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On this Joyous occasion of the 61st Birth Anniversary of our beloved Fourth Druk Gyalpo, His Majesty Jigme Singye Wangchuck , the family of the Bhutan National Legal Institute joins the Nation in offering our heartiest gratitude and prayers for His Majesty's Good Health and Long Life.
We also take this opportunity to re-dedicate ourselves to serve the Tsawa-Sum with Loyalty and Dedication.

Ombudsman: *Introducing a Potent ADR Tool whose Time may Have Come for Bhutan*

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Abstract

In a Rule of Law state, the question 'who governs the government' is relevant; more so as the sphere of the governmental activity expands with the advent of the welfare states, decentralisation policies and paternalistic attitudes of the state officials. This inevitably leads to increase in the areas of conflict between the citizens and the government. As the range and complexities of government activities expand, more and more discretionary power is given to the public authorities who impinge upon the rights of the citizens.

There has been concerns that there are no adequate means to deal with the grievances of the citizens against the mistakes, negligence or abuse of power by public authorities. Thus, there is a need for institutions other than courts to redress citizens' grievances when their rights are violated by the government officials. In some countries this function is performed by a person called an 'Ombudsman' who functions as a defender of the people in their dealings with government. This Paper is a preliminary discourse on the Ombudsman concept as an Alternative Dispute Resolution (ADR) tool or a grievance procedure to resolve disputes pertaining to public functionaries sparing the need for formal litigations.

Introduction

For all its user-friendliness and accessibility, the courts lack the flexibility and effectiveness for remedying the wrongs of modern administrative actions. They are costly, cumbersome and slow. This keeps courts beyond the reach of common men in many countries. Besides, the courts often review decisions only on the question of legality and not its content, wisdom and reasonableness. Even the special administrative appeal bodies do not cover all fields of administrative actions. Moreover, many administrative decisions carry no formal right of appeal. In our context, we cannot allow the insidious and acrimonious affect of the adversarial judicial proceedings to weaken the community vitality and social harmony in a GNH (Gross National Happiness) state.

'Ombudsman' is a Swedish term which means 'citizen's defender,' 'grievance man' or 'public watch dog', 'an attorney or representative.'[1] It is known by different names in different countries: *Defensor del Pueblo* in Spanish-speaking countries such as Spain, Argentina, Peru and Columbia; *Parliamentary Commissioner for Administration* (PCA) in the United Kingdom and Sri Lanka; *Mediateur de la Republique* in France, Gabon, Mauritania and Senegal; *Public Protector* in South Africa; *Protecteur du Ctioyen* in Quebec, Canada; *Volksanwaltschaft* in Austria; *Public Complaints Commission* in Nigeria; *Provedor de Justica* in Portugal; *Defensore Civico* in Italy; *Investigator-General* in Zambia; *Citizens' Aide* in Iowa; *Wafaqi Mohtasib* in Pakistan; *Lok Ayukta* in India, etc.

Who is an Ombudsman?

The root of the modern ombudsman concept goes back to the *Justitie ombudsman* (Ombudsman for Justice) of Sweden which was established in 1809. According to the Ombudsman Committee of the International Bar Association, it is:

1 Frank Stacey, *Ombudsman Compared* (1978).

> *An Office provided for by the Constitution or by action of the Legislature or Parliament and headed by an independent, high level public official who is responsible to the Legislature or Parliament, who receives complaints from aggrieved persons against government agencies, officials and employees, or who acts on his own motion, and who has the power to investigate, recommend corrective action, and issue reports.*[2]

The Ombudsman concept has spread across the world.[3] This has led to its application in a wide range of constitutions, political and administrative systems. As a result, the institution itself varies widely in its scope, powers and functions in different countries. There are many differences in details between the Ombudsman systems adopted by different countries. Compared with other countries, the British system places a number of restrictions on the powers of the PCA.[4] In order to fully appreciate roles played by an ombudsman, it is crucial to understand the rationale for the emergence of the concept in the first place.

Controlling the controllers

We have always felt the need for controlling the controllers - long before the development of modern welfare states. During the Roman Republic between 200 and 80 B.C., there was the office of the *Censor*. Every five years, two magistrates were elected for tenure of 18 months. They examined the functions of the state officials during the previous years and heard public complaints against the performance of those officials. In China, there was *Control Yuan* (206 B.C.–A.D.220) which supervised the state officials and heard complaints concerning maladministration. Similarly, in the medieval Europe and Britain, the Church often performed the function of interceding between the subjects and the ruling princes or barons. In England, the *Court of Exchequer* which originated from the King's Council of the Norman times attempted to provide special remedies in cases of official misbehaviours.

The Initial Roles

The 1809 Swedish constitution charged the Ombudsman with the primary duty of supervising, in his capacity as the representative of the Parliament, the application of laws and regulations by judges, government officials, and other public servants and, to prosecute those who had committed offences or neglected to fulfil their duties. Further, an *Act of Instruction to the Justitieombudsman* passed by the Parliament in 1810 made it an additional duty of the Ombudsman to oversee and recommend legislation and amendment of statutes which in his view were ambiguous, outdated or otherwise inappropriate.

Thus, it is apparent that the institution of ombudsman was initially not intended to protect citizens or redress their grievances against the government. It was intended to provide a method of parliamentary scrutiny to ensure that the official wrongdoings were controlled by insisting on implementation of laws;[5] the ombudsman's activities were mainly concerned with supervision of courts and police. However, with the growth of administration in the twentieth century it shifted its emphasis to the bureaucracy.

Modern Roles

Sweden was one of the first parliamentary democracies to adopt the welfare state with extensive social planning system. This aggravated the danger of bureaucratic disregard to individual liberties.[6] This in turn accelerated the transformation of the Ombudsman into a people's guardian against the governmental abuse of administrative power. Consequently, the functions of the Ombudsman became mainly receiving complaints of maladministration from the citizens. He/she is required to investigate these complaints and make representations to the officials and department concerned with a view to correct the wrongs wherever the complaints are justified. However, he/she has no authority to overrule any official decision or question the way in which the discretionary power has been exercised if it was clearly within the ambit of the relevant power. He/she prosecutes the erring officials in certain cases, makes critical reports to the Parliament and the media. Besides acting on the complaints, the Ombudsman inspects departments and institutions and carries on investigations on his own initiatives, where necessary.

Grievance Procedures

The method of handling complaints and appeals against administrative decisions by the Ombudsman is direct, informal, speedy and cheap. The complaints

2 Cited in N E Holm, 'The Ombudsman – A Gift from Scandinavia to the World' in Gammeltoft-Hansen, Hans and Axmark, Flemming (ed), *The Danish Ombudsman* (1995), 13.

3 More than 120 countries across the globe (Europe, North America, Latin America, the Caribbean, Africa, the Australasia, Pacific region and Asia) have established ombudsman's office at national and sub-national levels.

4 Due to the limitations placed upon the PCA's scope and powers by the government, its Office was initially denounced as a 'pointless', a 'joke', 'a gimmick' and 'ludicrously emasculated.' The PCA was described as a 'toothless tiger'; 'watchdog in chains'; a 'muzzled watchdog'; 'a swordless crusader'; 'ombudsflop' and; an 'ombudsmouse' : Rowat, above n 14, 122-124.

5 Sawer, above n 12, 8.

6 Sawer, above n 12, 9.

may be posted, faxed or emailed. The investigation is conducted openly and informally. No formal hearings are held. The Ombudsman need not necessarily wait for the complaints; he/she has the power to initiate investigation on his/her own initiative based on the media reports. He/she is empowered to inspect the administrative agencies and, recommend improvements in their administrative policies and procedures. He/she has access to all relevant official documents and may command services of specialists and carry out inspections whenever necessary. Every authority is required by law to co-operate with the Ombudsman.

Remedies

The influence of Ombudsman is based on his objectivity, competence, superior knowledge and prestige. He/she scrutinizes departmental documents and if required demands explanations thereto. If the explanation is not satisfactory, he/she reprimands the official and tries to secure remedial action. He/she may also direct a department to discipline one or more of its officers, or in serious cases, prosecutes them. The main weapon of the Ombudsman is criticism and does not interfere with the day to day administration; he/she does not substitute his/her judgment for that of the official, nor does he/she quash administrative decisions. If necessary, he recommends changes in laws and regulations to remove injustice and anomalies. He/she can make critical reports of the complaints to the Parliament and he/she is authorized to release the complaints and his/her recommendation to the media.[7]

However, ombudsman system is not a panacea for all the administrative ills.[8] The recommendations of the ombudsman are not legally binding. His/her jurisdiction is limited. He is not a super-administrator and no ombudsman in any country, organization or agency is authorized to make orders, reverse administrative actions, or enforce remedies.[9] In most countries, he/she simply attempts to conciliate individual public grievances which are only the symptoms of the systemic faults in the bureaucracy.[10] An ombudsman is not an advocate for the complainant or, for that matter, for the authority complained against.[11]

7 Sawer, above n 12, 9.

8 For instance in Nordic countries, the ombudsman scheme only supplement a battery of other effective controls and New Zealand added the Ombudsman Plan to the already existing parliamentary grievance system.

9 Gregory and Pearson, above n 44.

10 Birkenshaw, above n 50, 189,320.

11 Richardson, above n 40, 186.

Spread of the concept

Though the Ombudsman concept was born as far back as 1809, it did not spread outside Sweden and Finland[12] until after the Second World War. Even Norway[13] and Denmark[14] did not adopt it until later despite absence of geographical, cultural and linguistic barriers. Common law countries considered that the need for an Office of Ombudsman would be so great that it would be overwhelmed by the complaints. Britain, for instance, in the absence of comprehensive system of administrative appeal feared that the Office might turn into some something like the Chinese *Control Yuan*[15] which became almost a parallel branch of the government. It was suspected that instead of being a public watchdog over officials' acts, the Ombudsman might become a blood hound sniffing after their every decision.[16] It was also believed that the Office should be small, informal and highly personal and, in larger countries, the size of the Office would lose these characteristics. The other reason against the spread of the Ombudsman concept was the distinct system of governments and laws which nurtured the concept in Sweden and Finland. In reality, the ombudsman was not a super-administrator. He had only a few legal officers with no power to substitute his judgment for that of the officials. He rarely commented on the contents of the discretionary decision but rather on the way in which the decision has been made, to ensure its legality and fairness.

The doubt of the efficacy and sustainability of the Ombudsman concept in populous, federal, racially heterogeneous and developing countries proved to be wrong;[17] the myths that the Ombudsman concept could not be transplanted in other countries were shattered when Denmark, Norway and New Zealand successfully adopted the concept. The popularity of the Ombudsman concept increased starting in the early 1960s as various Commonwealth and European countries established the Office of the Ombudsman.[18] In Denmark, the Office of the Ombudsman in fact vindicated the official decisions and increased the public confidence in the civil service in most of the

12 Finland adopted the ombudsman system in 1919.

13 Norway adopted the ombudsman system in 1963.

14 Denmark adopted the ombudsman system in 1955.

15 Han Dynasty (206 B.C. – A.D. 220).

16 In reality, the ombudsman was not super-administrators. He had only a few legal officers with no power to substitute his judgment for that of the officials. He rarely commented on the contents of the discretionary decision but rather on the way in which the decision has been made, to ensure its legality and fairness: Rowat above n 14, 51.

17 Harry Woolf, Protection of the Public: A New Challenge (1990), 87.

18 Peter Leyland and Terry Woods, Text Book on Administrative Law (3 rd ed, 1999), 53.

cases. Minor officials found that the Office assisted them in their dealings with their arbitrary superiors. Danish system of law and cabinet government resembled those of common law countries; it had neither a system of administrative courts, nor tradition of administrative publicity. Even in Sweden, there are laws against revealing state secrets or information that would be injurious to private persons or commercial firms. The names of the complainants and officials involved in cases are not ordinarily revealed, and the amount of publicity given to cases is partly at the discretion of the Ombudsman and is voluntarily controlled by the press.[19]

As Lord Woolf stated, the ombudsman system has been "flatteringly copied"[20] by many countries, organizations and institutions and, continues to do so. Currently, the word "ombudsman" is used to describe many complaint-handling or appeal procedures, for instance, tax ombudsman, postal ombudsman, university ombudsman, newspaper ombudsman, trade union ombudsman, NGO ombudsman, corporate ombudsman, banking ombudsman, insurance ombudsman, telecommunication ombudsman, etc.[21] The increase in respect and trust in the ombudsman is evident from the gradual increase in number of countries and institutions adopting it though most of these institutions lack the features of the original ombudsman system.

19 Rowat, above n 14, 19.

20 Harry Woolf, *Protection of the Public: A New Challenge* (1990), 87.

21 Leyland and Woods, above n 36, 53.

Conclusion

The ombudsman is an independent and non-partisan officer who supervises the administration. He/she deals with specific complaints from the public against administrative injustice and maladministration, and he/she has the power to investigate, criticize and publicize. He/she supplements the courts; or provides an alternative means to resolve disputes between citizens and public officials. However, although it is an additional means in the dispute resolution spectrum, it is not a substitute for courts of formal legal system.[22] It affords a non-adversarial or informal means to resolve disputes with little or no effect on the social harmony and community vitality – one of the essential components of the balanced material and spiritual development philosophy of GNH.

In our context, the institution and the roles of the Ombudsman have assumed important in the wake of our transition to parliamentary democracy with extensive decentralised governance with the resultant omnipresent public officials and risks of conflicts and violation of citizens' rights. The concept may warrant further discourses sooner than later as Victor Hugo said "no one can stop an idea whose time has come"!

22 Geelhorn, above n 67, 255.

The Perversities of Deemed Supply Law for Drug Trafficking in Bhutan

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Abstract

The burden of proving the case beyond any doubt is upon the prosecution in a criminal trial. The fabric of criminal justice system has not however been seriously considered by the deemed supply law, *Narcotic Drugs, Psychotropic Substances and Substance Abuse Act* which came into force in 2015. This article attempts to analyse the proportionality and reasonableness of the law in light of limitations provided by the dynamics of criminal legal principles, laws, and practices. It presents a comparative study of similar laws particularly the trafficable thresholds in other jurisdictions mainly USA and Australia; the proponents of deemed supply law. The study concludes that such law not only creates injustices by wrongful conviction of suspects, but is also responsible for mass fuelling of prisons. A country like Bhutan may abolish such laws.

Introduction

The drug issues in Bhutan have intensified in the last few years. This sudden upheaval led to incarceration of hundreds of people especially students and minors. Yet, laws are amended for stringent enforcement. A reform in the form of repressive law came into effect, 'the deemed supply law': A question is simply put, whether the law is rational?

The earlier drugs law *Narcotic Drugs, Psychotropic Substances and Substance Abuse Act 2005 (NDPSSA Act)* was enacted in giving effect to international laws. As the drug use and trafficking were merely seen as potential threat to the society and not as actual threat, the law devises measures for preventive and harm reduction strategies. It was more of preventive and reformative than deterrent justice.

The new law that came into effect in 2015[1] repealed the old law in entirety. The deemed supply provision is the hallmark of the new drug law that presumes trafficking of drugs based on certain quantity found in possession with the suspect. The reasons for the amendment were inadequacies in the investigation and prosecution of drug offences. For instance, the increasing number of drug cases led to unfold inefficacies in investigation and prosecution of offences. Above all, drug causes harm to the society in many ways.

The deemed supply provision however contradicts the criminal justice system in Bhutan. It reverses the burden of proving the case from prosecutor to suspect. The reverse presumption must be justified to the extent permitted under the framework of laws. The presumption of innocence in a criminal trial is not only a fundamental right but also reinforced in our penal laws.

This article studies the implications of the law, it causes to the society and to an individual person. A comparative analysis of the threshold quantities (of trafficking) of substances of different jurisdictions is carried out. It is concluded that the deemed supply law in Bhutan may not withstand criminal principles and international practices. Such law may result in miscarriage of justice by wrongful conviction or arbitrary application of laws. Finally, the research recommends that the provision may be abolished; alternatively, the threshold quantities may be redesigned based on evidences.

1 Narcotic Drugs, Psychotropic Substances and Substance Abuse Act, 2015

1. Background

In absence of substantive data, there is no clear picture of drug abuse and trafficking in Bhutan. The first case of drug abuse in Thimphu town was recorded in 1989 with the Royal Bhutan Police (RBP). The Government and the *National Assembly* then recognized the seriousness of the potential problem of drugs on culture, economic and social cohesion.[2] In particular, the *National Assembly* in 2005 called for preventive educational measures to be taken by the Government and civil societies and for effective rehabilitation if prevention fails.[3] The recent record from RBP unfolds 86 percent of drug users from 2010- 2012 were youths and more than half of the users were students.[4] The following year, the RBP began a nationwide crackdown on drug offenders, and as a result 1452 people were arrested including 64 female in a span of two years.

Bhutan's vulnerability to drug trafficking is primarily attributed to free and unregulated trade with India and the open porous borders.[5] The origin of drugs, in most of the cases of trafficking and consumption is pointed to the neighboring towns across the border.

2. Legal Framework

Domestic legislation on drug controls was motivated by international conventions. Bhutan is a party to *United Nations Convention against Illicit Traffic in Narcotics Drugs and Psychotropic Substances, 1988* (the *Convention)* as acceded in 1990. It also became a party to the 1961 and 1971 Conventions on 24th and 18th August 2005 respectively. The implementations on drug control have been carried out through domestic legislation like *Civil and Criminal Procedure Code 2001*, the *Sales Tax, Customs and Excise Act 2000, Medicine Act 2003, Penal Code of Bhutan 2004 (PCB)* and *NDPSSA Act, 2005*.

Although, trafficking of drugs or precursor was provided as offence under *NDPSSA Act, 2005,*[6] it did not specify corresponding sanction and sentence. It also ignored other drug offences like consumption and possession of drugs. It was essentially enacted as harm reduction strategies on abuse of drugs.[7] The implementing agencies had virtually engaged in creating legal awareness on abuse of drugs, HIV transmission and help associated to drug dependent people.[8] Conversely, *PCB 2004* contained drug-related offences including illicit trafficking, possession and use of controlled substances, and diversion of precursors. Therefore, criminal investigation and prosecution were carried out as per *PCB 2004* until *NDPSSA 2015* was adopted.

Unlike the *NDPSSA Act, 2005*, the offences under *PCB* did not excuse even drug users of criminal liability. It is argued that this harm reduction strategy as a core value under *NDPSSA 2005* was eclipsed as a result of punitive provisions under *PCB*. Nevertheless, investigation and prosecution of drug related offences were not on the public limelight prior to 2010 and the reason is not known because of lack of official report and cases.

