveillance should not be subject to traditional warrant requirements, which were established to govern the investigation of criminal activity, not ongoing intelligence gathering.[15]

7.3 Advantages of Judicial Review

We strongly believe that there are some advantages in vesting the judiciary with the control of intelligence activities in addition to the other oversight mechanisms.

Most importantly, the judiciary is independent from other branches of government, and, unlike the executive, it is less likely to enter into a conflict of interest. As the past experience shows, there is a risk that the executive may misuse intelligence in pursuit of its own agenda. Secondly, as experience in prosecuting criminal cases has shown, ongoing control by a judge allows for the development of standards and best practices. It is an effective safeguard mechanism when it comes to the protection of civil liberties and civil rights. Prior approval from an independent judge ensures that all the interests at stake will be considered.

Parliamentary oversight or independent scrutiny by an independent body are necessary, and allow for a thorough review of the system. Nevertheless, parliamentary or independent oversight will probably focus more on administrative and organisational matters, and therefore, will never be equivalent to a full judicial review in each individual case. Judicial review is therefore complementary to other oversight mechanisms, and should not be seen as an alternative.

11 Hans Born, *Parliamentary and External Oversight of Intelligence Services*, p. 167, in Hans Born and Marina Caparini (dir.):*Democratic Control of Intelligence Services. Containing Rogue Elephants*, 2007, Aldershot, Ashgate.

12 For an overview of this topic see *Democratic Control of Intelligence Services*, footnote 11.

13 Public Law 95-115. For a detailed history, see George B. Lotz, The United States Department of Defense Intelligence Oversight Programme: Balancing National Security and Constitutional Rights, in Chap. 7 of Democratic Control of Intelligence Services, footnote 11.

14 Investigations by the Senate Select Committee to Study Governmental Operations, chaired by Senator Frank Church and the US House of Representatives Select Committee on Intelligence, chaired by Representative Otis Pike.

15 See the case United States v. United States District Court for the Eastern District of Michigan 407 US 297 (1972) also known as the *Keith* case, after the name of the federal district judge in the case.

8. Conclusion

As with any new law, there are still many questions to answer, and issues to address. Experience has to be gained with the handling of such sensitive cases. In order to maintain independence and credibility, and in regards specifically to the level of justification for the need of surveillance, the main challenge faced by the judges will be the development of legal tests and standards. The role of the judges will also to make sure that intelligence activities do not interfere with the due course of criminal justice.

Intelligence agencies shall work under a robust legal framework, and respect the rule of law. We are confident that the Swiss model will show a way to achieve it.

Rights and Wrongs under Copyright Laws

Pema Needup, Judge, Punakha District Court,
LL.M (NALSAR University of Law, Hyderabad, India);
LL.B (Punjab University, Chandigarh, India)
B.A. Eng (Hons)(Sherubtse College, Kanglung) & PGDNL,
RIM, Thimphu.

The copyright issue is a major concern worldwide and Bhutan is no exception. The copyright piracy poses threat to the fledging Bhutanese film and music industries. If this copyright infringement practice is not curbed sooner or later, it is going to frustrate and cripple the whole film industry and its fraternity.

Copyright is the set of exclusive rights granted to the author or creator of an original work for a specific period. Copyright issues in Bhutan are governed by the Copyright Act, 2001.

Original works afforded copyright protection under the Copyright Act include literary, dramatic, musical, artistic works and photographic works, audiovisual works, computer programmes, databases, works of architecture, sound recordings, performances of artistic works and programmes of broadcasting organizations. Copyright extends to unpublished as well as published works.

An idea is not a work, unless it is expressed through written works or other forms, in order to get a copyright protection. Copyright subsists only in the material form in which the ideas or facts are expressed. Similarly, the procedures, processes, systems, methods of operation, concepts, principles, and discoveries or mere data, official texts of a legislative, administrative or legal nature, and any official translations thereof are not within the scope of copyright protection.

