



Bhutan Law Review

Volume XI Spring 2019

Bhutan National Legal Institute
Thimphu, Bhutan



Pledge

We have been blessed with benevolent Monarchs who put the interests of the nation above themselves.

They have been the embodiment of love, compassion and benevolence; images of reverence and worship; sources of joy, hope and aspiration.

On the occasion of the 39th birth anniversary of His Majesty the Druk Gyalpo, let us acknowledge and enjoy the blessing, and emulate His exemplary "leadership of the self" and "service with humility".

We pledge our commitment to persistently work toward our organizational goals of empowerment of people with legal education.

We pledge to promote rule of law and inspire public trust and confidence for a free, fair and content civil society.

Content

1. Preface.....	i
2. Exposition of Constitutional Kuthangs –Article 4 <i>Culture</i>	1
3. Lyonpo Sonam Tobgye, <i>The Blessings of Enlightened Laws – A Foundation for Peace and Happiness</i>	4
4. Lungten Dubgyur, <i>Buddhism – A Source of Bhutanese Criminal Justice System</i>	17
5. Lobzang Rinzin Yargay, <i>Mediation: Treading the Middle Path in Dispute Resolution for Community Vitality and Gross National Happiness</i>	29
6. Tharchean, <i>Child Justice in Bhutan: A Need for Awareness and Advocacy</i>	44
7. Pema Needup, <i>Nangkha Nangdrig (Mediation): A Panacea for Dispute Resolution in Bhutan</i>	55
8. Phuntsho Wangchuk, <i>Child Justice in Bhutan: Challenges and Opportunities</i>	64
9. Sonam Tshering, <i>Freedom of Expression and the Rise of Anonymity on the Social Media</i>	72
10. Tenzing Lamsang, <i>Law and Media - The Media's Expectations from the Judiciary in a Democratic Context</i>	77
11. Stephan Sonenberg, Rinchen Dema, Kirsten DeRemer and Kuenzang Dolma, <i>Tell us About 'Justice' – A Search for the Common Strands of Law and Justice in Bhutan</i>	83
12 Book Review.....	90

Preface

Bhutan National Legal Institute is the training and research arm of the Judiciary. It is our equivalent of Judicial Academies and Judicial Colleges in other countries – the primary mandate being to help judges and judicial personnel acquire the requisite tools and learn continuously to discharge their responsibilities of interpretation of laws, dispensation of justice and delivery of judicial services.

Judgeship is a learned profession, and the judges and lawyers are the privileged members of the society. Judges are venerated in society since they are entrusted with the authority to make decisions on behalf of the people. Judges are the last individuals people turn to when all others have failed them. Judges are the bridge between the people and the Throne in our country. If the *Constitution* and other laws are to be truly ‘living and organic documents,’ the judges must continuously render expansive and innovative interpretations of the laws in sync with the time and local context of our country, our region and the world at large. This capacity is known to reside in the learned judges – judges who learn continuously and move with time.

The judiciary is the pioneers of the Bhutanese legal system and arguably has the country’s brightest legal minds. Due to heavy workload, our judicial officials are perpetually struggling to steal time off from their daily judicial rituals of clearing caseloads – leaving less time for vigorous intellectual discourses, academic pursuits and professional development. Besides, our society puts a cloak of perfection and deify our judges – the weight under which some of us risk buckling due to the heavy pressure of high expectations. Given our small and transparent society, as well as the professional demands, judges tend to suffer in emotional intelligence and social capital. With the doors of the courts open throughout the year, most judges hardly take time off the judicial routine – with the potential adverse effects to their health, wellbeing and social life. Since most of the courts are manned by a single judge covering vast jurisdiction, expanding docket, professional demand and public expectation, our judges will continue to work hard.

There are several roles judges play in the society. Judges are among the most intelligent or wise people in any country. For that matter, any person who discharges judging and decision-making duties such as mediators and arbitrators should be learned, trained and erudite professionals since much lies at stake in their hands – of precious lives, fortunes and livelihood.

Judges are the crucial link between the government, laws and people. When elected governments deviate from the laws due to electoral forces the judges align the government conducts to the law as people expect. Judges are the trusted people to review the laws and actions of the governments, i.e., validate or legitimize the exercise of power by the governments.

Judges are the collective face of the justice system to the people, especially to those who appear before them. As ritualistic and mundane as it may seem to the judges and judicial personnel, court appearances for the members of the public may be once-in-a-life time and life-changing experience – an experience they may never forget in their life. The way the judges call, respect or treat people who appear before them reinforces public faith in the justice system. The respect of the judges to the laws and limit to their power promotes respect for the legal system and faith in democracy.

Judges are the faces of fairness in the society, and therefore, as the American judge and judicial philosopher Justice Billings Learned Hand said, they have to be “passionately dispassionate” and “develop a bias against bias”. Fairness is not simply granting equal opportunity to all – it is treating different people differently, in such a way that they are able to enjoy the rights and privileges granted by the laws. It means the feeling of being listened to, and heard; and tendered reasons for the decisions the judges make - especially consider the arguments and give reasons if the decisions are against them. Fairness includes, holding both the government and the people accountable; and respecting people as citizens.

Judges are professional decision makers and social engineers. Judges do not make speeches in public for they speak through the judgments they write. They set trends, guide the society and regulate behavior of the people. Disputes are inevitable and they create wounds and chasm. The judges as social doctors heal the wounds and bridge the chasm by resolving the disputes and giving justice. Decision-making is the most important tool judges are equipped with. Decisions given by judges affect people positively or adversely for generations in some cases. Therefore, the decisions need

to be communicated in a clear and precise manner giving reasons for why or how they came to a particular conclusion or decision. This transparency ensures that people are not victims of bias, whims or extraneous pressures. Since the judgments are drafted using the FIRAC (Facts, Issues, Rules or the laws, Applications or Analysis and Conclusion) tool in our courts, it is expected that all or most of our judgments are informed, mindful and reasoned. To ensure impartial and objective judgments, judges are also required to know themselves well. They need to suppress their personal reactions, dislikes, exhaustion, impatience and irritation over obnoxious parties and advocates; and approach the issues objectively, with open minds - treating every case as unique or different.

Judges are teachers, and they teach in many settings, e.g., while explaining laws and legal processes to the litigants. Judgments are plan of actions and road maps as to how people should conduct themselves in the society. Judges write articles, teach law school graduates, and speak at the meetings, trainings and conferences. Due to the high credibility and the awe and reverence people have for the judges, people remember what have been told or taught by the judges. Besides judges host visitors, school children, visit schools and institutions within and outside the countries – teaching all the times in the process.

But what is most important is that the judges are learners; they learn all the times, throughout their career. They continue to learn, for the excellence of the judges does not only come from his knowledge of the laws and legal controversies brought before them. It comes more from the wisdom and understanding drawn from the history, philosophy, literature, culture, civilization, the life itself – what we in our context is termed as ‘knowledge, tactics and strategies which no university teaches.’ Judges need to learn to understand and interpret different culture, values and human conduct. Moreover, judging is a high and lonely job, and the judges operate under tremendous time pressure. They deal with people who are in distress most of the time, and often judge them under stress themselves. Every case and every people is a case study in humanity and human behavior. When they do this for a reasonably long career, judges become good people-readers, which enhance their capacity to understand people better and judge better. That is why we need the continuing legal education and professional development for the judges; since the law is a dynamic tool constantly evolving with time and the social demands.

Judges are the role models for the society in terms of knowledge, conduct and commitment. They are very influential people on or off the Benches. The responsibility and power of resolving disputes and deciding cases lend them high social profile. They are held in high social esteem and looked upon as the role models; although living up to that image in a small and interdependent society is challenging.