The *NDPSSA Act, 2005* is being repealed by *NDPSSA* Act, *2015*, recently. The hallmark of *NDPSSA Act 2015* is the *deemed supply* provision that deems a person to have supplied drugs for trafficking or commercial purposes based on possession of certain quantity of drugs.

3. Rational for Drug Law Amendment of 2015

The need for amending *NDPSSA Act 2005* was mainly the perceived difficulties in the prosecution and sanction of drug traffickers. Of particular note was the evidence of overt sale and commercial sale, which is rare in such offence. It was difficult for a police or prosecutors to determine whether a suspect carrying a large quantity of drugs was for consumption, sale or distribution. This resulted in varying degree of charges and sentence for possession of the same quantity of drugs or vice versa. Courts using its discretionary power[9] altered charges especially from illegal transition to a simple possession or abuse of drugs. This was evident from number of cases disposed by the Courts in a year. For instance, in 2014, 30 cases were charged for illegal trafficking of drugs before Thimphu District Court,[10] out of which 28 cases were sentenced for three years and below.[11] This means, the court had altered charges for 85 percent of the cases. Similarly, in 2015 just before the new law came into effect, only 1 out of 8 cases of trafficking was sentenced for more than 3 years.[12]

2 *Bhutan* (24th June 2016) United Nations Office of Drugs and Crime-South Asia <https://www.unodc.org/pdf/india/publications/south_Asia_Regional_Profile_Sept_2005/09_bhutan.pdf >.

3 Ibid.

4 Tshering Dolkar, Youth Substance Abuse in Bhutan: A Challenge To The Pursuit Of Gross National Happiness' (2012) < https://www.drugabuse.gov/international/abstracts/youth-substance-abuse-in-bhutan-challenge-to-pursuit-gross-national-happiness >.

5 Above n 1.

6 *NDPSSA Act 2005* s 94.

7 The focus of the legislation was on regulatory measures on import and export of drugs having medicinal values and to rehabilitate (small) portion of people who use drugs.

8 Report of The International Narcotics Control Board (2009) 92.

9 Bhutanese legal system is a quasi-inquisitorial system. The Judges excise discretionary power to conduct independent investigation and alter charges in criminal prosecution.

10 Before the 2015 law came into force, most of the cases related to sale, purchase, export, import, transport and storage of a controlled substance were prosecuted for illegal transaction of controlled substance under section 99 of the *PCB 2004*.

11 Annual report of the Office of the Attorney General (2014).

12 Annual report of the Office of the Attorney General (2015).

The watering down of trafficking cases questioned the institutional capacity of law enforcement agencies especially the RBP, Office of the Attorney General and the Judiciary. It may be inferred that lack of expertise or experience in the field of drug laws and enforcement coupled with lack of tools, tactics and resource had caused the laxity. For instance, not having enough policemen to do the jobs could lead to overlooking evidences that could have helped in proving the motive of supplying drugs.

The threat posed to the Bhutanese community as a result of trafficking of drugs was yet another reason for amendment.[13] Year 2014 and 2015 saw a maximum number of drug related cases prosecuted before the Court.[14] And violence resulting from consumption of drugs is observed to be a concern to the community. Such violence leaps at par with availability of illegal drugs in the market.[15] The impact of the threats is apparent from increasing health care expenditure to the government and individuals.

4. The Deemed Supply Law

The *NDPSSA Act 2015* introduced the concept of "deemed supply" provision for illicit trafficking of drugs into Bhutanese legal system. This principle presumes 'intent to supply' for commercial purposes based on the quantity of drugs a person is suspected to have possessed regardless of the intention to supply. Legal thresholds or minimum quantity of drugs are prescribed in the schedules to the Act that construes illicit trafficking of drugs. The degree of sentencing differs based on the nature and quantity of drugs.[16] For instance, a person possessing cannabis of 50 to 100 grams is liable for 3 to 5 years imprisonment with maximum of 5 to 9 years for possessing 100 grams and more.[17] Similarly a person possessing heroin less than 2 grams is imprisoned for 5 to 9 years and a rigorous sentence of 15 years to life sentence for possessing more than 4 grams.[18]

The legal thresholds are important but controversial tools in the sentencing of drug offenders. Many countries[19] avoid the use of legal threshold while few retain it in order to differentiate drug users from actual traffickers and high-level offender.[20] The proponents of legal thresholds[21] believe that without such basis high-level offenders such as trafficking of drugs or syndicates would get away with simple possession. The legal thresholds invent opportunity for sentencing and prosecutorial abuse for the offenders.[22] However, the opponents of legal thresholds argue that such threshold comes with risks. Firstly, there is a risk of wrongful conviction of users as traffickers because the legal threshold ignores criminal intention and motives for committing the offence. Secondly, legal thresholds may offer unwitting incentive to high-level offenders or syndicates as they may change their behavior to reduce risk of severe sanction, for instance, by making mules hold their drugs rather than themselves holding it. [23]

5. Implications of Deemed Supply Provision

a. Drug Users are at High Risk

A finding from Australian Institute of Criminology suggests that the current legal threshold system in Australia is placing drug users at risk.[24] The research conducted, compared purchasing behaviors of users of the two drugs viz. a viz. heroin and MDMA, also known as ecstasy, with the current trafficable quantities across all six states.[25] It is found that the maximum quantity consumed or purchased for personal use alone exceeded the trafficable quantity for most drug types.[26] This is a case where users would be convicted for trafficking, as in, assumed for commercial transaction.

Drawing from Australian experience, the legal thresholds are relatively low in Bhutan for most of the drugs. For instance, most commonly apprehended narcotic drugs are heroin and cannabis and their trafficable thresholds are 2 grams and 50 grams[27] as

13 Kinga Dema, 'Drugs Related Case drop in 2015', *Kuensel* (Thimphu) January 30, 2016.

14 Above n 13.

15 In 2015, 6 cases out of 35 cases prosecuted for possession of drugs have additional charges such as burglary, assault and battery, etc.

16 *NDPSSA Act 2015* Sch-VII.

17 *NDPSSA Act 2015 s* 134.

18 *NDPSSA Act 2015 s* 140.

19 European countries like France and England avoid legal thresholds for drugs offence.

20 Caitlin Hughes et al, 'Australian Threshold Quantities For 'Drug Trafficking': Are They Placing Drug Users At Risk Of Unjustified Sanction? (2014)476 *Trends & Issues In Crime And Criminal Justice- Australian Institute Of Criminology.*

21 Ibid: US drug laws and Australian Drug laws can be example of punitive and unjust laws.

22 Ibid.

23 Ibid.

24 Caitlin Hughes et al, 'Deemed Supply In Australian Drug Trafficking Laws: A Justified Legal Provision? (2015)27-1 *Current Issues In Criminal Justice- National Drug & Alcohol Research Centre* 15-16.

25 The average quantity of trafficable thresholds are provided in Module Criminal Code of Australia, which is drafted in order to render consistencies across all states of Australia while drafting their respective criminal laws.

26 For example, the average trafficable quantity for heroine in most of the States is 3 (mixed) grams. The findings show that during typical session users use 3 grams while during heavy session they use 6 grams.

27 *NDPSSA Act 2015* Sch-VII.

compared to an average of 3 grams and 100 grams in Australia with maximum of 25 grams and 1000 grams in Tasmania (an isolated island off Australia's south coast). The comparative analysis, subject to its own limitations, concludes that the trafficable thresholds of drugs prescribed under *NDPSSA Act 2015* does in fact level drug users to a great risk of convicting them as drug traffickers.[28]

b. Deemed Supply Law is Not Consistent with Criminal Justice System

The deemed supply provisions do not appear consistent with the criminal justice principles. Firstly, the cardinal principle of criminal law devises that the intent (*Mens rea*) and the act (*Actus reus*) must both concur in order to constitute a crime.[29] This is reinforced in the *PCB* and is the principle governing the criminal justice system in Bhutan.[30] Secondly, in a criminal trial the burden of proving the case beyond reasonable doubt falls on the prosecutor. Thirdly, the presumption of innocence of a person until proven guilty is non-justiciable principle. This means a person is presumed innocence until the judge or a jury is convinced beyond any doubt that the person charged has committed all elements of the offence. The presumption of innocence is further emphasized in Article 7[31] of the *Constitution* containing bill of rights. These principles are safeguards against the arbitrary power of the State in relation to procedural fairness, arbitrary laws, and unjustified use of powers but also unrelated laws.[32]

Ordinarily, to prove drug trafficking the prosecution needs to prove that the defendant actually trafficked (i.e. sold) the drugs or possess the drugs with the intention to sell. The legal thresholds under the *NDPSSA Act 2015* however presume that a defendant possessing illicit drugs beyond the prescribed quantity has the intention to supply for commercial transaction. The actual intention and motive is immaterial. That said, the burden of proving the case is unfairly reversed to the defendant to prove on the balance of probability[33] that the drugs seized from him do not belong to him or is not for supplying.[34] Yet again, the literal reading of the offences in the said Act failed to provide the defendant to at least prove his or her case otherwise. Section 139 of the Act reads, *"A defendant shall be guilty of the offence of illicit trafficking…if he or she possesses, imports, exports, stores, sells, purchases, transports, distributes, or supplies…Any substances under schedule I and II of this Act..."*[35] and the corresponding section 140 states, *"The offence of illicit trafficking of any substance under schedule I and II of this Act shall be: (1) A felony of first degree if the quantity is equal to more than two times the quantity determined in schedule VII…."*[36]

The words such as possesses, imports, exports, stores, sells, purchases, transports, distributes and supplies in the given sections indiscriminately refer to trafficking because of the thresholds prescribed. The two physical elements of possession are firstly the knowledge of existence of the quantity of drugs from a common sense perspective and secondly to have control and dominion over the drugs.[37]

c. Inconsistent With the International Practice

Peddling of drugs is a serious trans-boundary issue and such issues are addressed through international laws. The *Convention* emphasizes the requirement of an intention and knowledge for prescribing offences associated with drugs.[38] The *Convention* requires the national authorities like judiciary, prosecutors and investigators to acquaint with the magnitude and challenges of drugs in the country, particularly if it is associated to organized crimes, gang violence, repeat offenders, victimizing a minor etc.[39]

The deemed supply provision is explicitly avoided in many jurisdictions, particularly European nations, making this to be the least preferred module so

28 The comparative analysis remains redundant for schedule-I and II drugs of the *NDPSSA Act 2015* that includes narcotic and psychotropic substance without medicinal values, as there are no thresholds prescribed for these drugs and the exception being cannabis. Thus, depending on the degree of quantity a defendant is liable for illicit trafficking of drugs with a minimum sentence of 3 years to a maximum life imprisonment.

29 *Fowler v. Padget* (1798)TLR509(514):101 ER 1103.

30 *Penal Code of Bhutan* 2004 s 53.

31 Section 16 to Article 7 of the *Constitution* states, "A person charged with a penal offence has the right to be presumed innocent until proven guilty in accordance with the law.

32 Nadler, 'Flouting the Law' (2005)83 *Texas Law Review* .

33 When the reverse presumption is invoked the degree of proving innocence by the suspect is based on the balance of probabilities.

34 *ACT Criminal Code 2002*, section 604(1): If, in a prosecution for an offence against section 603, it is proved that the defendant — ... (d) possessed a trafficable quantity of a controlled drug; it is presumed, unless the contrary is proved, that the defendant had the intention or belief about the sale of the drug required for the offence.

35 *NDPSSA Act 2015* s 139.

36 *NDPSSA Act 2015* s 40.

37 Andrew Hemming, 'Criminal Law Guidebook: Queensland and Western Australia' (2015) <http://lib.oup.com.au/he/Law/hemming/HEM_CLG_AssesPrep_Ch1.pdf >. In *Lai v The Queen* [1990] WAR 151, the Western Australian Court of Criminal Appeal held that proof of possession of an illicit substance may require proof not only of knowledge of its existence but also of a present claim to it or exercise of some control over it.

38 *United Nations Convention against Illicit Traffic in Narcotics Drugs and Psychotropic Substances, 1988* S 3(2) & 3(3).

39 *United Nations Convention against Illicit Traffic in Narcotics Drugs and Psychotropic Substances, 1988* S 3(5).

far.[40] They adhere to a system where possession of the threshold is only indicative of an offence of trafficking, other indices of supply will be considered in addition to the quantity seized for proving a case of trafficking – determinant factors include: presence or absence of drugs packaged into discrete quantities, scales, cutting agents, equipment for manufacturing or distribution, unexplained sums of money, and phone and other records.[41]

d. Mass Imprisonment and Miscarriage of Justice

An experience from Italy in 1990 and 2006 unfolds that the deemed supply provision had led to fuel a mass rise of imprisonment of users as traffickers while achieving less conviction of high-level offenders. The most notorious examples of such perversities is the USA where their policy on 'war on drugs' led to fuel mass imprisonment, resulting to large number of (especially young) Black in prison.[42]

There were incidences of miscarriage of justice because of the perception of the deemed supply law. In *R v Masri*[43] the accused who was arrested for possessing 13.2 grams of MDMA had instructed his counsel that it was for his personal use. The counsel advised him that this did not affect his guilt for offence of supply as it is beyond trafficable quantity. Similarly in *Price v Davies*,[44] the accused was arrested for cultivating 47 cannabis plants. He instructed the counsel that it was cultivated solely for relieving pain from work-related spinal damage and to cut down cost of purchasing three to four times a week. The counsel again advised that it was irrelevant and he pleaded guilty. It was only when he was in prison the advise was known to be wrong. The legitimate defenses for the accused were clouded by the strict liability concept of the deemed supply law.

e. Challenges in Designing the Threshold Quantities

There are common key challenges for governments in designing the trafficable quantities for drugs. These challenges will persist so long as the threshold system is not abolished. The key challenges are largely whether the legal thresholds would actually differentiate traffickers from users. They include what quantities could be threshold for the given drugs and should the quantities be set in a pure weight or mix weight.[45]

Well-designed threshold system would be more challenging with time, technology and especially with growth in the number of substance. For instance, in New South Wales (NSW) alone, as of 2nd March 2015 there were 358 illicit drugs listed, this necessitate specification of trafficable thresholds based on appropriate evidences.[46] Not surprisingly, cases are springing up in Bhutan where new substances that are not even in the exhaustive prohibited lists are apprehended posing serious challenges to law and enforcement. Similarly, legal thresholds for some substances especially under Schedule III and IV[47] are determined in terms of numbers or pieces of tablets, instead of weight content. It is thus not difficult for traffickers to manipulate the size of the tablets to take advantage of the threshold system.

6. To What Extend Is The Deemed Supply Law Justified?

The legal thresholds impose limitations to fundamental rights of a citizen under Article 7(16) of the *Constitution*,[48] the presumption of innocence until proven guilty.[49] The only justification for compromising this right is through reasonable restriction by law when it concerns national interest such as the sovereignty, security, unity, integrity, peace and stability, and foreign policy.[50]

In absence of the litmus to test the proportionality of the law as against fundamental rights, the seriousness of an offence and the rationality of the means devised by the law are considered. Firstly, the seriousness of an offence is an important determinant to grade the criminality of an offence. Factors that are essential in grading the criminality of an offence (drug offence in the present case) are the profit expected to accrue from illegal activities, the damage to the community including property crime and violence, and harm to an individual user. Secondly, the proportionality test determines the reasonableness of the law reversing the burden of proving a case in a criminal proceeding.[51]

That said; the market for illicit drug market is one of the largest and most profitable industries. It is estimated to be over $500 billion a year.[52] The most

40 Above n 23.
41 Ibid.
42 Ibid.
43 *R v Masri* [2005] NSWCCA 330 (14 September 2005).
44 *Price v Davies* [2001] WASCA 81 (16 March 2001).
45 Above n 23: It is appropriate to determine the trafficable thresholds based on data's and statistics from consumption habit of a person for regular and occasional users. As the weight is concerned, mix weight is criticized as less transparent as 0.75 grams of heroin could be equivalent to more pills with more weight depending on the market condition. Nevertheless mix weight is found to be more effective and less cost saving for the purpose of enforcement.
46 Ibid.
47 *NDPSSA Act 2015.*
48 *The Constitution of the Kingdom of Bhutan 2008* s 7(16).
49 *Civil and Criminal Procedure Code 2001* s 204.
50 *The Constitution of the Kingdom of Bhutan 2008* s 7(22).
51 Explanatory Memorandum, Criminal Code (Controlled Drugs) Legislation Amendment Regulation 2014 (ACT) 3.
52 Matthew S. Jenner, 'International Drug Trafficking: A Global

difficult stage for the market consists of trafficking of drugs involving distributors ranging from gang members and drug cartels to individual smugglers. The prospect of exorbitant profits in such business attracts criminals who are often violent and dangerous, and relates to the epidemic of violence associated with drugs. For instance, in Mexico alone hundreds of people are murdered every week involving drug incidents. [53]

Nevertheless, it is not proper to imply the seriousness of drugs violence and health hazards appearing in countries like the USA and Mexico to the situation in Bhutan. According to National Statistical Bureau's publication: *In absence of a systematic assessment of the nature and extent of drugs in the country making it difficult to get the complete picture of the issues, its relative impact on the community such as associated crimes and drug abuse are being seen as a minor problem*.[54] It is thus tenuous to conclude that the legal threshold adopted under *NDPSSA Act 2015* is reasonable and proportionate.

7. Recommendations

Firstly, the abolition of deemed supply law is to be pioneered. This means reversing the onus back on the prosecutor to prove the intention of trafficking. It is a common practice in most criminal justice system such as in France and Queensland, the latter being the only State in Australia that abolished deemed supply law despite all other states. Instead, the police, prosecutors and judicial authorities may take into consideration the nature of the substance, the quantity and any prior criminal records in their decision to prosecute, reduce the charges or not to prosecute an offender.[55] The threshold quantity is rather an indicative of an offence of drug trafficking[56] and under the circumstances where users exceeds the thresholds it would be much less troubling to charge for trafficking. Intent can be deduced from evidences such as scales, multiple bags, telephone records etc. In absence of any additional evidence it would be appropriately charged for simple possession offence.

The abolition of deemed supply would demand framing effective tools and tactics in dealing with drug related issues for investigators, prosecutors and judges. The number of police or dealing investigators may need to be increased, and the enforcement procedures may need to be strengthened. Judiciary may need to acquaint with the challenges and implications especially when it is linked with organized crimes, minor victims, violence etc.