There is no copyright in live events such as sporting and news events. Copyright does not subsist in history, historical incidents or facts. Copyright protection is not granted where the work is grossly immoral, illegal, defamatory, seditious, irreligious or contrary to public policy or calculated to deceive the public. Copyright protection encompasses web page textual content, graphics, design elements, as well as postings on discussion groups.

Under the doctrine of fair use, the uses of the copyrighted works are allowed in the below mentioned circumstances and purposes:

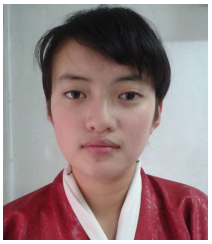
- Reproduction of a published work, a work of architecture, a database, music, audiovisual or a computer program, etc., in a single copy for your personal use is permitted without the consent of the author.
- Reproduction of a short part of a published work, in the form of quotation is considered a fair use or fair deal provided the name of the author if provided be indicated in the work from which the quotation is taken.
- Reproduction of a short part of a published work for the purpose of teaching in educational institutions is permitted.
- Making a copy of a short part of a published work by pupil for the purpose of his/her research or study is permitted.
- Making a single copy of a published work by reprographic reproduction by libraries and archives is permitted.
- Reproduction of a short part of a published or an unpublished work in a newspaper or periodical, the broadcasting and other communication to the public for informatory purposes is permitted.

- Reproduction in a single copy of the adaptation of a computer program is permitted.
- Import of a copy of a work for your personal use is permitted.
- Public display of original works or copies of works is permitted.
- Always check for copyright notice. These days, even if a work bears no copyright notice, assume that almost all works are copyrighted the moment they are written, and no copyright notice is required.
- One is free to use any work that is in the public domain, however, check for a statement to that effect.
- One must not translate an article or work without the permission of an author.

Under Copyright laws, it is essential for individuals and agencies dealing with these issues to note the following, and faithfully comply with them:

- Reproduction of a published work, a work of architecture, a database, music, audiovisual or a computer program, etc., in multiple copies for your personal use is not permitted.
- Reproduction of a whole part of a published work for the purpose of teaching in educational institutions is not allowed.
- Making multiple copies of a short part of a published work by pupil for the purpose of his/her research or study is not permitted.
- Making multiple copies of a published work by reprographic reproduction by libraries and archives is not allowed.
- Import of pirated goods amounts to copyright infringement.
- Export and distribution of infringing copies violate copyright.
- Don't assume that if you credit the author there is no copyright infringement. You can only use copyrighted material if you have explicit permission from the author to do so.
- Don't copy material just because you are not making a commercial use. You are still infringing the law if you do not have permission from the author.
- Don't assume that if you remove the copyrighted material you will be out of trouble. The removal of the copyrighted material will not remove the copyright infringement at all.
- Don't copy material just because you can't find a copyright holder.
- Loading a single copy of a software program onto several computers for simultaneous use is not permitted.
- Uploading copyrighted software to Internet for downloading, collecting materials off the Internet and compiling into a new work and forwarding material off the Internet to friends, co-workers is not allowed.
- Copyright applies to all materials in the Web. All web documents, images, source code, etc., are copyrighted.
- Unauthorized downloading of recorded music and songs often in the form of MP3 files and sharing with peer-to-peer via internet and mobile phone is not permitted.
- Sampling of copyrighted music for use in other works without permission is also a form of copyright infringement.
- Bootleg recording of audiovisual or music which has not been officially released by the artist or their associated management or production companies is not permitted.
- Ignorance of the law does not make one exonerate from liability thereof. As such, one must be cautious of copyright infringement and its criminal sanction.

Youth and Unemployment Conundrum



Meto Seldon,
XII Science 2015,
Yangchenphug Higher Secondary School,Thimphu.

In Bhutan, during the olden times, the job standards were not so stringent, and even a class ten passed student could readily avail jobs. As the country was in the nascent stage of its development, our successive Kings had engineered the state machineries for the rapid socio-economic development of the country. Emerging from a medieval to a modern welfare state, Bhutan has undergone huge and drastic changes. As the Royal Government of Bhutan realized the importance of education in building the nation, so much of emphasis was placed on it, and now the youth are milestones from getting jobs with even a post graduate certificate.