Judges listen and write and lawyers speak. Judges ‘speak’ through their judgments, not in public forums. Judges are indeed writers. They write or ‘author’ hundreds of judgments every year. The linguistic skills, more so the reading and writing skills are indispensable tools of the judges. Unfortunately, no law school train lawyers and potential judges adequately in these areas. A few renowned scholar or philosopher judges such as Justice V.R.Krishna Iyer, Justice P.N.Bhagwati; and our own Justice Sonam Tobgye are mainly self-taught through relentless toils and personal sacrifices – learning continuously over and beyond the law school syllabuses.

Every day as the judges enter the courtroom and ascend the judicial seats they pray that whatever they say, do or decide from that high seat of justice be for the good of the country. They wish that by the orders they give, judgments they render; and the actions and conducts they regulate - they engineer a free, fair, just and a content civil society; that they silently grease the social engine and ensure its smooth operation and growth.

Going by the number of laws, we are making we are departing from an innocent informal society – and ascending the ladder of a formal one - a legalistic, individualistic and a sophisticated society. The number and nature of the cases our courts handle on a daily basis indicates that we are becoming assertive citizens and a litigious society, which has the potential to weaken our community vitality and social capital. More laws means rights; and more rights means more cases to the courts; and for the judges it means more work and pressure, unless more courts are established and more judges are appointed. Legal services continue to be literally free with less than a dollar fee for the case registration; and with most of the cases, being conducted *pro se*, the expenses for the judicial services are minimal.

However, with the revitalization of the age-old customary practice of amicable resolution of disputes in the community through Alternative Dispute Resolution system such as Mediation (*Nangkeba Nangdrig*) by the

Institute, a number of cases are weaned off the adversarial proceedings and win-lose outcomes of the courts. With the prospect of institutionalization of the Court-Annexed Mediation on the horizon, the courts can expect to allocate their scarce judicial resources to the more serious cases. Besides, the Bar is increasingly being regulated with the institution of entrance examinations soon. This heralds a good era for the judges as more professional lawyers will appear before the courts and argue cases and interpret laws, leaving less chances for the miscarriage of justice.

Among the several public agencies appointed to hear public grievances are the courts and law enforcement agencies. The primary objective of the legal profession is to hear, listen actively and empathetically the grievances of the people who have been allegedly wronged, hurt or aggrieved - and grant appropriate legal remedies.

Keeping the diverse and challenging duties of the judges and courts in mind, the Bhutan National Legal Institute has been established by Her Royal Highness, Princess Sonam Dechan Wangchuck on 25 February 2011 – to mainly build the capacity or the skills of judges to perform the onerous tasks entrusted to them and live up to the public expectations. A brainchild of Her Royal Highness, the *Bhutan Law Review*, country's first law journal creates an intellectual platform for our judges and judicial officials to engage in academic discourses and research; and publish their opinions and findings on contemporary legal topics and issues; more importantly, learn continuously and develop professionally.

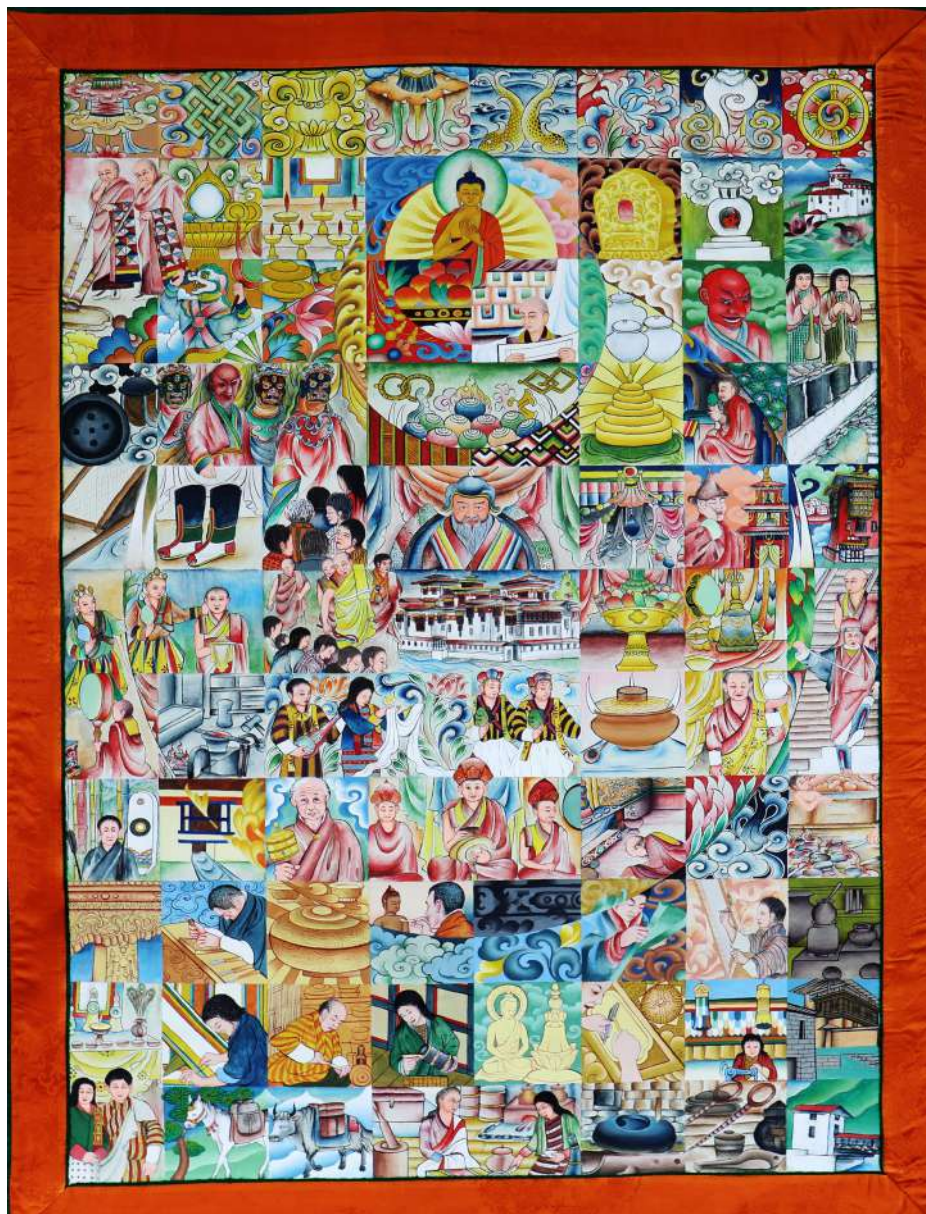
As we bring out the 11th volume of the Journal, we hope you will find time to read, hear and listen to our contributors, who are in indeed creating indigenous legal literature on the various aspects of laws, shaping the Bhutanese jurisprudence and developing judicial philosophy. In this volume, we have our judges and lawyers expressing their thoughts and opinions on areas of laws, as diverse as Alternative Dispute Resolution, connection between Buddhism and our legal system, law and media; laws pertaining to child justice – and then exploring the finer essence of the concepts of law and the justice itself. We have also included a book review. We crave no commendation for our work, but seek your indulgence, patience and continuous feedback for our continued learning, unlearning and relearning.