Secondly (as alternative to above), elevating to exceed the maximum quantities of drugs identified for personal use may be considered. Although, there are hosts of challenges in designing a better threshold system, an evidence-based threshold will help rationalize the law and minimize disproportionate incrimination of users. This may require increasing the trafficable threshold limits for substances, given that the limit of heroin and cocaine is set at 2 grams in Bhutan, which is very low in comparison to other jurisdictions. Similarly, thresholds for Cannabis are very high in many jurisdictions with minimum of 300 grams; it is 50 grams in Bhutan.

Conclusion

Being a member state to the international conventions on drugs, Bhutan enacted drug laws to implement the objective of the conventions. The first laws were enacted in 2004 and 2005, and much focus was given on harm reduction strategies than trafficking of drugs. In absence of a comprehensive data on drugs and crime, drugs were not considered as serious offence. In the mean time, cases of drug trafficking and users increased considerably. The law could not cater to the situation. Drug trafficking were investigated and prosecuted but ended up with lesser sentence or lighter charges.

The deemed supply law was incorporated in the 2015 law, repealing the earlier law. The law is to remedy the mischief caused by the previous law, that being to prosecute drug traffickers with a heavy sanction. The burden of proving the case is reversed from prosecutors to suspects. The intention of trafficking is immaterial making the job of investigation, prosecution and Courts much easier.

It is argued that the law is not in conformity with international legal principles and practices. The rationality and proportionality of the law is still questionable. Nevertheless, more study is required to be carried out in the field as data available are not comprehensive enough to guide us to a right conclusion.

Problem with a Domestic Solution' (2011)18 *Indiana Journal of Global Legal Studies*.

53 In 2010, 15,273 drug-related murders occurred in Mexico alone, an average of almost 300 deaths per week. Mexico's Drug-related Violence, (4th May, 2011), B.B.C. NEWS <http://www.bbc.co.uk/news/world-latin-america-10681249>.

54 Lham Dorji et al, 'Crime and Mental Health Issues Among The Young Bhutanese People' (2015)8 *National Statistics Bureau* 3.

55 Chantal Collin, 'National Drugs Policy: France' (2001) (Prepared for Senate Special Committee on Illegal Drugs) *Library of Parliament*.

56 Above n 25.

Fundamental Rights and Writs

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Abstract

This article examines the basic rights which are described as the Fundamental Rights in our Constitution and the mechanisms to implement such rights. Article 7 of the Constitution provides various types of fundamental rights and freedoms which are available to all the persons in Bhutan. Though they are categorised as the Constitutional guarantees they are not absolute in nature. They are subject to the reasonable restrictions and limitations that are necessary in the national interest and public order. This is based on the rationality of the framers of the Constitution that an individual welfare needs to yield to the common welfare as the latter outweigh the former.

It is also important to note that mere abstract constitutional declarations of fundamental rights may not hold water unless there is effective remedial machinery to enforce them.

Against this backdrop, this article will study, develop and analyse the issues associated with this topic.

Introduction

Every human being is endowed with certain basic rights by birth, the right to life, liberty, food, shelter and clothes. Nowadays, these rights are collectively described as human rights[1]and they owe their origin to the Magna Carta and the English Bills of Rights. In different countries, such rights are named differently. In the United States of America, it is known as the Bill of Rights,[2] and Fundamental Rights in Bhutan.

Bhutan adopted its Constitution in 2008. It was the result of hard work and meticulous preparation, and the vision of the Fourth Druk Gyalpo His Majesty Jigme Singye Wangchuck.

Article 7 of the document provides for fundamental rights and freedoms. It enumerates about 21 different types of rights and freedoms. Of them, section 23 lays down the remedial mechanism for the enforcement of these rights and freedoms in accordance with the law.

The legal significance of such rights and freedoms is that any law or policy enacted or adopted by any government agency has to be strictly in compliance with the fundamental rights and freedoms guaranteed under the Constitution.

As compared to other legal or statutory rights, the fundamental rights and freedoms therefore restraint the government agency from taking any action which is not constitutionally sound. So, any enactment by Parliament or any administrative action by the executive would be rendered null and void[3] if they are not in consonance with any provisions of Article 7. The summary of these rights and freedoms as enumerated in our Constitution are:[4]

1 Youth for Human Rights. Can be accessed at http://www.youthforhumanrights.org/what-are-human-rights/videos/food-and-shelter-for-all.html

2 The Constitution by White House. Can be accessed at https://www.whitehouse.gov/1600/constitution

3 Article 1(10) of the Constitution of Kingdom of Bhutan provides that " All laws in force in the territory of Bhutan at the time of adopting this Constitution shall continue until altered, repealed or amended by Parliament. However, the provisions of any law, whether made before or after the coming into force of this Constitution, which are inconsistent with this Constitution, shall be null and void".

4 Constitution of the Kingdom of Bhutan. Bhutan became Constitutional Monarchy in 2008. The First Democratically Elected Parliament of Bhutan adopted the Constitution of the Kingdom of Bhutan 2008 on 18th July 2008. This day is annually observed as the Constitution Day in Bhutan. It has 35 articles of which Article 7 provides fundamental rights and article 8 provides the fundamental duties. These fundamental rights are similar to fundamental rights

1. Right to life, liberty and security of person, information, vote, equal access and opportunity to join public service, own property, any lawful profession, trade or vocation, equal pay for work of equal value, material interests, equality before law and equal and effective protection of law, presumed innocent until proven guilty, representation by a Bhutanese jabmi of his or her choice;
2. Freedom of speech, opinion and expression, freedom of thought, conscience and religion, press, radio, television and other forms of dissemination of information including electronic, peaceful assembly, association;
3. Right to be prohibited from any form of discrimination based on race, sex, language, religion, politics or other status, torture or cruel, inhuman or degrading treatment or punishment or capital punishment, or arbitrary arrest or detention, arbitrary or unlawful interference with his or her privacy, family, home or correspondence nor to unlawful attacks on the person's honour and reputation; and
4. Right to initiate appropriate proceedings in the Supreme Court or High Court for the enforcement of the rights conferred by Article 7 subject to the reasonable restrictions provided under section 22 and procedures prescribed by law.

The fundamental rights and freedoms enshrined in our Constitution, however, are not absolute. Article 7(22) enumerates the grounds based on which the government can impose reasonable restrictions by law on the fundamental rights and freedoms if it concerns:

a) The interests of the sovereignty, security, unity and integrity of Bhutan;
b) The interest of peace, stability and well-being of the nation;
c) The interest of friendly relations with foreign States;
d) Incitement to an offence on the grounds of race, sex, language, religion or region;
e) The disclosure of information received in regard to the affairs of the State or in discharge of official duties; or
f) The rights and freedom of others.

provided under Part III of the Constitution of India.

The fundamental rights and freedoms thus constitute protection and safeguard of the citizens under the Constitution. In other words, an aggrieved person can enforce legal remedy for breach of fundamental rights in accordance with the law.

1. Fundamental rights and other legal rights

The various types of rights and their differences are elucidated below:

a) What is a right?

There is no single universal standard definition of a right. Many jurists came up with various definitions of rights. Rights may be moral, ethical or legal. Legal rights may be defined as legal interests acquired under a law or where a law gives a person a certain freedom or privilege to do something or otherwise. Holland defined right as a "capacity residing in one man of controlling, with the assent and assistance of the State, the actions of others."[5]

According to John Salmond, right is "an interest recognized and protected by rule of law." It denotes an interest, respect for which is a duty, and the disregard of which is a wrong."[6] Legal right may be defined as an addition or benefit which is conferred upon a person by rule of law.[7] T.G. Green defined right "as powers which is for general well-being that the individual should possess, while K.R.R. Shastri defined right as an interest recognized and protected or guaranteed by the State since it is conducive to social well-being."[8]

b) Fundamental Rights

Fundamental rights may be defined as basic rights or human rights. They constitute rights such as right to life, liberty, privacy, reputation, residence, movement, speech, opinion, expression or freedom of religion, etc., which are often enshrined in the Constitution. These rights "derived from natural or fundamental law where a significant component of liberty, encroachments of which are rigorously tested by courts to ascertain the soundness of purported governmental justifications."[9]

Fundamental rights "represent the basic values cherished by the people and they are calculated to protect the dignity of the individual and create

5 Mahajan, V.D. : Jurisprudence and Legal Theory, Eastern Book Company, Lucknow, Fifth Ed, 2007, pp. 286
6 Ibid
7 Mahajan, V.D. : Jurisprudence and Legal Theory, Eastern Book Company, Lucknow, Fifth Ed, 2007, pp. 302
8 Ibid pp.288
9 Black's Law Dictionary, 4th Ed, 1891

conditions in which every human being can develop his personality to the fullest extent. They weave a pattern of guarantees on the basic structure of human rights and impose negative obligations on the State not to encroach on individual liberty in its various dimensions."[10] Further, "the primary aim of these provisions is to increase judicial protection offered to individuals who wish to complain about an alleged violation of their human rights. In that sense, the right to an effective remedy is an essential pre-condition for an effective human rights policy."[11]

In short, the object of fundamental right is to establish Rule of Law and to create a Government of law and not of man so that citizens not only have security and equality but also standard of conduct, justice and fair play in nation building.[12] The fundamental rights enumerated under our Constitution are no different from others. In fact, the Constitution of Bhutan being originated from the Buddhist principles and philosophy and nation's guiding principles of Gross National Happiness, it further ensures that every Bhutanese enjoys equality and effective protection of law and the State to function on the basis of Rule of Law and due process of law.

2. Difference between Legal Rights and Fundamental Rights

A few differences between them are summed up below:

Legal Rights or Statutory Rights

- These are rights provided under various statutory instruments.
- These are enforceable only upon giving effect by some legislation
- Legal rights exist only when there is a statute and it ceases to exist as and when the statutes are repealed.
- It can be suspended by any ordinary legislation.
- The State can impose any restrictions to limit or even cancel the legal rights through various means including executive orders or normal laws.

Fundamental Rights or Constitutional Rights

- These are basic rights provided under the Constitution.
- These are generally enforceable directly without an enabling legislation.
- It can be curtailed only upon amendment of the Constitution which requires more stringent procedure as provided under Article 35 of the Constitution.
- It can be suspended during the period of Emergency under Article 34 of the Constitution.
- Only reasonable restrictions under Article 7(22) of the Constitution can be imposed and it can still be challenged in the competent court of law.

3. Legal Remedy for Fundamental Rights

No rights can be said to be rights if there are no remedies for the enforcement of such rights. The Rule of Law on any right and its enforceability is based on the legal maxim ***ubi jus ibi remedium*** which suggest that where there is a right, there is a remedy. According to this principle, if a man has a right, he must of necessity have a means to vindicate and maintain it and a remedy if he is injured in the exercise or enjoyment of it. And indeed it is a vain thing to imagine a right without a remedy.[13] Thus, a right without a remedy is spurious.

Thus, the basic principle contemplated by this maxim is that, when a person's right is violated, the aggrieved person will have an equitable remedy under law. It also means that a person whose right is infringed has a right to enforce it [14] in accordance with the law.

4. Prerogative Writs

A petition for writs is one of the most common mechanisms to enforce and remedy the fundamental rights. The various kinds of writs that can be commonly issued by the Supreme Court and the High Court are in the nature of *habeas corpus, mandamus, prohibition, and certiorari and quo warranto***.** Each of them is elucidated as below:

a. Habeas Corpus

The writ of *habeas corpus* which means 'to have a body' is a Latin phrase. It originated from the English Common Law to protect individuals from an illegal detention.[15] This writ enables the Courts to determine the validity of the person's imprisonment or detention.

Any person who is arrested is required to be produced before a court of law within twenty four hours of arrest and also require arrest warrant to arrest any person

10 Maneka Gandhi v. Union of India, AIR 1978 SC 597 as cited in Pandey, J.N. :The Constitutional Law of India, Central Law Agency, 50th Ed. 2013 pp.54

11 Kuijer, Martin, Effective Remedies as a Fundamental Right-Seminar on human rights and access to justice in the EU, 2014.

12 Moti Lal v. State of Uttar Pradesh, AIR 1951 ALL 257 as cited in Pandey, J.N. :The Constitutional Law of India, Central Law Agency, 50th Ed. 2013 pp.54

13 Remarks by Justice Holt in the case of Ashby V. White (1703). Justice Holt remarked that, if a man has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; want of right and want of remedy are reciprocal.

14 Retrieved from USLEGAL Definition at http://definitions.uslegal.com/u/ubi-jus-ibi-remedium/

15 Legal Information Institute. Can be accessed from https://www.law.cornell.edu/wex/habeas_corpus

except in cases of cognisable offences.[16] The object of this writ is to release any person who is illegally arrested or detained and not to punish or reparation to the person wronged.[17] This writ only tests the validity of an arrest or detention.

b. Writ of Mandamus

Mandamus literally means "We Command" or an "Order." Therefore, writ of Mandamus is an order issued by a Superior Court commanding a person or a public authority including the legal persons to do or to refrain from doing something which may be public duty or statutory duty.[18]

For example, the Road Safety and Transport Authority (RSTA) is duty bound to issue a driving license upon fulfilling the conditions. However, if a person is denied a driving license even after fulfilling the conditions, he may seek remedy under this writ. It is often sought against the public officers for failing to perform their duty such as the maintenance of roads, water supply, and public service delivery. This writ cannot be invoked in case of mere discretionary duties, those not entrusted with public duty or obligations arising out of contract.[19]

The case of *Texmaco Rail & Engineering Ltd v. Mangdechhu Hydroelectric Project Authority (2011)*[20] is one instance which has some relevance to the application of the writ of Mandamus in the Bhutanese context.

In this case, the petitioner alleged that the action of the respondent in not opening the price bid of the petitioner was wrongful, discriminatory and violative of Article 7 and that the authorities exercising the powers of the State cannot discriminate against the Petitioner in accordance with Article 7 (15) of the Constitution.

The Court held that *"Equality before the law and right of the Petitioner to seek remedies on equal and effective protection of law is a fundamental and a core guarantee of our Constitution. However, the Court in current the case…..does not warrant the invocation of Article 7(15) of the ……. as the Petitioner could not prima facie establish or otherwise demonstrate the comprehensible nature of discrimination faced either procedural or substantive violations of laws for allegedly not opening the bid. The Court further said that not every legislation or rules of classification occasioning differential treatment shall violate equal protection based upon the principle of necessity to differential treatment and reasonableness."*

Writ of Prohibition

This writ denotes an order by a Court to refrain from doing or banning from doing. This writ is often issued by superior courts to an inferior courts or quasi-judicial authorities preventing the inferior courts from usurping jurisdiction with which it is not legally vested[21] or when it seizes or exercise jurisdictions wrongfully. The writ of prohibition thus helps to prevent inferior judicial or quasi-judicial authorities such as tribunals when that "authority proceeds to act without or in excess of jurisdiction or violates the natural justice or proceeds under a law which is ultra vires or unconstitutional"[22] and the scope of this writ lies only to the extent that no decision is yet taken and it is under proceedings.

c. Writ of Certiorari

Certiorari is a Latin word and it means "*to be informed."* This writ is similar to writ of prohibition as it is issued by superior courts to inferior courts or tribunal. It is an extraordinary prerogative writ where a superior court issues in its discretion to an inferior court, ordering it to produce lower court or agency's decision for review which "otherwise would not be entitled to review to determine whether any irregularities or errors occurred that justify the review of the case."[23]The irregularities or errors may include the questions affecting the rights of subjects, legal authority, and duty to act judicially or excess jurisdiction.[24]

For instance, Chapter 19 of the Bhutan Civil Service Rules and Regulations 2012 empowers the Disciplinary Committee and Human Resource Committee of any agency to take disciplinary action against the erring civil servants. In case, these

16 Section 158 of the Civil and Criminal Procedure Code 2001 prohibits any arbitrary arrest or detention and Section 161 of the same Code permits arrest of person for cognisable offences without arrest warrant. However, 118.1 of the Code obligates the state to produce any person who is arrested to be produced in Court within twenty four hours of the arrest and 188.2 and Section 199 gives the right to bail to the person so arrested or detained.

17 Basu, D.D. Constitutional Remedies and Writs (2nd Edition, 1999), Kamal Law House, Calcutta, India, pp. 164

18 Pandey, J.N. The Constitutional Law of India, (50th Edition, 2013), Central Law Agency, Allahabad, India, pp.628.

19 Ibid

20 This can be accessed online at Judiciary Website of Bhutan at http://www.judiciary.gov.bt/html/case/Judg/2012/HC/petition.pdf

21 Basu, D.D. Constitutional Remedies and Writs (2nd Edition, 1999), Kamal Law House, Calcutta, India, pp. 172

22 Ibid

23 Certiorari. Can be accessed at The Free Dictionary http://legal-dictionary.thefreedictionary.com/certiorari

24 Basu, D.D. Constitutional Remedies and Writs (2nd Edition, 1999), Kamal Law House, Calcutta, India, pp. 174

Committees overlook or exceed their powers, Article 21(10) of the Constitution allows the aggrieved civil servants to petition the High Court and the Supreme Court for issuance of appropriate orders, directions or writs and to determine the validity of their action or decision.

d. Writ of Quo Warranto

Quo Warranto which is a Latin term means "by what warrant or by what authority or what is your authority." This writ is sought when a person holds a post without having the authority to hold that post. "A legal proceeding during which an individual's right to hold an office or governmental privilege is challenged."[25] This writ requires the person holding that office to show to the court under what authority he or she holds the post or office. If the court upon determination finds that the person holds such office without authority, the court can pass an order preventing such person from holding the office. The office must be a public office. Public Office may be defined as that office whether the duties of the office are in public nature or not. Public office holder is an officer "who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public" as defined in ***R v. Whitaker (1914) KB 1283.***[26]

In May 2015, a Senior Producer of the Bhutan Broadcasting Service Corporation Limited sued his own agency[27] for refusing him the post of a Manager as the recruitment was done by voting was not proper and the person so selected has no legal authority to hold the post as it violated the internal rules and the Labour and Employment Act, 2007 in selecting the person as the Manager. However, the aggrieved party did not seek remedy under Article 21(10) of the Constitution.

Therefore, the above writs may be used as legal means by the aggrieved persons to safeguard and enforce their fundamental rights against the violators in accordance with the law.

Article 21(10) of the Constitution also empowers the High Court and the Supreme Court to issue appropriate orders, declarations and directions for the enforcement of fundamental rights and therefore obligates the judiciary to safeguard, uphold and administer justice fairly and independently without fear, favour or undue delay in accordance with Rule of Law.