As per Kuensel (January 14, 2014), the youth unemployment rate in Bhutan stands at 9.2%. This rate will only increase with each passing year as potential employers both public and private, these days, look for experienced and skillful people who can deliver and meet their objectives. Therefore, if the youth are desirous of surviving with a secured employment, they have to work hard, study with focused objectives in life, and prove themselves worthy of a job in the market, or else remain without gainful employment in this competitive labour market.

As per Oxford Advanced Learner's Dictionary (6th edition, 2000), unemployment is the state of not having a job. So, it describes a situation in which the number of people who are not engaged in any activity for which they are paid. As such, the reasons that cause unemployment among youth could be attributed to their attitude towards jobs. This is because, the youth, though they are at a disadvantage side with limited job opportunities, is very choosy. They differentiate jobs as blue or white collar. Though the country is suffering from deficit of labourers, sweepers and many others, the youth deem blue collar jobs as unfit for them, and it only makes their conditions more deplorable.

Some people are weak by nature, because of which, they are not endowed with physical strength to take up blue collar jobs. But even then, one could explore some other meaningful business or ventures such as starting one's own small business or primary activities related to agriculture and livestock, which would also help our country, achieve its goal of self reliance.

Even in the case of white collar jobs, though most of the times, salaries are paid higher in private companies than government, youth prefer government jobs probably due to its security. The notion that a government job is more secure than private jobs is not absolutely true, though this perception has established deep roots and has flourished prosperously in most of the youth.

At this juncture, it is also important to remember, and note that one who got employed in a gainful job, is assessed his/her meritocracy against the levels of qualification, capability and experience. Thus, even in government jobs, there is no absolute guarantee that one will enjoy the security of job in perpetuity, if the concerned is not able to meet the mandate. Apart from this, it would not augur well with the employers, if the resulted output is not satisfactory, and the possibility for lay off or other measures become reality.

All these are real factors which determine the conditions of employment. Potential employers, be it public or private, are interested only in recruiting candidates who are competent and dedicated, and who really care about meeting the goals of their organization. Instead of striving hard to achieve good results, the youth carried away by getting everything done just with a single mouse click has made them un-enterprising and dependant. Apart from dedication and commitment to one's duties, attribute such as hard work is something, we rarely see in today's youth, so in the end, the youth become the ultimate victims of economic hard realities.

Although the qualification is one of the most important criteria for a job, it has its own level of standard and ranking. This standard bar is now slowly raising up in a situation where too many job seekers are chasing a few job opportunities.

In the medieval age, even passing class 10 standard was a huge achievement, and a thing to be proud of; whereas, now with class 10 passed certificate, even securing a simple job is uncertain. Thus, the youth have to reorient their thinking about jobs and need to give more importance to the studies, and gaining vocational skills for enabling them to increase their marketability for jobs.

Some may argue that even grades do not matter, and measure, how smart you are, as potential employers keenly look for the type of experience that the contestants have. And the ones who have a certain number of years of experience in the relevant field will certainly have an edge over others who do not have any.

Experience helps to acquire actual capability and skills at a particular task or field, and for most youth, experience is to be gained by undertaking some real works and part- time jobs. Since more experience makes one more likely to get a job, youth today have to try, and gain as much experience as possible by undertaking vocational trainings and life skill programs.

I hold that youth alone are not responsible for their unemployment. The government is also equally responsible for the situation. As highlighted above, the employers look for experiences in the contestants, while recruiting for jobs, but it is also crucial for the concerned to remember that youth means young and inexperienced. The youth can only gain experience through work, for which, firstly, they have to be employed for a work or gain practical experience by doing. It also seems very judgmental on the part of employers, not to give the youth jobs, based on only one interview. Getting a job or not is a life changing decision, and one interview deciding it, is too much of a cliché. One cannot know a person in a day; it takes time, energy and effort on both parts. For example, a very talented and capable young person might end up unemployed, as he did not fare well in interview due to his introvert nature.