The Exposition of Constitutional Kuthangs

The Constitution of Kingdom of Bhutan encapsulates people's aspiration to preserve the sovereignty and identity of Bhutan. The *Constitution* is the most sacred document which is the basis for internal freedom and external symbiotic existence. The *Constitution* mirrors the selfless and extraordinary leadership of our Kings. It inspires our people with the blessings of liberty, justice, unity, peace and happiness. As a tribute to His Majesty the Fourth King on His 60th glorious birth anniversary, the Supreme Court of Bhutan and the Bhutan National Legal Institute, under the noble guidance of Her Royal Highness, Princess Sonam Dechan Wangchuck initiated the paintings of the 34 Articles of the *Constitution*. Each Kuthang represents the Article of the *Constitution* and captures its significance and purpose. The Bhutan National Legal Institute aspires to embrace the profound representation of the wisdom in the *Bhutan Law Review*, Kingdom's first *Law Journal* as a continued tribute to His Majesty the King, His Majesty the Fourth Druk Gyalpo, the Country and the People.

The *Constitution* is founded on the historical, cultural and religious principles of the Bhutanese people that reflects the traditions of Bhutan. The future generations must draw inspiration from the *Constitution* with pride. Although the *Constitution of Bhutan* is unique and different from the other *Constitutions*, it has considered the sound principles and practices of other *Constitutions* and draws upon them including the third generation rights, which relate to specific needs and the unique location, history and culture of Bhutan. Therefore, as our future generations read the *Constitution*, they will forever hear the voice of the nation.

Article 4 – Culture



Recognizing national and cultural heritage is indispensable for maintaining national identity. Article 4 emphasizes the need to preserve, protect, promote and develop our Bhutanese traditions and rich cultural heritage. Bhutan has a distinct cultural heritage with long, uninterrupted and lawfully recognized traditions.

The culture and tradition have religious, moral, spiritual and social values and functional utility. They are evident in the environment, architecture, dress, social behavior and other facet of Bhutanese life. Culture illuminates the mind and scintillates the spirit. It helps to determine the well being of the social fabric. The future should always reflect the past with its traditions, values and aspirations. The concept of cultural heritage is very broad and encompasses very important principles. It denotes practices, representatives, expressions, knowledge and skills, as well as instruments, objects, artifacts and culture spaces. Bhutan has benefitted from the uninterrupted and lawfully recognized traditions, and religious, moral, spiritual and social values.

The state is required to endeavor to preserve, protect and promote the cultural heritage of the country, including monuments, places and objects of artistic or historic interest, Dzongs, Lhakhangs, Goendeys, Ten-sum, Nyes, Language, literature, music, visual arts and religion to enrich society and the cultural life of the citizens. Traditional values and institutions are key to Bhutan's sustainability as a progressive society, which include the customary institution of marriage, which forms the basic strands of social fabric, the extended family structure, which is the unfailing guarantor of social security, and the tradition of community sharing and self-help that provides the basis for harmonious and sustainable development.

The Parliament is required to enact such legislation as may be necessary to advance the cause of the cultural enrichment of Bhutanese society; to strengthen and facilitate continued evolution of traditional values and institutions that are sustainable as a progressive society; it shall conserve and encourage research on local arts, custom, knowledge and culture. The protection and preservation of culture heritage has been incorporated in the successive five-year development plans.

The protection and preservation of the cultural heritage of Bhutan continues to be on the agendas of the successive National Assembly sessions. For instance, the National Assembly rectified the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. Bhutan also rectified the convention for the safe guarding of intangible of cultural heritage. In accordance with this convention, parliament has the legislative responsibility to enact legislations in order to advance the cause of the cultural enrichment of Bhutanese society.

The Blessings of Enlightened Laws – A Foundation for Peace and Happiness¹

Introduction

Dynamic intelligence, speculative minds, misery of pain and shared anguish prompted human civilization to devise law and justice system.² Law has become a complex concept now and religious leaders, scholars and philosophers have defined it in their own ways.³ His Majesty the Druk Gyalpo said, “*Law is not confined to the courts or the legislatures that draft them. Law is like the air that every person breathes at every moment. Its presence is unnoticed but its absence will be lethal.*”⁴ The Bhutanese concept of *Drig Thrim* is the best definition of law. *Drig* means harmonious settlement, while *Thrim* encompasses various laws such as *Ka Thrim Dru*, *Kadroe Chhenpo Dru* and *Ten Thrim Nga*.⁵ Law is an interpretative social practice⁶ that contains implicit

1 Contributed by Lyonpo Justice (retd.) Sonam Tobgye.

2 Generally see the history of Law Givers such as the ancient Egyptian law of 3000 BC (Ma’at), the ancient Sumerian ruler Ur-Nammu’s first law code, King Hamurabi’s *Codex Hammurabi*, the *Old Testament* in 1280 BC, Gyalpo Melongdong in 1214 BC, the Buddhist laws, laws of the Greek city-state, ancient Athen’s divine law (*thémis*), human decree (*nomos*) and custom (*dike*), the Arthashastra around 100 AD, Codes, the Manusmriti (c. 100–300 AD), *Zhelshay Chusum* by Tsong Tsen Gambo, *Jungwa Zhi Thrin* by Guru Padma Sambhava, major codification under Theodosius II and *Justinian Code*, A.D. 533, Zhabdrung’s *Kathrim* in 1652, Mipham Wangpo and Sherub Wangchhuck’s *Kathrim*, the Napoleonic and *German Codes*, etc. See John Lewis, *Early Greek Law Givers*, Bristol Classical Press, 2007

3 H.L.A Hart in his famous book *The Concept of Law*, divided law into primary (rules of conduct) and secondary ones (rules addressed to officials to administer primary rules). Secondary rules are further divided into rules of adjudication (to resolve legal disputes), rules of change (allowing laws to be varied) and the rule of recognition (allowing laws to be identified as valid).

4 His Majesty the Fifth Druk Gyalpo’s Address to the Judges during the closing ceremony of the 19th National Judicial Conference held in Thimphu on 11 June, 2010.

5 Zhabdrung’s *Ka-Thrim* in 1952

6 For example, Chanakya (350-275 BCE) who was a philosopher and founder of an independent political thought in India, laid down rules and guidelines for social, legal

moral principles and values. It is connected with the concepts of justice, reason, human nature and ethics. It is also an instrument of social change.⁷ According to Alexander Bickel, “*Law is the principal institution through which a society can assert its value.*”⁸ The objectives of law are to maintain stability, peace and tranquility of sentient beings. The Buddhist principle of sixteen virtuous acts of social piety (*Michoe Tsangma Chudrug*) exhorts that the past spiritual Monarchs’ laws were made to secure peace and freedom.⁹ Subsequently, Buddha propagated that the *law which leads to welfare and salvation; form conduct and characteristics distinguished by the sense of equality among all beings.* It also states that *law is equal and impartial for all beings.*¹⁰ His Majesty Jigme Singye Wangchuck advocated enlightened and rational laws. This principle is reflected in the preface of the *Penal Code of Bhutan*,¹¹ the *Civil and Criminal Procedure Code*,¹² the *Evidence Act* and other laws.

and political order in the society. See B.K Chaturvedi, Chanakya, Diamond Pocket Books, 2001.

7 According to Roscoe Pound, legal order must be flexible as well as stable. Law must be overhauled continually, and refitted continually to the change in the social life, which it is to govern. Roscoe Pound, *An Introduction of the Philosophy of Law*, available at http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=2222&Itemid=27.

8 Alexander Mordecai Bickel, *The Least Dangerous Branch*, 1962.

9 *bDe ba* encompasses freedom to secure happiness, welfare, safety, tranquility, prosperity and liberty.

10 *Dharmasangiti Sutra*.