5. Recommendations

As the fundamental rights and freedoms constitute the constitutional guarantees of the individual liberty, they hold a special sanctity and value compared to the other provisions in the Constitution. Hence, Article 7 of the Constitution may be described as the 'heart and soul' of our Constitution. The following may be few methods amongst others:

1) The legislature arm of the Government to fulfil the constitutional mandate of enacting a law which lays down the procedure as intended by Article 7(23) of the Constitution;

2) The Government to take the Constitution to the general people through various methods and programs of education and awareness; and

3) Both public and private actors to promote and stimulate the people the need to know the Constitution and other laws of the land, as ignorance of law is no excuse before a court of law.

Conclusion

Although Bhutan peacefully transitioned into the Democratic Constitutional Monarchy in 2008, it is still at an infant stage. With the advancement of time and as the nation progresses, the constitutional institutions, systems and values evolve and develop, it would become natural for requisite norms to fall in place to meet with the changing time. At the moment, it may be our fervent wish and hope that the will and wisdom of the framers of our Constitution will soon be realised by the Courts testing the existing of such rights what is known to us as Fundamental Rights.

25 Quo Warranto. Can be accessed online at Free Dictionary http://legal-dictionary.thefreedictionary.com/quo+warranto

26 Official Misconduct . It can be accessed online at Crown Prosecution Services(CPS) at http://www.cps.gov.uk/legal/l_to_o/misconduct_in_public_office/

27 Senior Producer takes BBS to Court. It can be accessed online at http://www.bbs.bt/news/?p=55628

Judging Justice Beyond Dispute Resolution Bodies

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Introduction

The world of constant conflicting and competing interests arise from the fact that there is no abundance of provisions to meet, naturally, the needs and desires of humanity. These, in turn, have rendered human race inherently discriminatory, making more concerned about oneself than others. Except for common heritage and private interest, "one cannot be said to have committed injustice by taking too much air at the expense of others."[1]

A free society allows having a right to act voluntarily and freedom to pursue one's interest and potential in which one is interested, but it does not mean one can pursue such recklessly as no right is absolute and no freedom is free in nature. It requires one to observe restraints and restrictions covenanted. These efforts to maintain balance are then the simplest invocation of the conception of justice. If the virtue of justice exists only from being needed for the use of society,[2] the purpose of justice is then to provide happiness, security, and order.

The virtues and laws of justice would be, however, suspended by human, where self-preservation is a necessity situation. Even a virtuous man would explore possible means to protect his life when threatened. Therefore, the individual need for defense and security overrides regards to justice. The need, relevance, and importance of the concept of justice, to this end, are dependent upon its utility.[3] For instance, equality is the primary element of justice, and yet it is conceptualized to mean different to different theorist, fairness to John Rawls, impartiality to Roemer, and mutual advantage to David Gauthier, etc.

It is inherent for a human to classify something superior and inferior. It is a very negative aspect of humanity, but unfortunately inescapable. In the context of decision making, when one makes a decision in the perfect sense of judgment, there are others who simply are not able to or do not want to see the cordiality that it brings about in the society. When one, in all honesty, loves to hang on everything the other(s) say, does one misses to see and hear both sides. When this happens, justice done is unseen, unappreciated, and critiqued with no substantial basis. Of all the theories and discourses on the conception of justice, this article, therefore, seeks to in context and relevance; delve into the concept of justice within the contractarian approach. The present approach is that contractarian approaches of conceptualizing Justice as Mutual Advantage (JMA) and impartiality, over the time, has been arguably considered as the dominant methodological framework for analyzing and justifying the concept of justice.[4] It, however, only endeavors to discuss the importance of understanding JMA and the certain roles of dispute resolution bodies to administer justice in times of controversies.

Conception of Justice from Contractarian Perspective

Contractarianism also referred to as constructivism in its essence has been defined as a doctrine according to which, justice is what would be agreed on in any specified kind of situation.[5] In this context, the rules

1 Hume, D., SECTION III: On Justice, Living Philosophy, The Web.
2 Ibid.
3 Ibid.
4 Zaluski, W., (2011). A Game-Theoretic Analysis of Justice as Mutual Advantage, p. 2.
5 Barry, B., (1989). Theories of Justice, University of California Press, Berkeley, p. 268.

of justice would be then justified if it is agreed by in a defined decisional situation.

The justice for Thomas Hobbes, the first contractarian theorist, is simply based on the covenant between the individuals. In the absence of such covenant there is no transfer of rights and every man has right to everything (state of nature) and consequently no action can be unjust.[6] However, once the parties agree to a covenant, then to break it is unjust, and the definition of injustice is no other than non-performance of duties under it, and whatsoever may be unjust is just.[7] The perimeter of what is to be just and unjust is, therefore, contained in the agreed covenants. Human as a rational actor find it better off to live in a world of cooperation and will "surrender every one of [their] natural rights," except self-defense to a sovereign to escape the state of nature.[8] Something undertaken must be complied as doing so was in one's best interest then.[9]

Similarly, David Hume argues that justice is a type of bargain[10] to effect mutual advantage emerging from the interaction of individuals pursuing their private interest. The rules of justice are just if everyone is better off with them than with no rules. For him, justice is fundamentally a matter of mutual advantage.[11] Thus the rules of justice that emerge from it are the key to ensuring mutual benefits for contracting individuals.

David Gauthier, the contemporary proponent of JMA, has further elaborated on the rules of justice by arguing that it is rational for an individual to choose in accordance with a fair, cooperative arrangement rather than utility maximizing to achieve mutual advantage (maximum interest) under certain condition. It is "not of absolute standards but of agreed constraint" which justifies the conduct of the rational self-interested individuals.[12] The rational behavior of an individual is the basis because a person would have no reason to accept constraints which are independent of his interests. Human being is a rational agent who can critically assess and reflect upon their choices and possible outcomes, and desire to maximize utility. It is these rational people who, after realizing that it is in their best interest, will enter into a contract.[13] If the covenant concluded is not respected, an act or omission of any party to that extent constitutes injustice by definition.

The justice, therefore, must be construed from the rules of justice that the parties agreed to be just and fair while covenanting. It signifies their primary interest effected through a rational assessment of the best strategy to attain the maximum interest. To redress the breach is then to implement the rules of justice as agreed unless attuning to the requirement of the law is warranted.

Basis of and Freedom to Accept or Refuse Covenants and its Consequences

From the thinking of Philosophers, it is rather logical that a decisional situation that generates rules of justice for JMA assumes that human beings as rational agents would accept a rule of justice if between rational egoists with rough equality of power is faced with a moderate scarcity of good. It also assumes that the parties to justice are also *homines oeconomici*, who can only relate to one another as competitors and concerned only with their well-being. Their decisions are based either on their needs or the profit they seek to make.[14] One is assumed to accept a rule of justice free of ignorance and is fully informed and knows their utility though distinguished by their bargaining forces, preferences and choices. Therefore, one may only enter into covenants that suit their interest. Once concluded, respect and compliance are obligatory upon the parties. The interest of the justice requires that such rules must uphold except a reasonable pursuit of one's interest may be allowed under the covenant.[15] In short, as Justice is the outcome of interactions between rational individuals, an agent is expected to participate in an interaction only if one benefits and intends to comply with it in the future.

As inherent, the law, therefore, gifts a person with absolute freedom from compulsion to agree to something that does not interest him. It is both the natural and fundamental right of every individual to

6 Springborg, P., (2007). The Cambridge Companion to HOBBES'S LEVIATHAN, at p.147.

7 Id, at 120.

8 Supra fn. 6. See also Waluchow, Wilfrid J., (2003). The dimensions of ethics: an introduction to ethical theory, Peterborough, Broadview Press, Ltd., p.125. See also, Hobbes's Moral and Political Philosophy, First published Tue Feb 12, 2002; substantive revision. Web.

9 Mariel, (2010). Wondering and Wandering: Morals By Agreement, Chapters 1 & 6. Web.

10 Salter, J., (2012). Hume and Mutual Advantage, MANCEPT Working Papers Series ISSN 1749 9747, 2009, Journal of Politics, Philosophy and Economics, August 2012, Vol. 11, No. 3 302-321, at p. 1.

11 See Convention, First Pub. 2007, Substantive Rev. 2011, Standard Encyclopedia of Philosophy, Web.

12 Gauthier, D., (1986). Morals by Agreement, Oxford University Press, New York, p. 2.

13 Waluchow, Wilfrid J., (2003). The dimensions of ethics: an introduction to ethical theory, Peterborough, Broadview Press, Ltd., p. 125.

14 Biesecker, A., The feminine twin in economics, Web.

15 Supra fn. 4 at p. 4.

pursue that which pleases them unless they breach a corresponding duty to respect the right and the freedom of others. A person has the right to retain the original situation called by David Gauthier as the "initial bargaining position" or "no agreement position" if he does not find a covenant rational and motivational.[16] If he wants to return to this situation, he must revoke covenants entered under the law.

In consonance with the law of liability and obligation, it is only the agreed covenants, from which, one's liability arises by way of wrong or breach of duty. To be liable, a person must violate a right or act contrary to duty created by a covenant.[17] In some cases, mutuality may not always assure reciprocity in contracting for mutual benefit,[18] however, unless beyond one's knowledge, for example, by way of misrepresentation, one has the recourses to revoke covenants agreed within the statutory limitations. Hence, the basic rule that covenants agreed in an environment in which neither party to the agreement is worse off, but can maximize their utility[19] and subsists through the statutory period to gain legal effect, must be complied. It does not matter if an agreement is worthy of cooperation. Individuals must be able to detect the dispositions of others, not of course with complete certainty, but with a very high degree of accuracy, though "… self-interestedly rational for the individual to be moral" may be seen less obvious and straightforward.[20] Even if covenant involves people making a concession to each other in contrast to justice as an ideal bargaining outcome,[21] doing so does not illegitimate the terms and condition of covenants unless in contravention of law.

Redressing Injustice

Without a collective power to maintain the right, it is not possible for individuals to live in society. Every man is moved by his interests and passions. This social nature of the man, demands he is regulated to live in society. Regulating human to avoid prevented state of nature has been found to be the key to maintaining and ensuring peace. To ensure compliance, the state of nature must be prevented, and there must be a certainty for *hominess oeconomici* to comply with an agreement they conclude. For there to be such certainty, we gave to ourselves that which is called the law. It is the noblest creation of man. In the words of His Majesty the King "….the law is the root of peace and prosperity…"[22] As such, it endeavors to create a society based on justice, equality, and fairness.

The law, while declaring right and the duty, created dispute resolution bodies before which one could redress the wrong or injury suffered. It is this institution that must ensure "falsehood does not triumph over truth... Injustice does not eclipse justice".[23] The law that is sovereign provides very precise rights and duties in the administration of justice. It declares that it is the responsibility of the dispute resolution bodies to uphold both the private and public justice according to law. Even if a wrong is done, one must refrain from helping oneself. One must abstain from taking the law into their hands. A modern State has no room for allowing the renounced private vengeance and the violent self-help system of the primitive days. Such is inevitable in appreciating the reciprocal relationship between political obedience and peace. Rendering justice is the business of the State. It is only the State that can administer justice with the sanction of physical force.[24] The State can only act as a judge to assess liability and impose a penalty. The law mandates that both substantive and procedural standard must be followed while redressing injustice suffered. For example, public opinion may be of valuable support, but it cannot substitute it, for it can never. Once a decision is out, criticism is a part of freedom of speech and expression. On the contrary, one cannot defame a neutral decision maker, write irrationally, writes wrong and false information or write pending a decision because doing so fails to address the real issue sought to be at the center of debate. The law requires that such acts must not be rewarded, but punished, for, it is harmful to society. For that matter, criticizing a decision must be done without casting aspersions on the person making the decision and the institution. As a responsible citizen, one should not pass adverse comments that scandalize a dispute resolution body.[25] Any criticism must be reasonable and constructive. It must be fair and on the merits of any case, heard and finally decided.

At the core, the influence of unwarranted views and opinions that just lack merit is not tenable in a healthy justice delivery system. It is an established principle

16 Cudd, A. (2007). Contractarianism. Web.
17 Mahajan, V.D., (2001). Jurisprudence and Legal Theory, Reprint, at p. 416.
18 Supra fn. 12 at p. 268.
19 Williams, G., (1998). The Problems of David Gauthier's attempt to derive morality from rationality, Libertarian Alliance, London, p. 4.
20 Foreste, Eric W., Review of Morals by Agreement by David Gauthier, Oxford: Clarendon, 1986, p. 710.
21 Roemer, J., (1996). Theories of Distributive Justice, Harvard University Press, P. 92.
22 His Majesty's Address to the 20th Annual Judicial Conference, 2010.
23 Tobgye, S., (2015). The Constitution of Bhutan *Principles and Philosophies*. ISBN: 978-99936-6587-8. Supreme Court, Thimphu, Bhutan.
24 Supra fn. 17 at pp. 128-136.
25 Advocate General v. Abraham George, 1976 Cr LJ 158 (161).

and practice that judges give justice according to the law of the country. The law that is sovereign also binds judges for it cannot be violated with impunity. It is paramount to note at the outset that any dispute resolution body that is assigned to perform one of the most important state functions of administering justice is not free to decide as they wish, which is but unfortunately presumed to the contrary by the public. They are bound by both procedural and substantive laws. They refer the substantive law if what facts constitute wrong is to be determined, while they apply the procedural law to determine what facts constitute proof of wrong.[26] Should the existence of a fact be contested, the law of evidence provides a very precise law on how to arrive at the truth. Where the law is not intelligent or where the rights of the parties are not certain, the dispute resolution bodies, with the aid of the principles of interpretation of statutes, develop and engineers the law to ensure that justice is served. Irrespective of the rationality of the parties, compliance with covenants[27] must be required to be upheld by the dispute resolution bodies while deciding a case.

The just arrangement between the parties is all that is upheld and implemented by a dispute resolution body. It is true because only if the mutual interest is taken into consideration, does the decision become justified. Given this, appreciating the cognizance of each case (dispute) in the light of the rules of justice agreed upon by parties by the dispute resolution bodies is fundamental. It is only with those rules of justice, can a dispute resolution body find out the truth because it demonstrates just and fair understanding between the parties in a covenant. In cases where rules of justice as agreed by the parties contravene the law, it is the responsibility of a dispute resolution body to attune to the sovereign, the law. Being its primary responsibility, the dispute resolution bodies throughout the proceedings addresses and redresses the wrong or injustice, an act contrary to the rule of right and justice. In doing so, it fixes the responsibility as to who committed a breach of a right or duty, and passes decisions, as must be, according to the declared law of the country. The law does not serve at the convenience of any neutral decision maker or any individual. It rather guides the conduct of the decision makers and individuals because the wisdom of the law is wiser than any man's wisdom as Lord Coke profoundly noted.[28] It corroborates simple logic that a wrong can arise only when a legal duty is broken.[29] When the facts or truth is established, only can the law come to aid naturally.[30] Justice is, therefore, rendered by appreciating and valuing the rules of right and justice upon which a covenant is negotiated, and not by the irrelevant and unfounded orders of a dispute resolution body. For example, refusing to repay a loan within the stipulated time constitute a breach of legal duty to repay. Rendering justice here would inevitably require the interest of the lender to have his money repaid be upheld, if necessary, including foreclosure of the mortgaged property. It is not unjust even if the mortgaged property was the only assets of the borrower.

Conclusion

The fact that we argue about justice by itself presupposes a level of mutual understanding. We may argue about facts and truths, yet it is unavoidable that justice has something to do with equity of appreciating a case within the parameters of its facts and circumstances. For example, some covenants may also be based on conventions of trust and mutual agreements. Such may maximize both private and public utilities. In such a scenario, a proper balance must be maintained between the private and public justice because the interests of the society require the covenants be carefully fulfilled to secure mutual trust and confidence of each other. Doing such not only crucial in ensuring justice, but also fundamental in maintaining the cordiality of the society. To this end, as evidenced by discussions of the different philosophies on justice, justice is at bottom a system of rules that parties agreed to follow for their mutual advantage. Unless with a constructive or objective analytical approach, it is not possible for one to review if what a neutral decider decided is fair and just.

It is not difficult to comprehend that appreciating JMA in a way also relates to how one would try to apply principles of rationality. The cooperation of other people is, by one's reasonable prudence, a condition of our being able to get what we want. But our approach to getting what we want is communicated through various modes. To this end, one's cognitive, social perception, motivational, and emotional biases should not be allowed to blind and blur him from reaching to an informed decision and constructively critiquing a decision. It is essential because it is not just about the bargaining process and the goals and

26 Supra fn. 17 at p. 485.
27 Supra fn. 4 at pp. 3-4.
28 The Law Notes.in. Web. Available at http://www.lawnotes.in/Advantages_and_Disadvantages_of_Legal_Justice
29 Supra fn. 17 at p. 282.
30 Sarathi, Vepa, P., (2006). The Law of Evidence. 6th ed., Foreword, Eastern Book Company.

expectations of rational economic agents, more often than not; people cannot be rational and faces mental shortcomings and behavioral limitations. As such, the problem is both a cause and solution in itself. All that dispute resolution body does is to diagnose and correct it by upholding the rules of justice assessed to be just and fair while negotiating a covenant.

Through one's endeavor to appreciate JMA, it is, therefore, reasonably logical that critiquing a decision without a fair understanding of the truth, defined more accurately to mean facts by the jurists and philosophers, is a futile exercise with adverse consequences. It not only unduly maligns the integrity and personality of the persons; but also depicts one's limited and incompetent indulgence. At its best, it originates unhealthy debate and draws the unwarranted attention of the public. Such an act of disproportionate representation of a person or institution to the public, which in effect instill distrust in the minds of the public, is prima facie violation of one's fundamental duty to serve the indisputable sovereign in return for enjoying peace.

In short, if justice can be understood as a mutual advantage and essentially as a matter of the outcome of a bargain, reviewing and critiquing a decision to be just or unjust in a given case is more accurate and proper. It can also enhance the acceptability of the necessary role of the dispute resolution bodies to administer justice in times of controversies. Whether it is in the context of the civil or criminal case, the path to truth and justice remains in appreciating the covenants entered to better off oneself by making some agreement. It is the set of rules under the covenant that one must primarily focus on in examining if justice is being done in any given case. Therefore, a conclusion one draws by assuming that which he does not know much would be utterly irrational and unfounded. In conclusion, as every theory of justice proclaims, all people are treated equal, but one must also note that the conception of equality is not same, similar or identical to the notion of justice.