Surprisingly, some unemployed youth are found to have had jobs once but got laid off. According to the idea of hysteresis, past unemployment is likely to cause future unemployment. This is because lack of jobs may cause young workers to become demotivated, and also may cause employers not to hire or employ them in the first place. With the fast growing population, youth unemployment in Bhutan, especially in urban areas among males stands at 20 percent, while it is at 30 percent among females.

Nowhere in the world, the issue of unemployment is resolved fully. It is one of the macro-issues that is confronted even by the developed nations. Bhutan being a developing, and aid dependent country, the problem of youth unemployment is not unique to it, but it is a common and natural issue that a nation faces in its life. Therefore, it is important to be mindful of the fact that both the public and private sectors cannot generate the job opportunities that can absorb all the job seekers. This makes job vacancies even scarcer, hence, the youth really have to work harder and apply for jobs with all their might or they'll remain without a gainful employment.

The Law will not Protect if you Sleep on your Legal Right

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Legal right is an interest recognized and protected by a rule of law, violation of which is a legal wrong and respect for which is a legal duty. Legal right is also termed as a power conferred by law. However, different thinkers have differing views on 'legal right.' This is because like many other concepts of law, the concept of rights does not bear one meaning, and jurists differ on its exact connotation.

Right in strict sense, is an interest correlated with duty. If you have a right, you have a duty at the same time. Duty here means legal obligation. A person is said to have a duty when he is under legal obligation to do or not to do something. There can be no right without a corresponding duty or a duty without corresponding right. The relationship between a right and duty is that of a father and son. Without the father, there would not be son. In the similar manner, for instance, if Mr. X owns a valid driving license, he has the right to drive. On the other hand, he also has a duty as well to follow the traffic rules and regulations. Likewise, if he possess a bar license, he has the right to run a bar, while he owes duty to observe liquor laws, and other related laws.

There are other types of legal rights that are not enforceable under law. Such kinds of rights are termed as imperfect rights. One such example is a debt barred by lapse of time. Thus, it is imperative in law that a right must be exercised with due diligence and within reasonable time which would otherwise be deemed as abandoned or waived. In other words, seeking to enforce a right or claim beyond reasonable time would be estopped by a doctrine of *laches*. *Laches* means unreasonable delay or negligence in pursuing a right or claim, and such delay or negligence has prejudiced the other party against whom such relief is sought. The Court will normally deny relief to a claimant who has unreasonably delayed or been negligent in asserting his legal right or claim because, granting of such relief would be unfair and unjust against the opponent.

Therefore, in such situations, as there is no fixed period of time for the Courts to consider and based its decision, it is essential for the Courts to ascertain the elements of *laches* which include knowledge of the claim, unreasonable delay and change of position on the part of both the parties. The underlying objective of this doctrine essentially is to encourage one to institute any legal action or proceeding before any competent authority within the prescribed time without delay.

To illustrate, let us say that in January 2011, Ms. A's crops have been damaged by her immediate neighbor, Mr. B's cattle. The aggrieved Ms. A files a law suit against Mr. B in January 2016 claiming damages. Yes, Ms. A had legal right (cause of action) to claim damages, and the court could have ordered Mr. B to pay damages accordingly, had the case been instituted to the court expeditiously soon after the damaged of the crops by the cattle. This also means that Ms. A has the right to sue, but at the same time, Ms. A has a duty to initiate such action before the court within reasonable time. Now that the case being filed after the lapse of five years, Mr. B might invoke the *doctrine of laches* asserting that Ms. A

has 'slept over her rights' and her petition should be dismissed forthwith. This is because by now with the lapse of five years after the incident, circumstances have changed, memories have faded, and no fresh evidences for both the parties to substantiate their arguments. As such, it is no longer fair, and just to entertain her claim, and grant the relief as prayed. The Court would say, sorry! Your claim is barred by *doctrine of laches*. Or else there would be no justice to Mr. B, who reasonably did not expect that he would be harassed by litigation after a lapse of undue length of time period. The question of legitimacy of the claim does not arise, as this doctrine can bar a claim that is made too late. The negligence to exercise your right in a timely manner can negate your right, and thus protection of law.