11 This *Code* was one of the reforms initiated by His Majesty the Druk Gyalpo for criminal justice system in Bhutan.

12 This *Code* was the beginning of a legal framework for procedural reform. It took nine years for enactment and I, having been entrusted with the sacred responsibility of drafting the *Code*, had to defend twenty-nine times in the National Assembly. The safe passage of the Bill can be attributed to the then Speaker Dasho Ugyen Dorji. Without his help and timely interventions, the Code would have been mutilated and diluted. Winston Churchill said that one mark of a great man is the power of making lasting impressions upon people he meets; and another is to have handled matters that the course of after events is continually affected by what he did. Many important laws that form the basis of the Bhutanese legal system such as *Civil and Criminal Procedure Code*, *Penal Code* and *Evidence Act* were enacted while he was the Speaker of the National Assembly. Judiciary has institutional memories. Truth is appreciated and always remembered.

Generally, laws can be divided into natural¹³ and positive laws,¹⁴ criminal and civil laws, public international¹⁵ and private international laws, among others. While the reason, commonsense and the truth are the basis of natural law - it is derived from absolute truth which is punctuated by the birth, old age, sickness and death. On the other hand, positive laws are man-made, which is further classified into primary laws – the Acts passed by Parliament and subordinate legislation, which are rules framed under such Acts. Therefore, the positive laws are the command of imperative sovereign authority, which emanates from the Parliament. In this Paper, I elucidate my understanding of laws and how they should be made in general; and in the context of making of the *Constitution of Bhutan*, in the glowing shadows of His Majesty the Fourth Druk Gyalpo, in particular.

Law and Obedience

Laws must be just and fair. Samuel Johnson wrote, “*The law is the last result of human wisdom acting upon human experience for the benefit of the public.*” Protection of wrong encourages breaking of law; one who breaks the law cannot get protection. Lord Denning said that one who breaks laws “*strikes at the roots of society itself, and they bring down that which protects them.*” Every good law encompasses command, duty to respect, and sanction behind it. In Buddhism, the principle of *Dhammanuvatti* enjoins living in conformity with righteous laws and principles, both in personal and professional life.

13 Natural law and social contract theories were rejected by David Hume which is contrary to empirical truth. Rousseau objected the doctrine of natural law in favour of inalienable sovereignty vested in the ‘general will’ as opposed to any individual ruler or oligarchy. Natural Law Theory is supported by Grotius, Blackstone, Locke, Pufendorf, Montesquieu, Voltaire and Rousseau. Natural law is divided into prescriptive and descriptive natural law. The origin of it can be traced to the belief in a law of nature as a system of justice common to all human beings of the Stoics. Lord Buddha differentiated laws as *Rangzhin* and *Chaypai Thrin*. Aristotle said that positive laws must be obeyed and ‘it is not perfect and it may give rise to inequalities, but we should aim at reforming the law, not breaking it.’

14 Lord Buddha differentiated laws as *Rangzhin* and *Chaypai Thrin*. Aristotle said that positive laws must be obeyed and ‘it is not perfect and it may give rise to inequalities, but we should aim at reforming the law, not breaking it.’

15 *Jus gentium* (the law of nations) and *jus naturale* (natural law) by Grotius

Aristotle is one of the earliest thinkers on law and justice. He has differentiated *corrective justice* from *distributive justice*.¹⁶ Different philosophers have interpreted justice differently. Therefore, there are different types of justice such as commutative justice or corrective or rectificatory justice. Compensatory or social justice conforms to moral principle of equality, while distributive justice pertains to the right way of allocating benefits and burden.¹⁷ Institutive justice raises issues of legitimacy, procedure, codification and interpretation. In Buddhism, justice encompasses the principles of equality, distributive and corrective notions. Justice is the constant and perpetual desire of rendering each man his due and the law requires us to live honestly and not to injure your neighbor.

Justice is a social virtue and an inherent human necessity. Delivery of justice requires institutional building, legal framework, infrastructural development, technology and human resource. *“Good laws are the guardian and protector of the world. Hearing that it punishes the guilty would appease the good people but frighten the bad ones.”* These were the profound words of Mipham Rimpoche.

According to Rawls, *“justice is the first virtue of social institutions.”* Hence, Justice promotes virtues and vitiates vices. Justice is equivalent to *Drang thrim*,¹⁸ in Bhutan, which means fair law.

However, law and justice have had their critics. Solon in 6th century BC moaned that laws are like a spiders’ webs which catches the weak flies, but the stronger ones break through. Oliver Goldsmith wrote *“Law grinds the poor, and rich men rule the law.”*

16 See J.Waldron, Legal Theory , 2003 p.269.

17 One of the most interesting attempts to defend principles of justice is found in *John Rawl’s A Theory of Justice and Political Liberalism*. According to him, the conception of justice demands three things: (a) maximization of liberty, (b) equality for all; (c) “fair equality of opportunity” and elimination of all inequalities of opportunity. See John Rawls, *A Theory of Justice*, Oxford University Press, 1991 and John Rawl’s *Political Liberalism*, Columbia University Press, 2005.

18 I take the liberty of referring to John Rawls’s argument that self-respect is “perhaps the most important primary good” on which a theory of justice as fairness has to concentrate. Amartya Sen, *Development as Freedom*, Oxford University Press, 1999, p.136.

The Rule of Law

Bhutan has always expounded the rule of law. It was enshrined in the *Thrimzhung Chhenmo* and the Constitution upholds and perpetuates it.¹⁹ Rule of law is the recognition of the supremacy of law, elimination of discrimination, due process law, and judicial review of administrative action. It conforms to the Buddhist philosophy of '*Upekkha*', which means, "*impartiality, fairness, and understanding that all beings experience good and evil in accordance with the Karma they have created; steadfastness in maintaining laws that are righteous*".

The Making of the Laws

Laws are made either through executive orders or through legislation.²⁰ The primary purpose of the Parliament is to make law. This perception derives from the very name 'legislature' - the carrier or proposer of law. Parliament represents the wisdom of the people, a collective wisdom, which by and large is the national conscience. The national conscience should flow in continuity with our glorious history. Parliament is a tympanum of the nation, persistent vision of its action and the perennial source of its tributaries of laws through distillation and deliberation.

The role of the legislature should be the fulfillment of the desires of the maximum number of human beings, for the welfare of the society, which is aptly described by Roscoe Pound as social engineering.²¹ This role and purpose of the legislature was further accentuated by the profound instructions of His Majesty Jigme Singye Wangchuck at the time of the drafting of the *Penal Code of Bhutan*. The laws should be for the national interests above all other interests.²² No democracy can survive without law

19 Refer Article 9(3) and 21(1) of the *Constitution*.

20 Dicey differentiated between the legal sovereignty of law making by the legislature and electoral sovereignty of the people as the political sovereignty.

21 See Sai Abhipsa Gochhayat, "Social Engineering by Roscoe Pound: Issues in Legal and Political Philosophy", NLS, November 2010.

22 It was the greatest dictum of His Majesty the Fourth Druk Gyalpo. Similarly, Roscoe Pound's Public interests are (a) Interest of the state, which are the integrity, freedom of action and honour of the state's personality and claims of the politically organized society as a corporation to property acquired and held for corporate purposes. (b) Interest of the state as guardian of social interests. (c) Social interests in the general security relating to general safety, general health, peace and order, security of acquisitions and security of transactions. (d) Social interest in general

and order. Public interest requires promotion of law and order, not its denegation and destruction.²³

Sovereignty of Law Making

Bhutan is a sovereign country and the people of Bhutan must make their own laws according to their aspirations. The sovereign power belongs to the people and the laws are an expression of the will of the people. Further, the *Constitution* enjoins the Government to safeguard the interests of the nation and to fulfill the aspirations of the people.²⁴ Hence, Bhutan has followed a dualist and not a monist approach to avoid slavish transportation of ideas:²⁵ This is reinforced by the norm that:

The Constitution is the Supreme Law of the State and all International Conventions, Covenants, Treaties, Protocols and Agreements duly acceded to by the Government hereafter, shall be deemed to be the law of the Kingdom only upon ratification by Parliament unless it is inconsistent with this Constitution.