Unintentional Bias in the Courts

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Abstract

"*…the simple fact that bias is such an insidious thing that, even though a person may in good faith believe that he was acting impartially, his mind may unconsciously be affected by bias.*" Matt Evans

When asked to interpret information and draw conclusions, people are prone to a number of well understood, unintentional errors in reasoning.[1] Count to yourself the number of word starting with letter E in the following sentence. Don't read it just count in 2 second.

"All persons are equal before the law and are entitled to equal and effective protection of the law and shall not be discriminated against on the ground of race, sex, language, religion, politics or other status."[2]

How do you do it? You look at the same thing but sees differently.[3] Our mind takes short cut[4] to analyze the information to make quick decision. These decisions are influenced by unconscious bias. The scientific studies provide that such biasness can be measured by[5]Implicit Association Test (IAT).[6] Which takes one of those biases and test by response time, how quickly people are able to respond to or against it? These studies highlight that information which bypasses our awareness can still influence decision making. The unintentional reasoning errors that people make are collectively known as cognitive biases.[7] Psychologists

1 House of Parliament, Parliamentary office of Science & Technology, Post note, NO.512 October 2015.

2 The Constitution of the Kingdom of Bhutan, Article 7 s. 15.

3 California Judicial Council, Implicit Bias, 7 March 2016.

4 McKinzey and Company, Unconscious Bias, 17 September 2015

5 Ibid.

6 The IAT measures the strength of associations between concepts (e.g., black people, gay people) and evaluations (e.g., good, bad) or stereotypes (e.g., athletic, clumsy). The main idea is that making a response is easier when closely related items share the same response key.

When doing an IAT you are asked to quickly sort words into that are on the left and right hand side of the computer screen by pressing the "e" key if the word belongs to the category on the left and the "i" key if the word belongs to the category on the right. The IAT has five main parts.

In the first part of the IAT you sort words relating to the concepts (e.g., fat people, thin people) into categories. So if the category "Fat People" was on the left, and a picture of a heavy person appeared on the screen, you would press the "e" key.

In the second part of the IAT you sort words relating to the evaluation (e.g., good, bad). So if the category "good" was on the left, and a pleasant word appeared on the screen, you would press the "e" key.

In the third part of the IAT the categories are combined and you are asked to sort both concept and evaluation words. So the categories on the left hand side would be Fat People/Good and the categories on the right hand side would be Thin People/Bad. It is important to note that the order in which the blocks are presented varies across participants, so some people will do the Fat People/Good, Thin People/Bad part first and other people will do the Fat People/Bad, Thin People/Good part first.

In the fourth part of the IAT the placement of the concepts switches. If the category "Fat People" was previously on the left, now it would be on the right. Importantly, the number of trials in this part of the IAT is increased in order to minimize the effects of practice.

In the final part of the IAT the categories are combined in a way that is opposite what they were before. If the category on the left was previously Fat People/Good, it would now be Fat People/Bad.

The IAT score is based on how long it takes a person, on average, to sort the words in the third part of the IAT versus the fifth part of the IAT. We would say that one has an implicit preference for thin people relative to fat people if they are faster to categorize words when Thin People and Good share a response key and Fat People and Bad share a response key, relative to the reverse. https://implicit.harvard.edu/implicit/iatdetails.html

7 Ibid. 1

have identified 10[8] such biases and many of which are relevant to court room proceedings.[9] Some of the biases relevant to courts are *Confirmation Bias* which occurs when people seek, weigh or interpret information in a way that conforms to their pre-existing beliefs or assumption.[10]*Contextual Bias* occurs when information about the context of an event influences reasoning but it is logically irrelevant to the decision at hand.[11] The third, *Unintentional Stereotype Bias* occurs when people associate certain traits with their perception of a person's social group, such as race, gender, or age. These associations can influence decisions and behavior, even though people are unaware that they harbor them.[12]All these unconscious, unintended, implicit or subconscious biases are aptly summarized by Matt Evans[13] *"the simple fact that bias is such an insidious thing that, even though a person may in good faith believe that he was acting impartially, his mind may unconsciously be affected by bias."*[14]

In this light, may we focus on how professional judges (some times lawyers) might be prone to cognitive biases despite their experience and expertise? The cognitive biases may arise at various stages of judicial process such as when the police first process a crime or in forensic investigation, etc. However, this article focuses on their effect on court room participants' in particular to the witnesses and judges in criminal trials. Studies show that such biases have influence in civil process[15] also but here we limit to criminal justice process only.

Cognitive biases are particularly likely to influence reasoning when people make decisions under uncertainty. Identifying suspects, and evaluating evidence, accusations and alibis all involve determining likelihoods with incomplete information.[16] During a trial, judges are presented with evidence; they may ask for additional or other evidence, they may judge evidence as inadmissible, or they may decide to give more (or less) weight to certain pieces of evidence. Such tasks in the hearing process might be affected by several cognitive biases.[17]

Confirmation Bias

It comes to operate when judge has preconception or hypothesis about a given issue, they tend to favor information that corresponds with their prior beliefs and disregards evidence pointing to the contrary. This confirmation bias makes people search, code, and interpret information in a manner consistent with their assumptions, leading them to biased judgments and decisions.[18] Confirmation bias can also affect judges when they hear and evaluate evidence brought before them in court. Specifically, judges might be biased in favor of evidence that confirms their prior hypotheses and might disregard evidence that does not correspond with their previous assumptions.[19] For instance research conducted in UK suggests that the influence of external factor, the pre-trial attitude of the mock jurors who endorse statements such as *"too many obvious guilty persons escape punishment because of legal technicalities"* of the justice system tend to favor conviction in a burglary case at a higher rate than those who do not.[20] Similarly, Jurors exposed to media reports portraying the defendant in a negative light were significantly more likely to discuss ambiguous trial facts in a manner that supported the prosecution, but rarely in a manner that supported the defense.[21] An analysis of US based studies revealed that negative pre-trial publicity significantly affects jurors' decisions about the culpability of the defendant.[22]

Contextual Bias

When people evaluate events or outcomes after they have occurred, they sometimes exhibit a contextual bias when they judge the event as being more predictable then it was before it actually happened.[23] This bias has been shown to occur in the courtroom as well, mainly in liability cases.[24] In

8 Cognitive Biases in the Law, Charlotte Blattner, 8 March 2014.
9 Cambridge University Press, Heuristics and Biases: The Psychology of Intuitive Judgment, 2002.
10 Ibid. 6.
11 Ibid.8
12 POSTbrief 15, Cognitive Bias in Forensic Investigation.
13 He the Director of the AIRE Centre, a specialist charity whose mission is to promote awareness of European law rights
14 Matt Evans, A Question of Judicial Bias. Human Rights Sentencing, 11 September 2012, Rv Gough (1993) AC 646 at 659.
15 Jerry Kang,Judge Mark Bennett,DevonCarbado,PamCasey ,NilanjanaDasgupta,DavidFaigman,RachelGodsil,Anthony G. Greenwald,Justin Levinson, Jennifer Mnookin, Implict Bias in the Court Room. 59 UCLA. Rev.1124 (2012)
16 House of Parliament, Parliamentary office of Science & Technology, Post note, NO.512 October 2015
17 Eyal Peer &Eyal Gamliel, Heuristics and Biases in Judicial Decisions, Court Review Volume 49.
18 Scot Plous, The Psychology of Judgment and Decision Making (1993).
19 Ibid 16.
20 Lundrigan. S 2013, Predicting Verdicts using pretrial attitude and standard of proof, Legal and Criminology Psychology.
21 Ibid. 15.
22 Steblay ,N 1999, The Effect of Pre-Trail Publicity on Jurors Verdict.
23 Eyal Peer &Eyal Gamliel, Heuristics and Biases in Judicial Decisions, Court Review Volume 49.
24 Ibid.

such cases, the task of the judges or jurors is to assess how foreseeable an outcome was and to evaluate whether the plaintiff's behavior took this risk into consideration. The problem is that judges evaluate the outcome in hindsight, while the plaintiff only had the chance to provide foresight about it. For example, in one case, a physician was accused of malpractice because he failed to detect a tiny tumor in early chest radiography. The tumor got bigger and the patient died as a result, leading to the malpractice claim. The physician was found guilty after another radiologist who saw the radiographs after the tumor was found testified that the tumor could have been detected in the early radiography.[25] Clearly, the second radiologist had the benefit of knowing the tumor was actually there, an advantage the first physician did not have at the time. In addition, studies have found that the severity of the outcome increases hindsight bias dramatically. For example, judges who were informed that a psychiatric patient became violent were more likely to find the patient's therapist negligent than those who did not receive information about the outcome and its severity.[26]

Unintentional Stereotype Bias

Research shows that people unintentionally attribute stereotypical traits to individuals from particular social groups, and that these attributions affect decision making.[27] Unintentional social bias may manifest at many levels, from the point of entry into the justice system, to witness testimony, to the gathering and presentation of evidence.[28] For instance, stereotypical attitudes about rape victims that was shown in the case simulation in UK that mock Jurors routinely emphasized the significance of a lack of signs of physical injury to their not guilty verdicts, despite the fact that research shows that rape is not necessarily accompanied by evidence of physical force.[29] Similarly, lack of victim's emotional responses and delays in reporting of crime were some of the issues that unintentionally suspect the suspicious of the victim's credibility in rape cases.

Consider a vegetarian's biasness against meat. He has a negative attitude (that is, prejudice) towards meat. He also believes that eating meat is bad for his health (a stereotype). He is aware of this attitude and stereotype. He also endorses them as appropriate. That is, he feels that it is okay to have a negative reaction to meat. He also believes it accurate enough to believe that meat is generally bad for human health and that there is no reason to avoid behaving in accordance with this belief.[30] This is explicit bias.

Now, if this vegetarian is running for selection to some office and he is meeting people in a region famous for barbecue, he will probably keep his views to himself. He could, for example, avoid showing disgust on his face or making critical comments when a plate of ribs is placed in front of him. Indeed, he might even take a bite and compliment the cook. This is an example of concealed bias (explicit bias that is hidden to manage impressions).[31]

Consider, by contrast, another vegetarian who has recently converted for environmental reasons. She proclaims explicitly and sincerely a negative attitude towards meat. But it may be that she has an implicit attitude that is still slightly positive. Suppose, she grew up enjoying weekend barbecues with family and friends, or still likes the taste of steak, or first learned to cook by making roasts. Whatever the sources and causes, she may still have an implicitly positive attitude towards meat.[32] This is an implicit bias.

Judge

The right to be tried by an impartial judge is embedded[33]in the judicial jurisprudence. Litigants and Jabmis often come to believe that a judge has become bias or prejudiced against them. However, implicit biases as highlighted above are state of mind not easily provable fact. A legislature in many jurisdictions has authorized the parties to seek for the disqualification on the basis of an appearance of judicial bias or impropriety. For instance, judges in Bhutan are required to conduct impartially that "no bias or perceived bias in the judicial process" is tolerated.[34] Further, judge is required to recuse from presiding or dealing with the case where a judge is related to party, or circumstances exist that affects or could be construed to affect his impartiality.[35]

25 Leonard Berlin, Hindsight Bias,175 Am. J Roentgenology 597(2000).
26 Ibid.22.
27 House of Parliament, Parliamentary office of Science & Technology, Post note, NO.512 October 2015.
28 Ibid.
29 Ibid.
30 Jerry Kang,Judge Mark Bennett,DevonCarbado,PamCasey, NilanjanaDasgupta,DavidFaigman,RachelGodsil,Anthony G. Greenwald,Justin Levinson, Jennifer Mnookin, Implicit Bias in the Court Room. 59 UCLA. Rev.1124 (2012)
31 Jerry Kang,Judge Mark Bennett,DevonCarbado,PamCasey ,NilanjanaDasgupta,DavidFaigman,RachelGodsil,Anthony G. Greenwald,Justin Levinson, Jennifer Mnookin, Implicit Bias in the Court Room. 59 UCLA. Rev.1124 (2012)
32 Ibid.
33 Judicial Disqualification Resource Center, Recusal and Disqualification of Judges and other Adjudicators.
34 Civil and Criminal Procedure Code, 2001, s.6
35 Ibid. s.6.1

In the beginning of the article, we asked to count words with letter E and found there are 4 *i.e. twice equal, entitled, and effective*. All these words are powerful in bringing out the Constitutional Fundamental Rights of individual to have impartial adjudication process to avail Fair Justice Services. However, all these provisions enshrined in as above are not necessarily the solution for the perceived judicial bias that many litigants seem to think it is.[36] Because cognitive biases are unintentionally operating in the court room as provided by substantial and growing scientific literature on implicit bias.[37] Despite their professional commitment to the equal application of the law, judges do not appear to have the same habits of mind as the chronic egalitarians.[38] As such implicit biases can translate into biased decision making under certain circumstances but they do not do so consistently[39]because it operates unintentionally. Therefore, it is time to confront a critical question *"What, if anything, should we do about implicit or cognitive bias in the court room?"*[40]

Science on existence of implicit biases is more than science on the ways to mitigate implicit bias is relatively in the formative stage. However to minimize the risk that such biases may lead to bias decision in court[41] following strategies are suggested.[42]

Raise awareness of implicit bias.[43] Understanding of the source of bias and becoming aware of it and its harmful impact on the judgment would help individual to pursue corrective measures. Similarly, seek to identify and consciously acknowledge real group and individual difference rather than being "colour blind".[44] Further, routinely check through processes and decisions for possible bias that is to adopt a thoughtful, deliberative and self-aware process for inspecting how one's decisions are made.[45] It is important to identify sources of stress and reduce them in the decision making environment and also to identify source of ambiguity and impose structure in the decision making context. One has to increase exposure to stereotyped group members for instance, seeks greater contact with the stigmatized group in a positive context.[46] The interventions on the operation of implicit bias as highlighted above are not exhaustive strategies.

Conclusion

Research and studies shows that human brains automatically develop implicit and stereotypes attitudes without awareness and intend. This environment of brain leaves open the possibility that even those individuals who are dedicated to the principles of fair justice system and strict adherence to the rule of law may at time unknowingly make crucial decisions and act in ways that are unintentionally unfair. Although the courts have excelled to eliminate explicit bias, particularly in Bhutan Judiciary, like any other institutions, the court may still be challenged by implicit biases that are difficult to recognize.

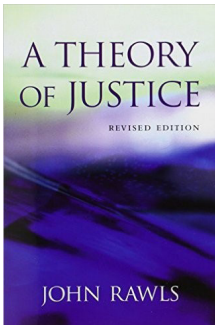
Therefore, one of the reasons why people are not 100 percent satisfied with Court services would be unintentional operation of implicit bias. The Bhutan National Legal Institute (BNLI) as the training arm of the judiciary of Bhutan is working on the modus operandi in creating awareness to Judicial Personnel about such issues. In fact BNLI has started in its endeavor to create awareness by conducting "Judicial Integrity and Ethics" training to *Dungkhag Drangpons*, *Dzongkhag Drangpons*, Court registrars and Bench Clerks in collaboration with Anti-Corruption Commission. It is important that judicial personnel be pro-active to training as it is the most effective means to curb implicit bias and it is like combating any unhealthy practices.

36 Ibid. 32.
37 Ibid. 29.
38 Jeffery J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich, Chris Guthrie. Does Unconscious Racial Nias Affect Trial Judges. Hein Online-84 Notre Dame L.Rev.1195 2008-2009.
39 Ibid.
40 Jerry Kang,Judge Mark Bennett,DevonCarbado,PamCasey ,NilanjanaDasgupta,DavidFaigman,RachelGodsil,Anthony G. Greenwald,Justin Levinson, Jennifer Mnookin, Implict Bias in the Court Room. 59 UCLA. Rev.1124 (2012)
41 Ibid. 37.
42 National Center for State Courts, Helping Court Address Implicit Bias -Addressing Implicit Bias in the Court
43 Ibid.
44 Ibid
45 Ibid.
46 Ibid. 41.

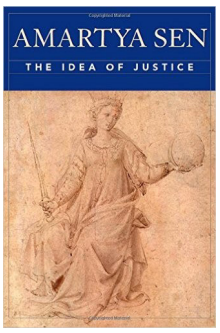
The Judges Book Club

The Bhutan National Legal Institute has started a 'Book Club' for interested judges and lawyers. The Members of the club meet first Friday of every month to discuss their opinions, experiences and beliefs about the selected book they have read. The Club was started with the objective of enabling interested members to take time out from their professional and family obligations to cultivate the habit of reading, and discussing and sharing views and opinions.

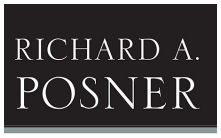
The First Judges Book Club was convened on August, 2011 and the book discussed was "Immanuel Kant's The Metaphysics of Morals". As of now the Club has to its credit discussed about twenty eight books.

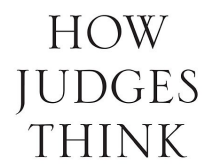


John Rawls in his book expresses an essential part of the common core of the democratic tradition "justice as fairness" and provide an alternative to utilitarianism, which had dominated the Anglo-Saxon tradition of political thought since the nineteenth century.

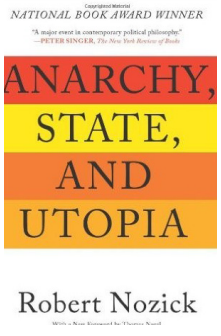


The transcendental theory of justice, the subject of Sen's analysis, flourished in the Enlightenment and has proponents among some of the most distinguished philosophers of our day; it is concerned with identifying perfectly just social arrangements, defining the nature of the perfectly just society.

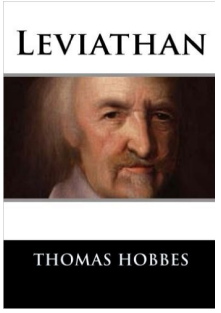




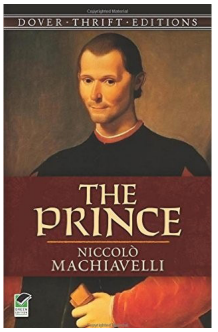
A distinguished and experienced appellate court judge, Richard A. Posner offers in this new book a unique and, to orthodox legal thinkers, a startling perspective on how judges and justices decide cases.



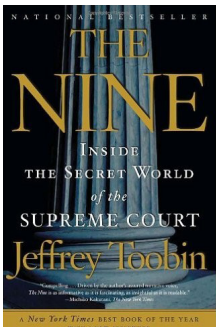
Anarchy, State and Utopia remains one of the most theoretically trenchant and philosophically rich defenses of economic liberalism to date, as well as a foundational text in classical libertarian thought.