However, the defense of *doctrine of laches* can be excused where parties are under legal disability like insanity. *Doctrine of laches* can also be excused in the event that the claimant was a minor during the time such claim was not initiated. As such, the claim can be brought once they attend majority.

On the other hand, the *doctrine of laches* bears a resemblance to a statute of limitation, since both are concerned with ensuring that any legal right or claim should be enforced within certain periods. However, the *doctrine of laches,* and the statute of limitations are not same. This is because the statute of limitation is only concerned with the time that has lapsed while the *doctrine of laches* is concerned mainly with the reasonable delay in bringing about a claim. Statute of limitation is a law passed by the parliament which prescribes the time within which any legal action or proceedings to be initiated.

In other words, the limitation law spells out the time frame within which the claim may be brought before the court of law.

However, the *doctrine of laches* is more focused on the equitable conduct of the plaintiff. But there might be a situation whereby a delay by few days may likely be met with a defense of *laches* whilst the statute of limitation might allow the type of action to be brought within much longer time period. The *doctrine of laches* is often applied by the Courts in common law jurisdictions even where a statute of limitation exists. Though the Court may deny equitable relief to a plaintiff in view of *doctrine of laches*, the plaintiff may still have a claim for a legal relief in the event the time has not been lapsed under the statute of limitation.

With regard to the statue of limitation, Justice Rinzin Penjor, Supreme Court has analysed in great length in his article titled: "Necessity of Statute of Limitation for Bhutan," published in Volume 3 of this Journal in February 2015.

In view of *doctrine of laches* being uncodified common law doctrine, the question may arise as to whether it can be applied by our Courts or how often our Courts apply this doctrine? It is at the discretions of the judge that this doctrine is applied as it is an uncodified law. However, in absence of statute of limitation unlike other countries, it is strongly recommended that this doctrine be applied by our Courts given that it is unfair and unjust to the defendant for his sleep to be broken by an unvarying fear of litigation, and also it is futile for the courts to deal with cases where evidence may have been long tampered and destroyed. Though this doctrine is not a black letter law, exercising discretions by our Courts in applying this doctrine on the facts and in the circumstance of the case would prove to be as lubricants than obstacles in advancing the social justice movement in the country.

Lamp in the Darkness

Sonam Choden (Intern at Bhutan National Legal Institute),
Class 12 Commerce, 2015,
Motithang Higher Secondary School, Thimphu.

Rhonda Byrne suggests that "Every single second is an opportunity to change your life because in any moment you can change the way you feel." In the similar sense, I feel, even the phrase 'inspiration' is a new idea, especially the ones that arise suddenly, and is creative and vivid in nature. As one may think, and feel that, there are lots of things happening around us which inspire, and instil in us, some kind of courage and confidence to deal with life. That may be for instance like 'seeing other people accomplishing great things, and overcoming difficulties and challenges with determination and perseverance; hearing inspirational speeches or talks from great people; and even the sheer beauty of nature can inspire us to change our life and take it positively.

While inspiration can help change the life of others in a positive manner, at the same time, it is also not devoid of deleterious impacts. In the sense that for instance, people who are vulnerable to picking up of habits such as abusing contravened substances, drinking and smoking, may easily get carried away into such habits as inspired by the peers or somebody like Bob Marley, who said that "Smoke in and take out the hell out of yours." For sure, as I know is that those who like football gets inspired through the tricks and skills their favourite players' display during matches, and many more. Therefore, the expression 'inspiration' is something that has the potential to change the life of others in both aspects.

I, as an individual affirmatively believe in inspiration, and have been inspired by the deeds and works of some great people whom are looked upon by the society and the entire world, with great reverence. The saying "Take the first step in faith. You don't have to see the whole staircase. Just take the first one," has relevance to my life. As this proverb suggests, in order to succeed and achieve in life, I believe the first thing that we ought to do is to have a faith in some great people and learn from their deeds and actions. To accomplish great things, we must not only act, but also dream; not only plan, but also believe in our own potential and strengths.