The international instruments only once ratified by Parliament are deemed as laws.

morals cover a variety of laws for those dealing with prostitutions, drunkenness and gambling. (e) Social interest in conservation of social resources that covers conservation of natural resources and protection and training of defectives i.e., conservation of human resources. (f) Social interest in general progress covers economic progress- freedom of use and sale of property, free trade, free industry, Encouragement invention by the grant of patent. (g) Political progress covers free speech and free association. (h) Cultural progress covers free arts, free letters, free science and Promotion of education and learning and aesthetics. (I) Social interest in individual life: self-assertion, opportunity and conditions of life.

23 Nani A. Palkhivala, *We, the People of India –The Largest Democracy*, UBS Publishers, 1997

24 Section 2, Article 10 of the *Constitution*.

25 His Majesty continually emphasized, which is reflected in Section 10 of Article 1 and Section 25 of Article 10 under the *Constitution*. Under the dualist system, the classic position is that domestic law is supreme. James Harrington “the happiness of living under laws of our own making”.

Rationality of Laws

Rationale of laws should be with “*right reason, harmonious with nature, diffused among all, constant, eternal; a law which calls to duty by its commands and restrains from evil by its prohibitions*”²⁶ Locke held that ‘reason must be our last judge and guide in everything’ which were echoed by Hegel and Schiller. The classical theory presumed that reason is common to all human beings and it is immutable. However, John Stuart Mill advanced reason categorized as public reasoning, which leads to ‘government by discussion’. Amartya Sen states:

In the history of public reasoning in India, considerable credit must be given to the Indian Buddhist, who had great commitment to discussion as a means of social progress... The so-called ‘Buddhist councils’, which aimed at settling disputes between the different points of view... these councils were primarily concerned with resolving differences in religious principles and practices, but they evidently also addressed the demands of social and civic duties...

Utilitarian reasoning has three distinct axioms: consequentialism, welfare and sum ranking. It concentrates on individual happiness or pleasure pioneered by Jeremy Bentham. Descartes advanced Cartesianism. The Bhutanese laws were based on public reasoning, which is central to participatory governance.

Laws as the repository of National Values

Laws must be in accord with moral and ethical values,²⁷ cardinal and spiritual values. These values are reinforced by Lord Buddha in Silasamannata - harmonious moral conduct:

Maintaining a level of conduct that meets community standards; adhering to community rules, not making oneself an object of distrust in the eyes of the community; refraining from conduct which would be detrimental to the community; contributing to an homogenous and equal respect for the community laws and compliance therein.

26 *The Enduring Constitution* by Jethro K. Liebermann, Harper & Row, publisher, New York.

27 William Blackstone “Law is the embodiment of the moral sentiment of the people.”

Bhutan considered many of them in addition to democratic values, tradition, culture and Constitutional values which became core, supporting and structural values while drafting the Constitution.

Just and Enduring Laws

Laws should be as far as possible just and enduring for its normative, procedural and institutional values including institutional responsibility and accountability.²⁸ Although no law lasts forever; as is with the Buddhist belief of impermanence, however, laws must endure over fluctuating fortunes. Therefore, Mipham Rimpochhe cautioned, *“If the laws are amended repeatedly, respect and obedience will diminish”*.

Proportionality of Crime and Punishment

Punishment must be proportionate to the crime. Legislations must recognize the principle of proportional justice whereby; the punishment of a certain crime should be in proportion to the severity of the crime itself. It must be fair. Public has a keen sense of fairness. Our legal system must not make life too easy for criminals or too difficult for law-abiding citizens.²⁹ Unintended results and consequence mitigate and dilute the original will of the lawmakers. Sentencing attracts more interest than any other aspect of the criminal justice system. When a person has broken the law and has caused harm or distress to others, the community expects that the sentencing process will punish that person appropriately. The crime, and the manner in which it is dispensed with, can affect the psychological well-being of people and indeed influence their everyday lives. Therefore, the sentencing process is at the very core of the criminal justice system and the society must strive to develop a justice system that is logical, rational, sensible and effective. Sentencing reflects our sense of right and wrong and the kind of society we want to live in. In a democracy, people decide what policies to vote for, and by letting politicians know their aspirations the people must help shape the laws.

28 The erstwhile National Assembly omitted certain progressive provisions from the *Penal Code*

29 John Locke’s a “state of nature” people were free to act as they wished.

Clarity of Laws

Statute must be direct, unambiguous, concise and definite. If laws are vague, the Courts will be constitutive and abrogative. Verbosity and incredulities must be avoided. It must be convincing, credible and factual by affirming the strength and not include conjectures by misrepresenting the weakness. For instance, the law must avoid the obvious, not use words that cannot be substantiated, is demeaning or is an expression of anger. As stated by Justice Krishna Iyer, “...*the rule of law and parliamentary democracy itself are imperiled if laws are incomprehensible. It is of fundamental importance in a free society that the law should be readily ascertainable and reasonably clear and that otherwise it is oppressive and deprives the citizen of one of his basic rights.*” To blame the courts for misinterpretation and plead for liberal interpretation are like begging for alms after giving it away and discarding Bentham’s caution, “*The power of the lawyer is in the uncertainty of the law*”.

Law, Traditions and Culture

The country cannot be economically assimilated, politically complacent and culturally influenced. Prosperity, modernization, and development will not bring satisfaction, if we lose tradition, culture and religion. Socially our system will break. Therefore, our laws must be Bhutanese in essence. We are reminded of the ringing words of Pavan K. Varma, the Indian Ambassador to Bhutan who succinctly opined, “*transplanting ... was not about the enlightened elitism associated with the assimilative cultural history.*”³⁰ During the drafting of laws, it is imperative to consider the accepted Bhutanese values,³¹ traditions and culture for more and better compliance in spirit than mere legal compliance. Laws must be homeostatic to maintain stability in changing conditions. We cannot afford complacency in our legal system. We must strive to gain the confidence of the people. Progress does not signal the renunciation of tradition. Traditional methods deserve respect, and we must draw inspiration from the wisdom of the past. At the same time, we must be able to meet new challenges of the changing times.

30 Pavan K. Varma, *Becoming Indian; The Unfinished Revolution of Culture and identity*. Penguin Books, 2010, p.107.

31 It was the consistent instruction of His Majesty the Fourth Druk Gyalpo.

Utility and Enforceability of the Laws

Law should be practical and enforceable without undermining transparency, accountability, efficiency and professionalism. It should be same to others and to oneself. It should be just and one should be subjected to it.³² It should be abided by interlocking principles for mutual support, maintain consistency and avoid incoherence. It should be free from passion and ulterior motives. Laws that are bias and legislated in anger will be subjected to the wrath of time. Law should have utilitarian and functionalist purposes.³³ It must encourage virtue, and prevent vice and immorality. The legal principles must be divided under three divisions, the enunciation of legal values without subordinate sections, elaborate legal remedies and punishment for violation and non-compliance. Every law must be cautionary to avoid disproportionate punishment and abuse of power.

Public Policy

Justice is central in identifying the aims and objectives of public policies and laws reflect behavior and psychology of individuals, society and ethics. Consequently, public policies entail choice. It may be a rational, public and social choice or involve economic considerations. Nonetheless, Rawl's rejection of *"the notion of radical choice finds no place in justice as fairness."* Simultaneously, laws must be cautious of incompatible aims of arbitrary choice or preferential choice.

Unity and Harmony of Laws

Descartes said that a multitude of laws often hampers justice. Therefore, laws should be drafted in a manner that it is harmonious with other laws

32 *"The insurance theory of constitutional regime - serves as insurance against loosing office"* by Prof Tushnet.