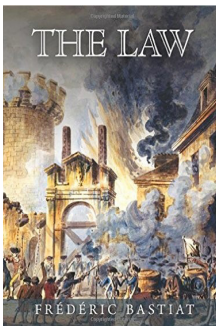
Thomas Hobbes took a new look at the ways in which society should function, and he ended up formulating the concept of political science. His crowning achievement, Leviathan, remains among the greatest works in the history of ideas. Written during a moment in English history when the political and social structures as well as methods of science were in flux and open to interpretation, Leviathan played an essential role in the development of the modern world.



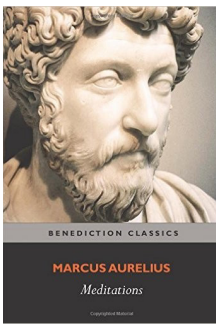
Machiavelli used a rational approach to advise prospective rulers, developing logical arguments and alternatives for a number of potential problems, among them governing hereditary monarchies, dealing with colonies and the treatment of conquered peoples.



In The Nine, acclaimed journalist Jeffrey Toobin takes us into the chambers of the most important- and secret- legal body in USA, the Supreme Court, revealing the complex dynamic among the nine people who decide the law of the land.

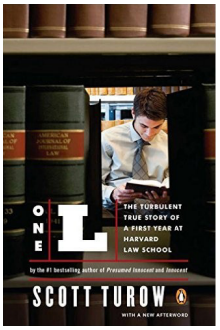


This book clearly states what the law (government) should do, and what the law should not do. If someone desires FREEDOM in their life, they should take to heart what is presented in this very readable book. This book substantiates why the minimalist Federal Government established in the United States provides the most freedom, and the evils and dangers of protectionism, socialism, and other means and methods of government to intrude into our lives (beyond the basic need to protect life, liberty, and property).

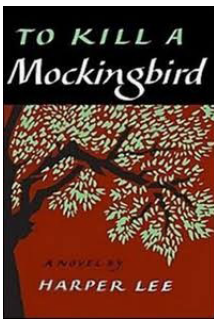


The only Roman emperor who was also a philosopher, the Meditations of Marcus Aurelius (AD 121-180) offer a remarkable series of challenging spiritual reflections and exercises developed as the emperor struggled to understand himself and make sense of the universe.

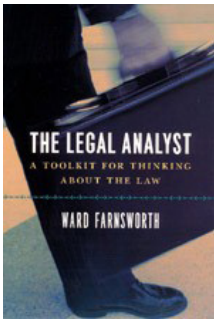
Ranging from doubt and despair to conviction and exaltation, they cover such diverse topics as the nature of moral virtue, human rationality, divine providence, and Marcus' own emotions.



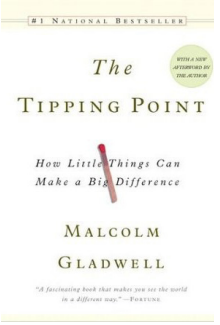
It was a year of terrors and triumphs, of depressions and elations, of compulsive work, pitiless competition, and, finally, mass hysteria. It was Scott Turow's first year at the oldest, biggest, most esteemed center of legal education in the United States. Turow's experiences at Harvard Law School, where freshmen are dubbed One Ls, parallel those of first-year law students everywhere. His gripping account of this critical, formative year in the life of a lawyer is as suspenseful, said The New York Times, as "the most absorbing of thrillers."



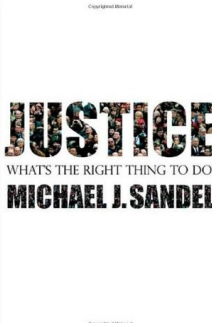
Compassionate, dramatic, and deeply moving, To Kill A Mockingbird takes readers to the roots of human behavior - to innocence and experience, kindness and cruelty, love and hatred, humor and pathos.



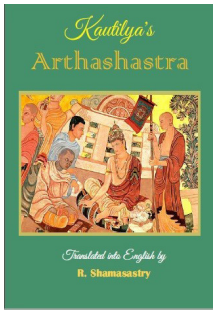
The Legal Analyst is an indispensable user's manual for law students, experienced practitioners seeking a one-stop guide to legal principles, or anyone else with an interest in the law.



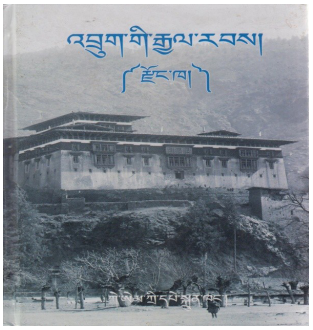
The tipping point is that magic moment when an idea, trend, or social behavior crosses a threshold, tips, and spreads like wildfire. Just as a single sick person can start an epidemic of the flu, so too can a small but precisely targeted push cause a fashion trend, the popularity of a new product, or a drop in the crime rate. This widely acclaimed bestseller, in which Malcolm Gladwell explores and brilliantly illuminates the tipping point phenomenon, is already changing the way people throughout the world think about selling products and disseminating ideas.



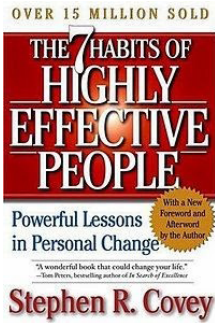
This book is a searching, lyrical exploration of the meaning of justice, one that invites readers of all political persuasions to consider familiar controversies in fresh and illuminating ways.



The Arthashastra is an ancient Indian treatise on statecraft, economic policy and military strategy. Centrally, Arthashastra argues how in an autocracy an efficient and solid economy can be managed. It discusses the ethics of economics and the duties and obligations of a king. The scope of Arthashastra is, however, far wider than statecraft, and it offers an outline of the entire legal and bureaucratic framework for administering a kingdom, with a wealth of descriptive cultural detail on topics such as mineralogy, mining and metals, agriculture, animal husbandry, medicine and the use of wildlife. The Arthashastra also focuses on issues of welfare (for instance, redistribution of wealth during a famine) and the collective ethics that hold a society together.



The History of Bhutan compiled by Pema Tsewang explains the evolution of world from the religious perspective and the existence of Buddhism in Bhutan. It also explains the arrival of Zhabdrung Ngawang Namgyel, a high Drukpa Lineage Lama from Tibet who was the first to unify the warring valley Kingdoms under a single rule. The book further explains the establishment of Dual System of Government; political power vested in an administrative leader, the Druk Desi, who was assisted by a collection of local governors or ministers called Penlops, and a religious leader, the Je Khenpo where power over monastic affairs were vested upon. In the later part of the book, it explains the establishment of hereditary monarchy in Bhutan, the reigning of the Kings and the development brought to the country.



Stephen R. Covey explains that in order to make real changes in our attitudes and behaviors, we must first make a paradigm shift in the way we see the world. This is similar to what he call "Mental Optometry," as it is the process of stepping back to try to see things as they actually are without the slant that our "lens" puts on the situation. He proposes what he calls an "inside-out" procedure to make this change and improve our life. He chose this name because we first work on habits that are completely inside us, and then we work on habits that involve our interactions with other people. By developing each of the 7 habits, in the order he suggests, we can make major, long-term improvements in our life.

Source: [www.amazon.com]

All books reviewed here are available at the Bhutan National Legal Institute. The softcopy of the books is also available on the Institute's website (www.bnli.bt).

Appeal and its Procedure

Sangay Khandu, Acting Chief Justice, High Court of Bhutan. LL.M. (University of Leiden, Netherlands); LL.B. (Punjab University, Chandigarh, India); and B.A (Sherubtse College, Kanglung, Trashigang).

Introduction

Article 21 Section 1 of the Constitution of Bhutan states that:

> *"The Judiciary shall safe guard, uphold, and administer Justice fairly and independently without fear, favor, or undue delay in accordance with the Rule of Law to inspire trust and confidence and to enhance access to Justice."*

Disputes are inevitable. Even Gods and Demi-Gods had disputes over the right to use fruits of the *Paksam Joenshing* (wish fulfilling divine tree). While the Demi-Gods claimed the right to the fruits - because they sowed the seed - the Gods claimed the territorial rights – because fruiting portion of the tree was in their territorial jurisdiction.

Dispute arises when two or more parties fail to agree to each other's proposals. The hostilities breed enmity and eventually lands up to the courts for settlement and thus the Courts and its judicial system.

There is none who does not long for peace and tranquility. As Bhutanese saying goes: 'while the Subjects are to the King; Peace and Tranquility are people' aspiration and the basis for it is the Rule of law.' Thus, in pursuit of peace and tranquility, there has been a gradual development of judicial system in Bhutan since the advent of Zhabdrung Ngawang Namgyel.

Like in any other countries in the world, Bhutan's judiciary plays a pivotal role in the functioning of a democracy. Appeal system is a unique hallmark of the Bhutanese judicial system. Unique, in the sense, that unlike in other countries, parties have free access to justice by way of appeal until the High Court. Access to justice is an essential element of the Rule of Law in a democracy. It is a fundamental right enshrined in the Constitution of Bhutan, as Article 7, section 15 provides:

> *"All persons are equal before the law and are entitled to equal and effective protection of the law and shall not be discriminated against on the grounds of race, sex, language, religion, politics or other status."*

1. Statutory Right

Be it a civil or a criminal case, a right to appeal to an appellate Court is expressly laid down under section 109.1 (c) of the Civil and Criminal Procedure Code (the "Code"), 2001. However, appeal must be preferred within 10 days of the judgment as specified in section 109.1 (c) of the Code. If no appeal is recorded within the given timeframe, it shall fail for automatic enforcement. This section is explicit that no layman could have misunderstood its literal connotations. However, the expression **'ten days'** has caused some misconceptions - a solution for which is provided hereunder.

Section 96.5 of the Code states that:

> *"Appeal shall be recorded within 10 days from the registration of the judgment in the Court record."*

To compute 10 days, it shall exclude all government and local holidays and such other authorized absence. 'Appeal' literally means judicial examination or determination of the decision and to redress the error by a higher court on the decision of the court of first

instance. Right to appeal is a statutory right. Section 109 of the Code states that:

> "*A party to a case may file an appeal to a higher Court against a judgment of the subordinate Court."*

Party to a case may prefer an appeal against the final judgment (96.4 of the Code) of the lower court. No provisions in the Civil and Criminal Procedure Code 2001 preclude any party from filing an appeal to the higher courts. Thus, the appeal is automatic.

2. Considerations of an Appeal

In accordance with sections 110 and 111 of the Code, unless the subordinate courts have made an egregious error with respect to factual issues, the appellate courts shall review only the issues of law and not facts. The lower courts must be deemed to have completed the fact finding process.

Sections 110 of the Code states that:

> *"The appellate court shall:*
>
> (a) *Determine whether there was error; and*
>
> (b) *If so whether such error warrants either a remand of full or partial reversal."*

3. Reasons of Appeal

A party may file an appeal only if there was:

- gross miscarriage of justice;
- a patent error of application of law;
- injustice due to evidence being overlooked;
- Judgment based on misleading evidence and the material evidence being ignored in totality.

The contemporary attitude of the party is that an appeal is preferred not to redress injustice but to harass the other party.

A few of many reasons of appeal are enumerated as below:

3.1 Procedural Lapses

- Arrest without warrant;
- Evidence – fruit of poisonous tree;
- Case dismissal on the grounds of jurisdiction;
- Negotiated settlement is dishonored;
- Child allowance not in conformity with law;
- Judgment rendered without having summoned the party(s);
- Default judgment;
- Judgment relied on fraudulent signature and thump print;
- Incomplete legal formalities involving *thram* (land title) transfer case;
- Appeal against negotiated settlement judgment;
- Commutation of sentences;
- Procedural protection such as approval for termination from the responsibility as a guarantor;
- Rectification of interest computation;

3.2 Fair Trial

- Not given adequate time and equal opportunity to make oral submissions;
- Deprived of the right to cross-examination and to be cross-examined;
- Denial of right to subpoena witness despite written request;
- Denial of right to be heard Audi Alter Partem;
- Refusal of Judicial investigation;
- Failure to examine negotiated settlement;
- Judgment relied on evidence not worthy of credence;
- Copy of submissions of one party is not given to the other party;
- Award of sentence not proportionate to crime/ inconsistent sentences;
- Misapplication of laws;
- Facts being overlooked;
- In exhaustive examination of case files;
- Non address of legal issues;
- Did not conduct DNA or Forensic test;
- Hurried judgment especially towards the year end;
- Judgments delivered at the pleasure of the *Drangpons*;

3.3 Cantankerous Litigation

- Judgment-Debtor appeals to prolong the case (intent to buy time);
- Appeals for extension or abridgment of time;
- The reason for appeal is not to redress injustice but malicious intent;

3.4 Principle of Natural Justice

- Conflict of interest;

4. Appeal Procedure

Unlike in other countries, appeal in Bhutan is automatic. However, section 109.1 (b) of the Code requires all appeals be filed with the registry of the appellate court in Thimphu. Section 109.1 (b) of the Code states that:

> *"An appeal shall be permitted only if it has been filed in the registry of the appellate Court."*

The above section implies that there is only one way for filing an appeal. In the Indian judicial system, appeal is allowed either by leave of court or by special leave. Although, theoretically, Bhutan's judiciary does not have such system, yet, in practice either of the above two-way system is adopted for party's convenience.

4.1 Leave of Court

The party may take the liberty of filing an appeal to the court of jurisdiction. '*Leave of court*' means that an aggrieved party may initiate an appeal with the court of jurisdiction within ten days. The concerned bench or the registrar, as the case may be, submits the petition to the *Drangpon* (Judge) for approval. The appeal is automatic if preferred within the timeline set forth in the law (96.5 of the Code). However, there are unusual instances where the *Drangpon* (Judge) refuses approval on some technical grounds. It is best explained by an illustration below.

Case Study 1

In a Gyelposhing Land Case the Office of the Attorney General (OAG) wanted to appeal against the judgment of Mongar District Court. OAG's prosecutor proceeded from Head Office, Thimphu, to Mongar two days before the timeline. Unfortunately due to indefinite strike in Jaigoan the prosecutor could not proceed and consequently failed to register an appeal on time. The Registrar, Mongar Court, rejected his appeal petition on technical ground. Subsequently, the OAG's prosecutor moved the High Court with a request to issue a writ of certiorari requiring Mongar Court to admit the appeal petition.

Although the timeline for appeal expires, there are natural catastrophes beyond human control, *vis majore,* that needs to be considered as in the above case. The appeal petition upon admission is referred to the High Court with a forwarding letter. This practice of filing an appeal in the court of competent jurisdiction is a policy decision. It is intended for the convenience of the parties so that they need not have to face harassment of having to travel to the capital Thimphu where the appeal court (High court) is located. (SC (Order No. 03-)2014/181 Sl. No. 12). There are hordes of social inconveniences, such as financial loss, physical risk, house chores, etc., involved to travel to Thimphu just to file an appeal. Paradoxically, what is preached is not practiced. Thus, access to justice is denied and it becomes expensive and dreadful at times.

4.2 Special Leave of Appeal

A party may file appeal petition with the registry of the High Court. This is similar to appeal by special leave of court as it is done in India. This is a special power bestowed upon the Supreme Court of India to grant leave to appeal against any judgment in case any substantial question of law is involved or gross injustice has been done. Similarly, section 109 (b) of the Code empowers the High Court to permit an appeal to be filed in the registry of the appellate court. After recording an appeal, the Registrar of the Court by a written *kasho (*order*)* signed by the *Drangpon* (Judge), directs the lower court to dispatch the case file for further review. However, it must be ensured that an appeal is filed before the expiry of the time allowed by law or else it is liable to be dismissed forthwith.

5. Appeal against *Nangdrig Genja* (Negotiated Settlement Agreement)

Confusion over appeal against *Nangdrig Genja* (negotiated settlement agreement) still persists amongst the legal luminaries and the practitioners. The question is whether an appeal could be preferred from *Nangdrig Genja* (negotiated settlement agreement) within 10 days of limitation period? Although the 21st National Judicial Conference, Agenda 1 - Resolution 1 has resolved that an appeal preferred from the judgment based on *Nangdrig Genja* (negotiated settlement) within 10 days from the date of judgment, should be allowed in the interest of justice. Nevertheless, many are still skeptical. There are two schools of thought pertaining to interpretation of Section 150 of the Code. Some are of the view that a valid *Nangdrig Genja* cannot be rescinded whatsoever, while others still believe otherwise. Consequently, appeal against such judgment or negotiated settlement agreement, as the case may be, is not uniformly observed. Therefore, this conflicting views need reconciliation.

There are two types of *Nagdrig Genja* (Negotiated Settlement agreement).

5.1 Out of Court Settlement (Nangdrig); and

5.2 Judgment based on Nagndrig Genja.

The validity of the negotiated settlement agreement is still contested. The clarifications are sought primarily on two issues whether:

a) A party can rescind the negotiated settlement within ten days of execution; and

b) The courts can annul such agreement if objected to within ten days irrespective of its validity?

6. Analytical View of Relevant sections Governing Negotiated Settlement

The question is not whether an agreement could be rescinded within 10 days of its execution. It is whether an agreement so executed is valid or invalid. In this regard section 150.6 of the Code states that:

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

The plain meaning of the expression ***"…shall raise objection to the validity…"*** speaks for itself. The rule of interpretation requires that the statutory enactment must ordinarily be construed according to the plain, grammatical meaning. The word ***'shall'*** has a mandatory and obligatory identity in legal jurisprudence. Thus, the phrase ***"…shall raise objection to the validity…"*** empowers an aggrieved party with a legal right to raise objection on the validity and legitimacy of the *Nangdrig Genja (*negotiated settlement agreement). Therefore, it can reasonably be inferred that a valid negotiated agreement shall stand binding under any circumstances.

The expression **'validity'** also attaches an equal importance to the negotiated agreement. According to the Black's Law Dictionary, **'validity'** means having legal strength or force; executed with proper formalities; incapable of being rightfully overthrown or set aside; founded on truth of fact. The legislative intent of incorporating **'validity'** in this section is to preclude parties from seeking relief to rescind such an agreement – any time after execution. Human minds are susceptible to undue influences. Succumbing to undue influences, the party to such an agreement may keep knocking the door of justice. To entertain an appeal to agreement would mean allowing the parties to open a Pandora's Box. Therefore, the right to appeal under section 109.1 of the Code shall not extend to the valid negotiated settlement agreement.