From the moment we are born, and as life goes on, we grow up, and attain adulthood. As we get associated with this complex changing world, it is important that we must have a person who can inspire and guide us, and be our role model, so we can climb the social ladder, step by step to attain our objectives and goals in life. Having someone, who could inspire us can really nurture our inner potential, and help make our life worth living. If we do not know the right direction where we are heading to, we might end up somewhere else as we create our own universe as we go along.

Until the mid level of my education, I nourished my wish to become a human Doctor in life, but, however, not backed by any valid reasons. That seems to be my goal not because of my interest and knowledge in the field, but it happens to be so, on the ground of my mother's weak health, as I thought that I could be of help to her. But when I really analyse the actual ground reality, and the conditions around me, immediately, I realized that I cannot nurture this ambition anymore, and need to abandon it forthwith.

At that moment, I became like frozen snow, with no goals, and no future. And realised that, the most common reason why people give up their power is, by thinking that they do not have anyone to look

upto, and rely upon. But I believe, it is not true, as life shrinks or expands, in proportion to one's own courage and confidence. Whatever we do, we must begin it with- as bold as genius, power and magic.

Later, as I reflected back upon my life, I could hear people talking about my role model, my inspirer none other than Her Royal Highness Ashi Sonam Dechan Wangchuck. It was she who enlightened my life like a lamp dispelling the darkness.

As I count on the deeds of Her Royal Highness, new hopes, new desires and enthusiasm rekindled in me. In fact, it appeared to me that a new lease of life had occurred to me, and activated my entire system. Moved and inspired by HRH, her charismatic leadership and deeds, kept on reverting my ears, and my desire to study law, and to become a personality like her kept on crossing my mind.

Since then, I started visualizing the prospects of my life, and successes happening, as if, in real life. It occurred to me that seeing and possessing things that I wanted became mine, and this had made me feel more confident and secured in life. Then I enquired more, and learned more about her works, I knew more about her, and my admiration to my ideal person became more genuine and boundless.

As it is said 'The mind is everything, what you think you become,' is true, and applicable to all of us. As our will power is very imaginative and resourceful, I think, it is all about our mindset, and how we perceive our life, and take on our duties and responsibilities and shoulder them. HRH is our mentor and guide in every sense, as she exemplifies to us the diligent and faithful discharge of duties for the welfare of the people and the country.

As a young girl with so much of life force, I drew my inspiration and confidence from the three doors (body, mind and speech) of HRH, to become myself a meaningful and productive citizen of this country. Amongst the various fields of professions, as inspired and motivated by the meticulous deeds and actions of HRH, I have developed in my mind a kind of interest and liking to the profession of law. Hence, I decided to pursue it as my profession not merely because of my immature decision but with complete knowledge of hard work, sincerity and dedication to achieve my goal, and to serve the Tsa-Wa-Sum. Last, but not the least, I would sum up that being inspired may not lead us to anywhere but it will take us to the right one.

Experience is one's First Teacher

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According to Oscar Wilde, "Experience is the hardest kind of teacher. It gives us the test first and the lesson afterward." I fully agree with him. Experience itself has accumulated in human memory and culture, gradually producing the methods of intelligence called "reasons" and "science". Human experience is thus the ultimate source, and justification for all knowledge and the best way to learn anything is by experience that we gain through some kind of meaningful engagements.

As for me, one of my first experiences to become a new person, to grow up, to follow my lifelong dream and goals, and to separate responsibilities from fun is, when I undertook an internship program at Bhutan National Legal Institute (the "Institute"). It was the most significant life changing experience that I have ever experienced. It was not in my mind that it would become a moment where I could see my complex world, and set steps towards fulfilling my dreams.

It was on 18th December 2015, that I appeared for the first time in the Institute. I remember walking in very nervous, and taking a seat as guided by the seniors. When I looked around the room, I could see my expression and conduct was mirrored from the people around me. Apart from this brief moment, I regained my senses and confidence, as the members of the Institute welcomed me warmly, though we were meeting for the first time.