33 His Majesty the Fourth Druk Gyalpo's command was that law should serve national interest. Normative ethics is rational inquiry into or theory of the standards of right and wrong, good and bad in respect of character and conduct, which ought to be accepted by a class of individuals. Hugo Grotius argued that law arises from both a social impulse. Hayek - "only the existence of common rules makes the peaceful existence of individuals in society possible... the "rationalist" or "constructivist" understanding of the origins of law."

to eliminate contradictions and disparities. Ambiguity and disparity breed controversies. The courts must also read ambiguous statutes as a whole with a view to harmonize the ambiguous and inconsistent provisions. When there are two provisions in an enactment, which cannot be reconciled with each other, the principle of harmonious construction requires that they should be so interpreted as to give effect to both.

Uniform law may not be a panacea for all the problems in the system, but it will at least fulfill the primary premise of “*equal justice under law*”. It should be just to the victim and fair to the offender. With that pure motive, legislature and authorities must make just laws. Law loses its legitimacy, when lawbreakers masquerade as lawmakers. It is further aggravated, when the laws punish the lawmakers, when they are out of power. Thus, laws should be just and fair.

Words and Languages of Laws

As far as practicable, the legislations should avoid using same words for different purposes for legal words must have allegorical meanings that indicate history, philosophy, social³⁴ setting, sources, values and an inspiration of heritage. As pointed out by Ambassador Pavan K. Varma, it is true that language is the symbol of people’s identity.³⁵ It is a popular rhetoric in Bhutan, which in principle cannot be disagreed, that the laws should be in simple Dzongkha. However, the pious and patriotic expressions must be realistic and practical at the same time. The terminologies must be better, if not equally good. Words should have historical connotation, expression of values and must be mindful of future implications. Words must be expressive of the meanings. The importance of words is clearly stated in Sumtag, “*From writing come names. From the names come words. Words express all the meanings.*” Moreover, Thomas Szasz said “*The battle for the word is the battle of definitions.*”

Balancing National Interests and Public Rights

Institutional balance and countervailing power are important for society as mentioned by Galbraith. An effort must be made to balance the administrative convenience of the Government with that of the rights of

34 Social decisions satisfy minimum conditions of reasonableness by Kenneth Arrow.

35 *Supra*, n.36, p.83.

the people. At the same time, all freedom is not free and all the rights are not absolute. According to Kant - In law, man is guilty when he violates the rights of others. Therefore, there should be a reasonable restriction as provided under the Constitution. The check and balance is a requisite method to avoid tyranny of law and to provide for a controlled Constitution, whereby, the principles of checks and balances have an important role to play.

Legislative Morality

Human morality³⁶ evolved to restrict excessive individualism that could undermine a group's cohesion and thereby reduce the individuals' fitness. It is for the 'reciprocity'. Morality is not absolute, but relative. There are descriptive and normative moralities, political morality, legislative morality, public morality, morality and wealth, morality and politics, moral codes,³⁷ neutral values, among many others. Moral codes are ultimately founded on emotional instincts and leaders must provide moral leadership. Political morality was propounded by a Greek philosopher, Sophocles, who wrote "*Nobody has a more sacred obligation to obey the law than those who make the Law*" and John Ray, who said "*They that make laws must not break them.*" Further, the ringing oxymoron on moral code by Palkhivala remains eternally relevant:

*Commerce without ethics;
Pleasure without conscience;
Politics without principle;
Knowledge without character;
Science without humanity;
Wealth without work;
Worship without sacrifice.*

36 Morality in the Latin is *moralitas*, which means "manner, character and proper behavior".

37 One of moral codes is the golden Rule which is "One should treat others as one would like others to treat oneself" or "ethic of reciprocity". The Five Precepts and the Noble Eightfold Path of Buddhism; the ancient *Egyptian Code of Ma'at*; the Ten Commandments of Judaism and Christianity the Quran of Islam; Judaism's Noahide Law; and the *yanas* and *niyama* of the Hindu scriptures.

Conclusion

I have quoted many scholars and philosophers to benefit from their wisdom and to place it on record that we did not do things blindly and stumble in darkness. It is not my argument that we have done something that has not been done in our nation's history, but to remind our posterity and ourselves that we strived hard and never failed to try our best. Moreover, I consider it as my social responsibility to share the scintillating wisdom and inspiring principles that was bestowed to me by the great Monarch, His Majesty Jigme Singye Wangchuck. My efforts will never conform to His Majesty's intellectual standards and may fail to record His profound words in its entirety. Nevertheless, I am reminded of Sir Winston Churchill, who said, "The nation had the lion's heart. I had the luck to give the roar." Similarly, our generation is blessed to give the roar of the mighty Lion, His Majesty Jigme Singye Wangchuck.

Buddhism – A Source of Bhutanese Criminal Justice System¹

Introduction

The influence of religion as one of the most important sources of our law cannot be ignored. Buddhism has played a very important role especially in the context of the Bhutanese criminal trial system and overall administration of justice in the country, for centuries. If one were to ask whether Bhutanese legal system falls in the adversarial common law² or the inquisitorial civil law system, it can be argued that the Bhutanese legal system is based on the adversarial principle of procedure with some elements of the inquisitorial system.³ The legal system of Bhutan draws upon a mixed system is neither purely civil nor absolutely common law. In the adversarial system, disputes are resolved by the courts after giving fair and equal opportunity to present the case by both the parties.⁴ The courts in the adversarial system act like umpires and do not take sides or show any favor or disfavour to any party. Questions may be asked by the judge to determine the facts and evidence presented before it. However, under any standard criminal procedure, it commences with the arrest of the accused, detention and the production of the accused before a judge, investigation,⁵ charge being laid, providing evidence and the commencement of sentencing or acquittal of the accused depending on whether proved guilty or innocent.⁶ Overall, in any civil or criminal process in a hearing/trial before the court encompasses

1 Contributed by Lungten Dubgyur.

2 The adversarial nature of the Bhutanese trial system has its origin in the *Bardo Thodrol*.

3 This question is frequently asked when one interacts with the western lawyers or with the people from outside.

4 The Law is equal, equal for all beings, Impartial is the Law.....

5 Upali -Decelerations without investigation is unlawful. –“If the samgha, upali, regarding a matter (&c., Down to:) declares the re-establishment of concord, without having inquired into the matter and without having got to the bottom of it, -this declaration, upali, is unlawful,” Vinaya Text Vol. 20., Part III, pp 322.

6 Under Buddhism, there are five things, which make a grant of acquittal to those who are conscious of innocence to be according to law. See Vinaya Texts –Vol..20, Part III,pp18.

the procedure of establishing the facts (issues), production of evidence, appreciation of evidence and finally the passing of a reasoned decision.

Under the Bhutanese law, the accused or the defendant is presumed innocent until proven guilty.⁷ This is ensured through the criminal process⁸ of production of the accused before a judge on suspicion of having committed an offence. The accused has the right to bail or the courts remand the accused to judicial custody or police custody depending on the nature of offence.⁹ Remand orders may be made for carrying out additional criminal investigation and the filing of charges to the court.¹⁰ The court conducts uninterrupted hearing¹¹ and depending on the nature of the crime allows public trial represented by *Jabmi* (Legal Counsel) of one's choice.¹² The presumption of innocence of the accused also ensures through the process that the burden of proof or the *onus propandi* beyond reasonable doubt lies on the prosecution.¹³ The accused in the trial is also granted fair opportunity to submit counter arguments to challenge the evidence of the prosecution.¹⁴ In each stage of trial, the accused is granted an opportunity to submit written deposition (statement) or testimony (oral submission) to substantiate their legal contentions. Based on facts, evidence and the law, the court hands down reasoned written judgment. In this Paper, I present Bhutanese criminal justice system which draws from the Buddhism.