7. What Constitutes a Valid Agreement

Chapter II of the Contract Act, 2013 requires three aspects of a valid contract, viz. "***Proposal", "acceptance" and "consideration***. It is enforceable between the parties.

Section 35 of the Evidence Act, 2005 read with sections 150.3 and 150.5 of the Code, an agreement is valid if:

(a) Made in the presence of one witness of each party;

(b) Signed by all parties or another person duly empowered by a legally binding writing in that behalf;

(c) Legally executed with a legal stamp;

(d) The settlement must be by voluntary consent of the parties; and

(e) Any subsequent modification of the settlement agreement is attested by the parties.

Any negotiated settlement that fulfills the aforementioned aspects is a valid agreement. Valid agreement is binding on both the parties (privity of contract). It creates a legal relationship. Such an agreement cannot be annulled as there exists no legal defect. No party shall file a motion for annulment. Therefore, remedies under section 150.6 of the Code are not available to either of the party.

8. Ten Days Time to Revoke Negotiated Settlement Agreement

The ten-day limitation period under s.150.6 of the Code has restricted access only to those agreements made under s.36 of the Evidence Act, 2005.

Section 150.6 of the Code states that:

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

Similarly, section 35 (a) and (b) of the Evidence Act, 2005 allows the parties to seek relief to repudiate the agreement when it's not:

(a) made in the presence of one witness of each party; and

(b) Signed by all parties or another person duly empowered by a legally binding writing in that behalf;

An agreement must be made in presence of one witness of each party. It must be attested in presence of all the parties. The aim of attestation is to protect parties from executing an agreement under duress, by force, fraud or undue influence. There are instances where some instruments are not signed in presence of the parties nor are the witnesses or parties had personal acknowledgement of signatures and marks. Such instruments are void *ab initio* at the objection of either party - if raised within ten days**.** Such agreements may be annulled for fresh hearing.

Considering the essentials of a valid written agreement as spelt out in section 35 of the Evidence Act, 2005, a valid agreement cannot be repudiated even if objection is raised within ten days timeline. On the contrary, an appeal against an invalid agreement under section 36 of the Evidence Act may be allowed irrespective of limitation period.

A void agreement is unenforceable. For example, an agreement between drug dealers and buyers is a void agreement because the terms of the agreement are illegal *per se*. (Section 36 (i) of Evidence Act, 2005)

9. Wager Agreement *void ab initio*

Wager Agreement is void *ab initio*. It cannot be enforced in the court of law. Section 393 of the Penal Code, 2004 states that,

> *"a defendant shall be guilty of the offence of gambling, if the defendant stakes or wagers something of value upon the outcome of a contest of chance or a future contingent event not under the defendant's control or influence upon an agreement or understanding that the defendant will receive something of value in the event of a certain outcome."*

Similarly an agreement between drug dealers and buyers is a void agreement because the terms of the agreement are illegal *per se*. (Section 36 (i) of Evidence Act, 2005)

10. Judgment Based on *Nangdrig Genja*

The court, during preliminary hearing, grants the parties opportunity to settle their case out of court. *Nangdrig* means mutual settlement. It is a consensual agreement having mutual benefit to both the parties. They opted for voluntary relinquishment of a known right to due process and fair trial. The court, upon close scrutiny validates *Nangdrig Genja* (out-of-court settlement) by way of judgment. Judgment reached from a consensual agreement is a consent judgment in contrast to the judgment resulted of court adjudication. No appeal shall lie against such consensual judgment. It is amenable to challenge. However, an agreement so executed must conform to section 35 of the Evidence Act, 2005.

Case Study 2

> *It involves a matrimonial dispute between Wangchuk Dema and Karma Sonam (jdmt.#13-447 dated 24.12.2013). The case was settled through a valid mutual settlement agreement. Lower court passed a final judgment based on the settlement agreement under s.150 of the Code read with s. 35 of the Evidence Act, 2005. The husband, however, aggrieved by the judgment, subsequently moved the High Court within ten days for further review and reconsideration. Appeal was challenged by his wife on technical ground that he could not avail s. 109.1(b) of the Code for their agreement does not suffer legal defects. The High Court dismissed the appeal under s. 111 (a) read with s. 155 of the Code.*

It was, thus, redirected to lower court for enforcement under s. 27 of the Code.

11. Appeal beyond 10 Days is Maintainable

There are some unavoidable situations which compel the court to admit appeal petition even beyond the limitation period. One of many such circumstances is illustrated by the case below:

Case Study 3

> *Sonam Wangdi filed an appeal petition against the judgment of the lower court in relation to monetary claims with the court of competent jurisdiction. He filed it three days before expiry of the limitation period. The very next day he was arrested and imprisoned in connection with alleged forgery. After three years of sentence he pursued his appeal petition filed three years ago. The court denied the right to access to justice and dismissed the petition as it was barred by limitation period. He moved the High Court for leave of appeal. The High Court allowed his appeal.*

12. Appeal against Default Judgment

Confusion over default judgment still pervades in the minds of the practitioners. It revolves mainly on, whether or not, the parties can prefer an appeal from the default judgment. Although s.152 of the Code empowers the court to pronounce a default judgment, if one of the parties fails to appear at the trial, yet, some practical difficulties still subsists. Therefore, it calls for a critical analysis of such judgment to understand the insight truth. Section 152 of the Code unequivocally implies that default judgment may be entered in favor of either party. It states that:

> *"The Court may pronounce a default judgment, if one of the parties fails to appear at the trial or in his or her answer:*
>
> (a) *fails to answer;*
>
> (b) *gives an evasive reply; or*
>
> (c) *otherwise fails to follow a Court's order thereby, severely prejudicing the Court's capacity to hear the case."*

Person who seeks legal remedies in civil case is a plaintiff. Where plaintiff fails to follow a court's order, the Court may dismiss the case. However, it is technically incorrect to dismiss a case by way of default judgment. Default judgment is never entered into with detrimental to the plaintiff. Such judgment has an adverse effect to the interest of a plaintiff. In one instance, the lower court has entered a default judgment against a plaintiff because defendant did not report at trial. The illustration below provides a clear picture of the consequences of such judgment.

Case Study 4

> *Mr. Sangay Wangdi (Plaintiff) sold his house to one Mr. Ugyen Dorji (defendant). The defendant became an ostensible owner of the house through an agreement. He took over the possession of the house and enjoyed the rent for the last one year. However, the ownership of the house (thram) is still with the plaintiff. The plaintiff initiates a lawsuit against the defendant claiming the right to own the house. The lower court entered a default judgment on the premise that the defendant failed to follow a Court's order thereby, severely prejudicing the Court's capacity to hear the case. Plaintiff moved the High Court seeking writ of certiorari requiring lower court for the enforcement of the judgment. The High Court dismissed his petition on the ground that lower court has not adjudicated the case. Since no due process was observed and no rights and liabilities were fixed against the parties it could not be enforced.*
>
> *He appealed to the Supreme Court. On the same round, his appeal was dismissed with instructions to reopen the case. It is now sub judice in the lower court.*

This is an unusual instance (at least to me) where a lower court rendered a default judgment on the premise that defendant failed to appear at the trial despite several summons. This can be best explained with an illustration as below.

Case Study 5

> *It pertains to a monetary case. The parties involved were Dawpo vs. Ugyen Dorji (hereafter referred to as Plaintiff and Defendant). A brief fact of the case is that the defendant owes plaintiff few lakhs of money. For default of payment the plaintiff sued the defendant to the court of jurisdiction for recovery. The court having served more than 6 summons the defendant failed to appear at trial. The court vide its jdmnt.# 11397 dated 22.7.2003 entered a default judgment and dismissed the case. The Supreme Court has affirmed the judgment of the High Court.*

A default judgment should normally be entered into in default of defense. It should fix the liability of payment against the defaulting party. But it was passed to the detriment of the plaintiff and on the premise that the defendant failed to act on a court's order thereby, severely prejudicing the court's capacity to hear the case. It was to the detriment of the plaintiff. The judgment must be a reasoned judgment (S. 96.3(d) of the Code).

The plaintiff preferred an appeal to the High Court for remand of the case. Accordingly, it was remanded with instructions to hear *de novo*. The remand order of the High Court was challenged by the defendant on the grounds that judgment once rendered from the

court of jurisdiction is final and binding, and is not subject to reopen whatsoever.

13. Application of Principle of *Res Judicata* against Default Judgment

When can a party invoke principle of *Res Judicata?* In order to apply principle of *Res Judicat,* it is important to define judgment. 'Judgment' is the final consideration and determination of rights of the parties in an action or proceeding. It is a judicial declaration by which the issues are settled and the rights and liabilities of the parties are fixed as to the matters submitted for decision. A judgment constitutes the considered opinion of the court and is a solemn record and formal expression and evidence of the actual decision of a law suit. The Black's Law Dictionary defines judgment as the final decision of the court resolving the dispute and determining the rights and obligations of the parties.

According to section 96.3 of the Code, a judgment shall be:

a) In conformity with *"Yig Kur" Namzhag;"*

b) In writing;

c) Reasoned;

d) Dated;

e) Sealed;

f) Signed; and

g) Placed in the court record.

Rendering a reasoned decision is an essential attribute of judicial and judicious disposal of a matter before courts. A default judgment entered against a plaintiff on defendant's failure to report to the court cannot literally be termed as a final judgment. Therefore, the defendant cannot claim protection of the principle of *Res Judicata*. Thus, such a judgment must be remanded for fresh adjudication.

However, on appeal where appellant does not appear at the trial Court may dismiss the appeal under section 152 of the Code. Where the appellant appears and the defendant fails to appear, the appeal shall be heard *ex parte* and judgment is entered against the defendant. It is a judgment of automatic affirmation and thus is final where principle of *Res Judicata* has strong hold on it. Such judgment is sent back to the concerned Courts for automatic enforcement under section 27 of the Code.

14. Registration of Appeal

The appeal files are received by dispatch section and hands over to the registry with receipt date. The files are registered and put up to the Chief Justice. The case files are assigned to the respective benches in an order of precedence (*seriatim)* irrespective of the conflict of interest. The judge, to whom a case is assigned has a conflict of interest under section 75 of the Code, may submit a note sheet to the Chief Justice of the High Court for exchange of files. It is an internal arrangement devised to solve such problems. However, this practice is no longer followed due to abuse of this arrangement.

15. Trial *De Novo*

Section 23 of the Code empowers the High Court to exercise appellate jurisdiction over judicial review on administrative adjudication and on any order, decision, and judgment of a Dzongkhag Court. The appellate court does not hear a case *de novo.* According to section 110.1 of the Code states that Appellate Court may review only those decisions upon which there are properly preserved records. Therefore, it should be noted that appellant must ensure only that portion or part of the judgment that requires reconsideration must be made in the appeal. The appellant shall not be allowed to make a new case or a case inconsistent with the case set up by him in the lower court.

Parties are not entitled to furnish any fresh evidence on appeal under s. 110.4 of the Code. It states:

> *"The party cannot introduce fresh evidence on appeal or rely on evidence not introduced during proceedings in the lower Court."*

However, the situation as mentioned below warrants the Court to admit fresh evidence.

a) The Court from whose judgment the appeal is preferred has refused to admit evidence which ought to have admitted;[1] *(hurried judgment especially towards the year end);*

b) The party seeking to produce additional evidence, establishes that notwithstanding the exercise of diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence be produced by him at the time when the decree appealed against was passed;[2] or (in other words it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial*);*[3] *e.g Karma Dolma vs. Pema Namgyel (Druk Sherig.*

1 The Code of Civil Procedure by S.N Singh
2 The Code of Civil Procedure by S.N Singh
3 US Supreme Court

c) Appellate Court requires any document to be produced, or any witness to be examined to enable it to pronounce judgment, or for any other substantial causes, the appellant Court may allow such evidence or document to be produced, or witnesses to be examined;

d) The evidence must be such that, if given, it would probably have an important influence of the result of the case;[4]

e) The evidence must be such as is presumably to be believed, or in other words, it must be apparently credible;[5]

Where the submission of additional evidence is allowed by the appellant Court, the Court shall record the reason for its admission. And it is a fundamental rule of justice that whenever additional evidence is admitted, the opposite party must be given equal opportunity to rebut it.[6]

16. Reasons for Amendment or Modification of Judgments

The annual report notes the disparities of judgments as follows:

- Affirmation 78.61 %
- Partial Reversal 16.59 %
- Full Reversal 4.80 %

The disparities reflected as above are due to slight deviation from the procedural principles and due process of law as enumerated hereunder.

16.1 Procedural Lapses

- Negotiated settlement is dishonored
- Child allowance not in conformity with law
- Judgment relied on fraudulent signatures and thump prints
- Incomplete legal formalities involving thram transfer case
- Appeal against negotiated settlement judgment
- Commutation of sentences
- Procedural protection such as approval for termination from the responsibility as a guarantor
- Rectification of interest computation
- Arrest without warrant
- Search of evidence without warrant
- Request for application of exclusionary rule of evidence

16.2 Fair Trial

- Not given adequate and equal time opportunity to make oral submission
- Deprived of the right to cross-examination and to be cross-examined
- Denial of right to subpoena witness despite written request
- Denial of right to be heard Audi Alteram Partem
- Refusal of Judicial investigation
- Failure to examine negotiated settlement
- Judgment relied on evidence not worthy of credence
- Copy of submissions of one party is not given to other party
- Award of sentence not proportionate to crime/ inconsistent sentences

16.3 Cantankerous Litigation

- Judgment-Debtor appeals to prolong the case
- Appeals for extension or abridgment of time

16.4 Principle of Natural Justice

- Conflict of interest: Justice is not seen to have been done

17. Need for Reinstatement of Larger Bench at the High Court

In order to resolve disparities in judgments, reinstatement of intra-appeal (Larger Bench) mechanism is highly suggested at the High Court. At the same time, it is also felt necessary and is therefore suggested that 50% of what the Supreme Court imposes on the appellant as cost of litigations should be introduced when an appeal is preferred to the Larger Bench from the Division Benches.

18. Composition of the Larger Bench

The Chief Justice of the High Court may constitute such number of the Bench as may be required in the interest of justice under s. 10 (d) of the Code. Larger Bench shall consist of three or five *Drangpons* to decide an appeal case. The appeal from the Larger Bench shall lie to the Supreme Court.

4 US Supreme Court
5 US Supreme Court
6 The Code of Civil Procedure by S.N Singh

Abortion: Freedom or Violation of Right?

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Introduction

As rightly expressed by Mark Rudolph MacGuigan, the Minister of Justice and Attorney General of Canada in 1982, Whether abortion is an expression of negative or positive conscience is a serious question with enormous consequence, abortion is indeed a crucial matter. According to Churchill's Medical Dictionary, abortion is the termination of pregnancy by the removal of the embryo or the fetus from the uterus, before viability, resulting in or caused by its death. An abortion most commonly refers to the induced methods of expulsion of the embryo. According to the World Health Organization (WHO), 40-50 million abortions are performed every year all over the globe. This corresponds to approximately 125,000 abortions per day. In many parts of the world there is prominent and divisive public controversy over the moral, ethical, and legal issues of abortion. Those who are against abortion generally assert that an embryo or fetus is a human with the right to life and may equate abortion with homicide, while advocates of abortion rights emphasize on a woman's right to decide about matters concerning her own body. The reasons why abortions take place are varied and we have to look at both sides of the argument to come to any definitive answer. A termination of pregnancy is done due to various issues such as personal, political and social. Most notably, as the need for family planning comes to the fore, unwanted pregnancies are abstained if one opts for abortive techniques. Also, financial security, the responsibility of handling a child at an inopportune time, maternal illness, relationship issues and disruption of one's own education are some of the personal reasons which come into play while making this decision. However, it should also be noted that in addition to these, the social stigma arising from bearing a child out of wedlock, as a result of rape or incest or insufficient economic and moral support from families, push one to opt for an abortion. In this regard, the idealistic view of violating the right to life seems utterly ironic and misplaced since societal pressure more often than not forces one to take such a drastic step.

Religion and Abortion

Most often religion and abortion most often do not go hand in hand. The Catholic Church, the Eastern Orthodox Church and most evangelical Protestants oppose abortion as immoral and consider it a sin. The Hindu texts strongly condemn abortion and in Islam the termination of pregnancy after 120 days is not permissible. In keeping with the pro-life outlook Mother Teresa in a passionate dictate once said that abortion is the destruction of peace "because if a mother can kill her own child, what is left for me to kill you and you kill me, there is nothing between". However, the pro-choice outlook is being adopted by people more and more as we progress with the times. The idea of a woman having full control and say over her body forms the basis of the pro-choice movement.

Law on Abortion

All the countries have their own set of laws regarding the practice of abortion. The right to life, the right to liberty, the right to security of person, and the right to reproductive health are major issues of human rights that are sometimes used as justification for the existence or absence of laws controlling abortion.

According to the *Indian Medical Termination of Pregnancy Act 1971*, abortion is legal up to 20 weeks of pregnancy under specific restriction. Some of

the conditions include rape, women whose mental and physical health would be endangered by the pregnancy, women facing the birth of a handicapped child, pregnancies of unmarried minors and 'mentally ill' with the consent of a guardian or the ones that are a result of failure in sterilization.

This law is often misused and has caused mass genocides in many parts of the country where sex-selective abortion is commonly practiced to cater to the patriarchal norms of the society.

In Bhutan the law relating to an abortion is found in *the Penal Code of Bhutan 2004 section 146* which states that a defendant shall be guilty of the offence of illegal abortion, if the defendant unlawfully aborts or induces expulsion of an embryo or fetus or prevents a child from being born alive, except the act is caused in good faith for the purpose of saving the life of the mother or when the pregnancy is a result of rape or incest, or when the mother is of unsound mental condition. Abortions are difficult for women to obtain since it is only legal when it is a result of rape, incest, to preserve the woman's mental health, or to save her life. Because of this, the Bhutanese women often cross the border into India, where they get abortions in unsafe conditions and this can cause a lot of distress to Bhutanese women who are subjected to inhuman and dangerous circumstances. World Health Organization estimates that 68,000 women die each year while hundreds of thousand others suffer morbidity from abortion complications.

Conclusion

In a nation where rape and poverty are unfortunately rampant, unsafe abortions conducted by village midwives and untrained practitioners in less than satisfactory sanitation facilities continue to out number safe and legal abortions. The debate over abortion is never ending but ultimately it comes down to a matter of choice and the personal beliefs and ideologies of an individual. The practicality in this case far outweighs the moral and ethical concerns. Financial and emotional security is essential to sustain and nurture life and the absence of such the ethical and moral concerns of forestalling birth becomes null and void. About this issue, not one verdict can be laid down since the circumstances surrounding it are way more complex than mentioned in paper and prone to endless debates.