On the first day, I was acquainted with the rules and regulations of the Institute, including the office decorum and etiquette. I was also advised on about the works and things that I could do for the Institute during the internship, and made clear their expectations from me as well. Though I was not feeling comfortable in the first week, the lessons I learnt were useful and informative.

As the time progressed, because of my constant dealing with the staff, it helped me to become familiar with the rules and regulations, and code of conduct and ethics as well. Over the period of time, I learned more about the mandates of the Institute, plans and programs, and other activities.

Being a teenager, working as an intern at the Institute was a unique experience for me. Initially, what I thought, and imagined was that an intern's work would necessarily involve doing some work that would earn me some cash or it is a kind of time pass job. But the actual internship experience is quite different from my initial perception and idea. Having experienced the internship, it makes me feel independent and matured now.

As the days went by, I got adapted to the new working environment, and started to do some minor works, and assisting the staff. I was ready to learn, and gain knowledge and skills from interactions with staff, and other programs at the Institute.

It was an enjoyable and a wonderful experience in my life. I loved every step of the work process that I learned from the program. I enjoyed each passing day, and the experience I acquired was enriching and interesting. I particularly liked the idea and kind of thinking the work involved.

A few months of internship at the Institute, has taught me many beneficial lessons. I gained confidence to decide on my own about doing things that were assigned to me. It made me think about my responsibilities, plan and prepare for execution. It has instilled in me a kind of feeling that now I'm grown up, and capable of taking independent decisions.

Internship program has helped me learn new things about real works by actually doing them. This has improved my understanding of working conditions and situations in a government office. As this was my first experience and opportunity to get insights into the working atmosphere of an office, I did not know exactly what to expect, and indeed, I did not have any specific expectations. The working environment was conducive and peaceful to work in the Institute.

The lessons that I learned and the experiences gained from the internship program would help me in dealing with the challenges in life. I know that life is not a bed of roses for us. So, I give the whole credit to the members of the Institute. They are the main source of the knowledge, and skills that I acquired. I would like to thank every one of them for being the great to the greatest and enemy to the worst.

As I, sum up, with strong good fortune on my part, I wish to be the best I can be, and do the best that I can do to serve the Tsa-Wa-Sum.

Prayers to the Gyalsey

Tshering Yangzom, Class VII, 2015,
Lungten Zampa Middle Secondary School,
Thimphu.

The sun is shining brightly
Wind blowing heavenly
Laying on the grass
I hear the trees whispering and thought
Oh! Lovely world!
With the vast, open sky above
The sun shines ever so brightly
A wonderful way to start the day
But then the wind died
Boom! Clash! Doom!
The sky became dark and furious
Thunderclouds formed in the sky
Heavy rainfall poured down on the earth
Trees were falling
The earth was trembling
Animals were looking for their loved ones
Wherever I looked
There was sorrow and unhappiness
Was this the world I loved?
I thought to myself
Tears rolling from my eyes
As the rain wet my clothes
I couldn't bear to see the surrounding around me
I collapsed on the ground
My leg shaking from the destruction
Cried out loudly with my heart
As it was destroying Mother Nature
Where is the gross national happiness in it?
Was this the way of showing our respect for the Kings?

Then the noise stopped
The rain began to cease
The angry clouds parted
Then the bashful sun slowly peeked at me
My eyes filled with tears
I couldn't bear to see the world
The world that I so dearly loved
When suddenly children appeared out of nowhere
Started to plant new saplings of trees and flowers
The playful wind blew gently again whispering
That life will be difficult but the future will be brighter,
Since the Prince will lead the world
With a strong heart and soul
Fulfill the wishes of our Kings and the people
And will save the world and nature from
Sorrow, sadness and destruction
He will lead us, our future leader
And bring happiness and peace to the world
His smile will light the world
And his laughter will bring
Music and harmony to life
By day
He will rise bright like the sun
And light our world with harmony
By night
He will be the beautiful moon
Giving us light
Dispelling all darkness
Making the world a better place
For all the people of this Planet