The Trial in the Intermediate State

The Bhutanese criminal trial process emanates from Karma Lingpa's fourteen-century text *Bardo Thodrol*, which is portrayed in the *Raksha Mangcham ritual dance*,¹⁵ which is performed all over the country on the

7 See Section 204 of the *Civil and Criminal Procedure Code, 2001* and Article 7, section 16 of the *Constitution*.

8 Tassa –Papiyyasika-Karma –Due process, Motion or Nati, Vinaya Text Vol. 17, Part II, pp330-335.

9 See Section 188.2 of the *Civil and Criminal Procedure Code, 2001*.

10 See Section 186.,Ibid.

11 See Section 75.,Ibid.

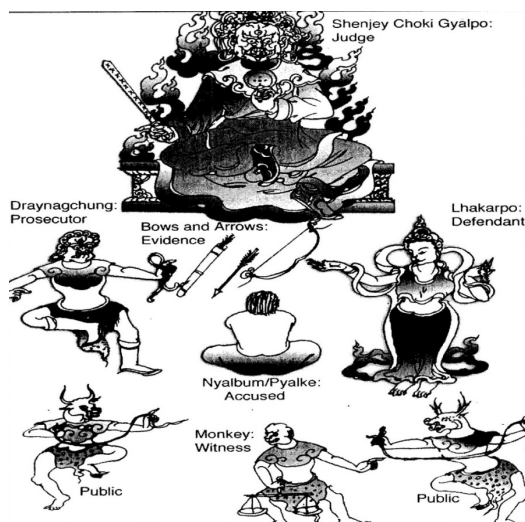
12 See Section 33., Ibid.

13 See Section 96.2, Ibid.

14 See Section 90., Ibid.

15 The dance performed in the Second Day of the (Tshechu) festival in the presence of the Lord Purgatory or the Lord of the Dead.

second day of the three-day religious festival. The trial is dramatized with all the principles of fair trial and natural justice. For instance, the right of *habeas corpus* (the production of the accused before a judge in person), the right of being represented by a legal counsel, uninterrupted hearing, notice of the charges, prosecution for the crimes, defence through rebuttal, production and establishment of evidence and *ratio decidendi* (the reasoned decision) based on facts and evidence are some of the principles which are clearly brought out in the ritual dance, as stipulated in the *Bardo Thodrol* text. The mask dance performance witnesses the prosecution of the evil (*Nyalbum*) and after his trial, the prosecution of the virtuous (*Monk*) or a religious practitioner (*Gomchen*). While the *Nyalbum* has been sentenced to hell and the monk is guided towards the heaven depicting condemnation and liberation symbolizing victory of the good over the evil. The trial in both cases exhaustive demonstrates equal justice, due process and effective protection of laws before the court of Purgatory.¹⁶



The Judgment of the Dead
(Art by: Rabjam Rinzin Wangdi,
Research Division, High Court)

The *Raksha Mangcham*

¹⁶ Article 7, section 1 of the *Constitution* guarantees the right to life, liberty and security of person and that a person shall not be deprived of such rights except in accordance with the due process of law. Further, Article 7, section 15 provides for equal justice and effective protection of laws without discrimination and Article 21, section 1 guarantees the administration of Justice fairly and independently without fear or favour.

Habeas Corpus and other Rights

In passing the Judgment of the Dead, the trial beings with the report of the appearance of a dead person (the accused, by name of *Nyalbum*) before the King or the *Lord of the Purgatory*, *Shenjei Choki Gyalpo*.¹⁷ *Habeas Corpus* (*ad sunjiciendum*) is a Latin term, which means, “You may have the body or produce the body”. *Habeas Corpus* is a writ, which requires a person detained by the authorities be brought before a court of law so that the legality of the detention may be examined.¹⁸ The right of appearance in person before a judge guarantees that the person accused of commission of an offence is not, a person of mistaken identity.¹⁹ The judge establishes that the person who has appeared before the court is of established identity and is alleged for the commission of an offence. Therefore, the Lord asks the accused as to where he has come from and invites submission²⁰ to be made before the court. “Where have you come from?... Did you carry out any virtuous deeds and abstain from sinful ones? Tell me what you may have to say now.”²¹

17 It is similar to Hinduism’s religious text called *Garuda Puran*, which deals with life after death.

18 Sir William Blackstone, who wrote his famous Commentaries on the Laws of England in the 18th Century, recorded the first use of habeas corpus in 1305. But other writs with the same effect were used in the 12th Century, so it appears to have preceded *Magna Carta* in 1215. For details, see “A brief history of habeas corpus” <http://news.bbc.co.uk/1/hi/magazine/4329839.stm>, See also P.Halshall (1998), “Modern History Sourcebook: *Habeas Corpus Act, 1679*”, halsall@murray.fordham.edu

19 Most countries’ criminal law provides statutory or procedural guarantees for the production of an accused before the court without delay. Similarly, section 188.1 of the *Civil and Criminal Procedure Code* requires the accused to be produced before the court within 24 hours of arrest.

20 The King of Purgatory asks the accused to submit orally (*bsbad rgyu chi’ dra yod daltia la” ur shod ching*)

21 *Khyod su yin gang nas ’ong’ nga’dun na mig gis Ita mi phodpa chi yin° ...dkarpo dge ba’ –skalpa ma chapa tsam zhing yod dam° nagpo sdigpa la ’zem long byas sam°* (*bsbad rgyu chi ’dra yod daltia la” ur shod chig*) See also Dasho Sithel Dorji, “The origin and description of Bhutanese Mask Dances”, (2001) KMT press, pp 22.

The Open Trial

The fair and public trial is demonstrated by the fact that the accused *Nyalbum* is heard in the presence of all the *Shingye Lakhen*. The *Shingye Lakhen* includes Ox, Boar, Garuda, Lion, Raven, Tiger, Leopard, Makara, Wolf, Goat, Horse, Dragon, Male Stag, Snake, Oxen, Monkey, Female Garuda, Bear, Dog, Female Stag, Wild Dog, Sheep, Rat, Hoopoe, Owl and Abominable Snowman.²² The open or public trial as opposed to *in-camera* (behind closed doors) trial is meant to check against judicial caprice and creates public confidence in fairness, objectivity and impartiality in the criminal process and of the administration of criminal justice.²³ The *Civil and Criminal Procedure Code* prohibits open trial only in certain cases where the courts finds necessary to protect privacy or has other reasonable restriction[s] that may be essential based on the nature and circumstances of the case.²⁴

The Right to Counsel

The trial proceeding is presided over by the impartial Lord of Purgatory (*Shenje Choki Gyalpo*). His Defence Counsel, *Lha Karpo* represents the accused and *Due Nagpo* represents the prosecution in the presence of the general public represented by many animals of the realm.²⁵ In the adversarial criminal law system, the state is represented by the prosecutor to prosecute the accused and the defence counsel to defend the accused and to counter the facts and evidence of the prosecution. The right to a *Jabmi* and legal aid²⁶ is one of the profound principles of legal rights

22 For translated version see the sources at the end of this paper in order of sitting arrangement of the Shejey Lhaken.

23 For the qualification for a Judicial Officer, the four Agati, See Vinaya Text, Vol. 20, Part III, pp 6-34.

24 See Section 4 of the *Civil and Criminal Procedure Code, 2001*.

25 The right to counsel under English law was recognized for certain cases only in 1695 and in case of United State in 1683 wherein it was mention that “all persons in all courts may plead their own cause themselves or their counsel.” For detail see Dr. A.N. Chaturvedi, “Rights of Accused under *Indian Constitution*”, Deep & Deep Publication, pp. 22-234.