Juvenile Delinquency

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Juvenile delinquency problem has always been an emerging issue all around the globe. A juvenile delinquency is generally defined as a person who is under the age of 18 years; found guilty for exposing delinquent act and by law such person considered a minor who may not be sentenced like an adult.

Prior to the 1960s, Bhutan remained isolated from the rest of the world. During this period, the youth related challenges where simply unheard of in the country. It was only towards 1960s when the planned socio-economic development programs and initiative began to show a noticeable results or impacts that youth issue surfaced. However, the positive impact of modernization and general improvement in the quality of life in Bhutan generally gave birth to challenges related to juvenile delinquency. Today, the youth constitutes the major chunk of the population. While the government views youth as invaluable to our country's future, unfortunately, the current reality appears to be slightly different. For a large majority of the young group of people today are engaged in either direct or indirect form of delinquent act.

The context of this issue of juvenile delinquency in a fast growing urban areas like Thimphu as highlighted or implied above cannot more apparent or any conducive than this. There are laws or regulations, and programs put in place by both the government and non-governmental institutions that help reduce case of juvenile crimes, educate, counsel and rehabilitate delinquents. However, more strategic and sustainable national actions towards tackling this issue of juvenile delinquency peculiar to the context of Thimphu seem to remain unaddressed.

The advent of television, internet and mobile connectivity although tremendously beneficial to the society, Bhutanese youth became highly vulnerable to the harmful effects of these new technologies. For it encouraged them to gradually spend more and more hours watching television instead of studying or reading books; watching make believe reality shows or movies instead of helping their parents with house hold chores or gardening; getting hooked onto social media sites instead of socializing with the family, friends and relatives or in chatting or texting messages instead of doing it so in person.

The policy of 'free education for all' led to an exponential increase in the number of students passing out each year, and with it came the issue of youth unemployment. In fact today one of the leading factors triggering youth related problem is the inability of the system to aggregate demand for and supply of jobs for youth.

While the school education system is not planned for preparing young people for their gainful employment, our school dropouts in general expect otherwise. Bhutan social safety networks such as in the form supporting or providing for the welfare of youth till they are able to earn or live on their own is also another reason that indirectly encourages them to become wayward or reckless.

Availability of alcohol in every nook and corner of human settlement is another reason why our juvenile is more susceptible to becoming delinquent. While tobacco products have been banned in the country from early 2000s, the frequent seizure by police indicate that these are also easily accessible in the country. Most of the traders and buyers are juvenile delinquent. Added to this, is the easy access to marijuana plants that are widespread and grown naturally in almost all parts of our country.

Different Type of Juvenile Delinquency and Frequency of Crime

a) The Life Course Persistent Offenders

The life course persistent offenders were proposed by Moffitt, a famous psychologist who dealt with the juvenile cognitive condition. Under this theory, he suggested that the adolescents who are exposed to appalling surrounding from the early age tend to develop long term anti social behavior. He added that when a child is exposed to social violence and other delinquent act the brain naturally pick up these acts or behaviors and then later becomes part of their life. These type of offenders can do any kind of crime depending upon the environment that they are brought up; including severe violence like murder, rape and other cruel act.

Another theory which supports the life course persistent offender is the transmissible of genes from parents to children; which naturally triggers child's brain to act abnormal and expose anti social behavior. This theory argues that this is one of the most horrendous crime levels where child carries it for a long term; such delinquent act does not deal with any situation or environment but naturally comes whatever the circumstances is.

b) The Adolescent Onset Offenders

This premise falls under the theory proposed by Moffitt in 1993; this theory describes that adolescences develop delinquent act when they enter certain age group. When the adolescent reaches the age of teenager they are more vulnerable to commit crimes and other socially unacceptable act. By law depending upon the level of crime the sentences can be month or year but less compared to persistent offenders. Moreover, their behavior can change within the prison or through counseling and realization. The adolescent onset offenders are newly developed delinquent behavior that develops due to peer pressure, dysfunctional family, age and other societal problems. The offences include robberies, narcotic consumption, minor violence and other anti-social behavior.

Conclusion

The government has been playing a vital role in deterring the delinquency by adolescents by introducing various programs and centers but despite such efforts the youth are exposed to an onslaught of negative influence. Adolescences before entering into adulthood tend to face many challenges in terms of social, economic and cultural factors which directly or indirectly influence their attitude and behaviors. When adolescences develop such nature, society tends to separate them from the mainstream. Therefore, it is not only the government who are responsible but society, community, relatives, family members and peers that can play vital roles in deterring the social behavior through advice, awareness and support.

BNLI's Perspective on Legal Education

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Administration of justice is the primary mandate of the Judiciary, and judicial decisions are required to dispense justice. The changes brought by social dynamism resulting in emergence of new legal issues that require up-gradation of knowledge and skills through continuing judicial education and training. The education provides opportunities to live and perform better in every dimension of life while the training prepares an individual to acquire skill that will result in a specific kind of behavior. Lord Buddha taught the four noble truths as guidance for all sentient beings to attain enlightenment through change in behavior and life styles. Similarly, His Majesty the Fourth *Druk Gyalpo* saw and felt the real need to alleviate his subjects in the remote areas, had propounded the profound concept of Gross National Happiness, a philosophy that believes in sharing both happiness and pains together.

The courts all over the world are established with fundamental objective of protecting the rights of the people. Protection of rights leads to securing and maintenance of happiness. It is the responsibility of the Parliament to enact laws which are socially vibrant and capable of ensuring socio-economic justice. The judiciary must translate the concept of socio-economic justice into action, while deciding the cases based on the laws enacted by the Parliament.

To have this, judicial institution must be equipped with vibrant, capable, efficient and competent judges and judicial officers. Lack of such human resources will impede the realization of administration of justice. No matter how well framed the substantive law and carefully designed the procedural laws are, the ultimate effect of these laws lies in the hands of the judicial officers presiding the courts. Therefore, requirement of adequately trained and capable judicial officers competent to apply and administer these laws are backbone of the judicial institution.

The Constitution guarantees both institutional as well as personal independence to the Judiciary so as to ensure their performance without any fear or pressure. The exercise of personal independence must be based on the principles and objectives, and, it does not mean to be secluded and cast in one's ego, under any circumstances. "*The thri is not for you as a person, but the seat of justice*" His Majesty said. A wronged decision of a court affects generations, while wronged diagnosis of doctor takes only one life. Therefore, a judge has a unique and sacred responsibility to adjudicate disputes based on objective facts and evidence.

The founders of the Institute had a vision to develop it as a premier Judicial Training and Research Institute with an objective to achieve excellence and highest standards in field of judicial education with special emphasis on moral and ethical values. Therefore, continuing judicial education provided by Bhutan National Legal Institute (BNLI) is aimed to help judiciary to evolve as a system that can live up to the public expectation. It also aims to provide forum for connectivity with other stakeholders namely, police, public prosecutors, and Non Government Organizations working in their specialized fields etc. Further, the Institute endeavors to educate judges to undertake their unique role & responsibility, and transformation of lawyers into judges, from judges to good judges, and great justices who will have vision, philosophy, compassion & responsiveness to the felt needs of the society.

Judicial function itself is very challenging, and judging is a delicate task that demands diverse knowledge and skills. At the same time, the opportunities, facilities and support services made available to a judge are very limited, aggravating the complexities, difficulties and challenges. The credibility and legitimacy of judicial decisions not only depend on merits and soundness of their competency, but also on public perception of impartiality, fairness and objectivity of the procedure adopted by the judges.

Legal education alone is not sufficient to equip a person to discharge this sacred and delicate function of judging. A Judge cannot function based on traditional mindset approach in a rapidly changing society. Judges should be able to adapt to change by changing their mindset based on the changing nature of the perception of justice. Judging is becoming more complex in view of the changing society. Ideas of human rights, democratic accountability, trans-border trade and crimes with globalization, complex corporate functioning with FDIs, media, etc…are putting new parameters to judicial function. Privileges and immunities of judges are being re-examined, and there is persistent demand for transparency and accountability with the influence of media. Judicial functioning is under close public scrutiny requiring judges to be more aware of being sensitive towards the cause of justice.

The popular myth and the illusive notion justice merely means disposal of cases according to law has to be done away. Law is no longer limited to maintenance of order and peace in the society through punishment. Law is an instrument of social engineering, and its purpose is to bring about socio-economic change in the country. Effective and efficient discharge of judicial function judges requires adequate legal education and training to provide new knowledge and practical ideas to complex problems. Through such avenues must be used as an opportunity to evolve best practices out of interactive process of sharing of experiences and participation amongst judges themselves and where needed, between judges and experts in various other fields.

The Preamble of the Constitution of Bhutan states "We, the people of Bhutan and it aims to achieve "justice, social, happiness and wellbeing." Justice is the vision and spirit of our Constitution. It mandates to promote justice on a basis of equal opportunity. Justice is the basic concern of the common man, and important conduit to enjoyment of all other rights and fulfillment of duties. It is as important as shelter, food, clothes, livelihood, health and access to common resources and property. His Majesty said, "Law is like the air that every person breathe every moment, Law must be upheld, without question, just as we do not question the need of breathe." A person's access to justice is a guaranteed fundamental right under Article 7 section 15 of the Constitution. Denial of this right undermines public confidence in the justice delivery system.

There may be cases which can be decided in summary. For instance in enforcement of judgment. However, the enforcement drags on for a long time and takes more time than actual adjudication, causing immense emotional and psychological harassment. Such situation in most of the cases may be due to lack of attention by the court and staff or deliberate ignorance. It is glaring in some cases that the learned judges sometimes, abandon the dignity of one's court to pursue personal glory. This kind of attitude erodes public confidence to the judiciary as a public institution.

Our judges, particularly at the District Level have a wrong notion of not having jurisdiction to hear any cases pertaining to the interpretation of the Constitution. But the fact is that justice is the cherished goal of the Constitution and every judge should realize that it is the most inspiring force in judicial decision making. Appreciating of the fact and evidence in cases must be guided by the principle of justice, fairness, freedom, equality and liberty. This enables the judges to identify their sacred and unique role as a judge in the society.

Judges must be able to fulfill the expectation of the people and society, an expectation to be fair, equal, objective, knowledgeable, independent, discerning, practical and sensitive. Society also expects them to be fair. All these expectations exist because judges have to play a very important role in making decisions on disputes affecting the life of people, their livelihood, safety, freedom, property, status and humanity. This requires periodic and regular judicial education to inculcate vision for justice, to bring about attitudinal changes to serve the purpose for which the laws are enacted, to be sensitized towards a cause related to marginalized sections of society – in particular women, children and weaker class and to be updated with current legal knowledge and modern concepts incorporated in the constitution and developed through judicial creativity.

A Judge functions in a human society, a society which is full of diverse conflicts and competing interests. Therefore, a judge is required to understand

the changes in the society and the changing human behavior. Only then he can be able to appreciate, link and apply legal knowledge to resolve the social and individual conflicts, which is an integral part of development of peaceful and harmonious society.

The BNLI in its endeavor to support Judiciary with its limited resources and its own limitations urges the members of the legal fraternity to respond to our calls both with positive as well as critical responses. The existence of BNLI is to support and not to impose anything against the wishes of legal fraternity, nor to interfere with the institutional and personal independence. Instead it endeavors to enhance both Judicial and Personal independence through various capacity building programs. Broadly, the activities of the Institute are dedicated to the cause of justice. It has to conduct study, analysis and research in the field of law and legal education pertaining to the practical problems of judiciary to make the legal system more effective and to find out the ways and means for building public trust and confidence.

The Powerful Fearless Lion:
A Tribute to His Majesty, The Fourth King, Jigme Singye Wangchuck

Lingi Jamtsho, Major, Royal Bhutan Army, Tencholing, Wangdue Phodrang. National Defence Academy (Pune, India). Sherubtse College, Kanglung, Trashigang.

The sun is the major source of energy on earth. Without it, no life would be possible. Yet, even this life-giver gets shrouded by eclipses and clouds. But, we have, in the person of His Majesty, The Fourth King, a figure who stood tall and uneclipsed. He is one of a kind who ruled Bhutan, a small country known for producing big leaders.

Ascending the throne at the tender age of sixteen, he propounded Gross National Happiness (GNH) as the development philosophy for Bhutan. Today Bhutan is known to the outside world as the 'Happy Nation', and this new development paradigm has caught the imagination of thinkers and policy-makers the world over.

He instituted *Dzongkhag Yargay Tshogdu (DYT)* and *Geog Yargay Tshogchung (GYT)* and sowed the seeds of decentralization, which fruitioned into a full-fledged democracy in 2008. He decreed the drafting of the Constitution of Bhutan and the subsequent ushering of democracy - Bhutan's greatest transition in its entire history – was handled with aplomb and thereafter the visionary King abdicated the Throne on his own volition, proving that he truly lived to serve his people.

He steered the country tactfully through some of the most unstable and volatile times in the region. Under his dynamic leadership, Bhutan developed in leaps and bounds. On the foreign policy front, he further strengthened the friendship with India while also cautiously nudging Bhutan into the international arena.

In 2002, when ten innocent people in *Nganglam* were mercilessly gunned down by the Indian Insurgent Groups (IIGs), he personally visited and offered hopes to the bereaved. This exemplified his humility, compassion and style of leadership. In fact, in the entire 34 years of his reign, he never lost his personal touch with his humble subjects.

His sacrifice for the security and sovereignty of Bhutan was demonstrated in 2003 when Bhutan reluctantly had to resort to military operations against the IIGs to flush them out from the Bhutanese soil. He risked his own life for the sake of his country and people, fully living up to his name, which literally means *'The All Powerful Fearless Lion'*.

The awe-inspiring King has inspired hundreds of songs, volumes of literature and grabbed headlines all over the world. He was aptly named by Time Magazine as one among 100 people who influenced the world the most. He was also inducted into the Kyoto Hall of Fame for championing the cause of environment.

Yet, for a legend like him he is a humble soul. His humble *barkle* (slabs from sawn timber, with the bark still attached) house and the meagre personal belongings stand proof of this fact. A true Bhutanese that he is, nobody has ever seen him in any clothing other than the national dress, the *Gho*.

"*There never was a leader and a King like Jigme Singye Wangchuk and never will a King like him be born…*" these words of His Majesty, The King best describe the person he is and the King that His Majesty Jigme Singye Wangchuck was. The epithet the **Great Fourth** sums him up perfectly.

The Special Moment in My Life

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His Majesty the Great Fourth after handing-over of the reigns of Head of State to His Majesty Jigme Khesar Namgyal Wangchuck in December 2006, it became a very rare opportunity for the Bhutanese people to catch the appearance of His Majesty Jigme Singye Wangchuck in public places. Every Bhutanese, therefore, particularly the ones from the nearby Dzongkhags, developed a genuine sense of aspiration or urge to come in contact or meet His Majesty during his outdoor activities in the periphery of Thimphu Thromde.

This piece is one which describes my special moment with His Majesty the Great Fourth in 2015.

It is not unheard of in Thimphu that people come across with the Fourth Druk Gyalpo while one was out for physical activities, such as walks, joggings, etc.

I too had the privilege of coming across with the personality of His Majesty, while I was on a walk from my house at Pamtsho to Dechenphug. Being a teacher, I find the time only in the evening. Though driven by my personal motivation to stay fit and healthy, having a family history of diabetes and hypertension, I do make a point not to miss the 2-hour of jogging every evening.

It was on 6th of August 2015, Thursday evening, as I was returning home from Dechenphug, I heard the sound of a vehicle moving in the same direction. I jogged casually on the road side when suddenly a hilux from behind drove in and stopped beside me. As I checked around to see who it was, I immediately bowed in respect, as it was none other than His Majesty the Fourth Druk Gyalpo.

As it is our etiquette that we cannot look directly at such personality, I remained bowed before His Majesty.

Soon, His Majesty handed me a 'bottle of water,' but too dazed by such an unusual event and not knowing what to do, '*Me Zhu la*' was what all I could murmur. In respond to it, "It has not been opened yet," His Majesty said. Not being able to differentiate a reality from that of a dream, I remember the extension of my hand to humbly accept the holy water from the living God, who is known to the Bhutanese people as the reincarnation of "Chenrezig." His Majesty then proceeded ahead.

Although I did not know, how I reached home, I had placed this holy water in my small alter and prayed for His Majesty's long life and good health. Now my family considers it as our sacred '*Ten'* in the house.

After this most remarkable and memorable moment with His Majesty, I no longer feel tired of my regular walk even after a tiresome day at the school. Inspired by my King, a walk for me has now become a part of my daily life.

The Great Light: *Dispelling Darkness in Bhutan and Beyond*

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Thimphu.

As I lay in the darkness,
My thoughts running wild,
Strike me to think,
"Is this how I'm supposed to be?
"Does my life end without doing anything?"
The darkness around me,
Grew darker and darker,
The negative thoughts and feelings,
Started to engulf me.
Day by day,
I was becoming invisible,
I didn't know who I was?
Suddenly a bright light blinded my eyes,
Through the light,
A Hand reached out to me,
It was brighter than the Sun,
And I felt like,
I will never be able to grab it.
When suddenly I caught the hand,
My darkness around me vanished into
The air.
The light penetrated my soul,
And filled it with love and affection.
When I finally adjusted my eyes,
I saw a human man in the light,
He had a far sighted vision in his eyes,
His face was filled with kindness,
And his smile would drive away,
All the darkness in the world.
He looked like an ordinary human being from outside,
But from the inside,
He was like a God,
Who thought about the people and the world.
I finally realized who I was,
I was born in the land of Thunder Dragon
Blessed by the Gods and,
Ruled by the great Kings,
Who had done everything for us.
To live in peace and harmony,
And the helping hand,
Who saved my soul,
Was our Fourth Druk Gyalpo,
His Majesty Jigme Singye Wangchuck.
Who not only saved my soul,
But also a thousand more souls,
From the darkness,
And brought light in our lives,
He was like a father who looked after us,
And helped us to become a better person.
He protected us from danger,
Through battles,
Putting his life in line,
For peace and harmony,
Of this Nation.
He was not only a King,
But a father to a Nation.
A God to the lost souls and
A hero for the entire world.
May His Majesty live a long,
And prosperous life.
PALDEN DRUKPA GYALO!