26 In *Webb v. Baird* (1853) the Indian Supreme Court recognized a right to attorney at public expense for an indigent person accused of crime. The sixth Amendment to the *United States Constitution* also states “In all criminal prosecutions, the accused shall

enshrined under Bhutan's *Criminal Procedure Code* and the *Constitution*.²⁷ However, under Bhutanese law, the choice for a *Jabmi* is a personal choice of the accused and no one can impose representation to be made if the accused has competently and intelligently d off the right to legal counsel. The Criminal Procedure also allows the defendant to defend personally, if he or she desires.

The Charges and the Pleas²⁸

The accused is alleged of the commission of various offences (sins), including the offence against person²⁹, property³⁰, cultural heritage³¹, wild life & environment³², public order³³ and other offences like fraud³⁴ and defamation.³⁵ The lord of Purgatory grants the opportunity to plead³⁶ innocent or guilty to the offence of various sins (offences) committed during the lifetime of the accused.³⁷ The accused in his submission, pleads guilty in affirmative defense. However, the accused argues and pleads that the crimes (sins) were committed under mitigating and extenuating

enjoy the right to have the assistance of Counsel for his defence.” See for details <http://www.nalda.org/About/About>

- 27 Article 7, section 21 of the *Constitution* and Section 33 (b) of the *Civil and Criminal Procedure Code*.
- 28 See Hamilton v. Alabama (1961) http://www.nalda.org/About/About_HistoryDefender
- 29 For example, indiscriminate killing (*mtshong tshad bsad*) battery (*brdung*) hardened criminal (*sdigpa cheba khyod las med*) and patricide (*pha dang ma manchad chungste shig dang srogma yan gyi srogchadpa*)
- 30 Theft, larceny (*taking without being given*) (*ma byinpa lenpa*)
- 31 Desecration of religious artifacts (*gtsulag Khangla menchen bsregs*)
- 32 Mass destruction of nature (*nagsri chenpo meyis bsregs*) and water pollution (*rgya mtsbo che la dungchen btob*)
- 33 Discord (*khyim-mtsbes 'kbrugspa sprad*) lacks virtue (*dge ba ' skal ba chad*) and wrong views (*log par Ita ba*)
- 34 Perjury (*rzun smra ba*) and cheating through weight & measures (*bre log srang log btsugspa yi*)
- 35 Harsh and abusive speech (*tsig rtsrub rgyun du dmras*) and blasphemy (*bsbes gnyen yong la skurpa btob*)
- 36 Submission (*bshad rgyu chi 'dra yod dam*)
- 37 Defence of innocence and pleading guilty. (*dkarpo dge ba 'skalba ma chapa tsam zbig yod dam° nagpo sdigpa la 'zem long byas sam*)

circumstances, due to necessity³⁸ and extreme poverty.³⁹ The accused submits that though he had no intention to kill, the crimes were committed out of the necessity to support his large family.⁴⁰ The accused argues that although he was made aware that the commission of sins was bad,⁴¹ he was never aware of the consequences of such actions⁴² and the existence of punishment after death. He pleads that he did not know that the hell existed, since he saw or heard of any one returning from the hell. He thought that below his feet was all earth and; and above him was the empty sky... in the process he ended up committing many sins.⁴³ Further the accused submits that, had he known the existence of the consequences of such crimes,⁴⁴ he would not have committed the crimes, and now he regrets and seeks the Lord's mercy.⁴⁵

In this uninterrupted hearing and submissions⁴⁶ by the accused, profound legal principles of defence such as the defence of mitigating circumstances, poverty as an excuse for the crimes, factual ignorance,⁴⁷ lack of intention

38 The accused submits that being poor he had to commit the crime (*long spyod ni chung* ° *zam gos ni ngan* ° *bu smad ni mang bas bz'rgyu medpas* ° *'sem chan mang po* ° *srogla 'bagspa lags*)

39 The principle of Criminal law is that, the poor (even if starving) are not allowed to take law into one's own hand. The law does not recognize the necessity to eat. For detail reading see G. Williams, "Text Book on Criminal Laws", 2nd edn., Universal Law Publishing Co. Pvt. Ltd., on "Necessity and Starvation," pp 608.

40 Under criminal law the absence of guilty mind "*mens rea*" is also taken into consideration while considering the charges against the accused in a criminal trial.

41 He was not convinced that bad deeds would lead to hell (*dmyal ba yod zer baa e bden mi shes* ° *dmyal ba phyin zer nas log pa ni min 'dug snyam*)

42 The crime would not have been committed if aware of such consequences (*ma go ma rig dbang gis sdigpa byaspa lags*)

43 See Dasho Sithel Dorji, "The origin and description of Bhutanese Mask Dances", (2001) KMT press, pp23.

44 He submits that had he known the existence of hell and bad actions would lead to hell, he would have never taken the lives (*'di 'dra mngon sum yodpa cha yod na sdigpa mi byaspa lags te*)

45 That given a chance, he would strive for virtuous actions instead of non-virtuous actions (*de nas sdigpa mi byas pa lags° dgeba byas lags*)

46 The submission made by the accused *Nyalbum* is voluntary without interruption which is evidenced by the fact that no questions whatsoever is asked when the submission as to plead guilty or not is made in the commencement of the trial.

47 Pleading ignorance and lack of awareness (*dmyal ba yodzerba Ae bden misbes° mago marig*)

to cause harm,⁴⁸ remorsefulness, promise of good conduct if pardoned⁴⁹ and mercy pleading,⁵⁰ pleading for reformation are tendered upon which most of the modern Bhutanese criminology and penology is based and founded upon.

The Prosecution

The prosecution (*Due Nagpo*) submits that even if the Lord was powerful (referring to the discretionary power of the Lord), one cannot be in a position to cleanse or overlook the crimes committed by the accused.⁵¹ The prosecution reiterates that the accused *Nyalbum* alias *Doelpa Nagpo*, *Nagpo Kuen Sey* or *Shenpa Lagmar*⁵² has committed the offence of indiscriminate killings of wild animals and destruction of marine life.⁵³ The prosecutor further alleges the commission of assault against innocent persons and parents,⁵⁴ use of harsh and contemptuous speech,⁵⁵ commission of arson by setting forest fires and pollution of ocean,⁵⁶ and the commission of the offence of theft and desecration of religious artifacts and monuments.⁵⁷ The prosecution exerts that the accused has shown no remorse for the crimes and took delight out of such acts⁵⁸ and reminds the Lord that the

dbang gis)

48 Lack of intention to cause harm (*keh-yod rnam-sla byas-na sdig-pa byas-pa ma yin no*)

49 The accused pleads for pardon, mercy and promise for good conduct (*adig-pa mi byas...dgeba byas lags*). Section 197 of the *Civil and Criminal Procedure Code* provides detail provisions on plea bargain. Promise for good conduct is also sometimes equated with the principle of plea bargain, See *Brady v. United States* and *McMann v. Richardson*, both in 1970. http://www.nlada.org/About/About_HistoryDefender

50 Mercy Pleading through compassion and protection (*thrim-sla mig-tugs par zhu° bdag la snying rje mzo'd° bdag gig rigs rten mzo'd*)

51 The Counsel argues the elimination of discretion (*chos kyi rgyal po sku che yang° keh-yod kyi sdig pa bkag tu med*)

52 A serial killer or red-blooded killer.

53 (*sems chan mthong tshad bsad° phu yi ri dags nyes med bsad° md° yi nya mo nyes med bsad*)

54 Committing assault on innocent persons and parents. (*bar gyi sprang-po nyes med brdung° pha ma brdung shing*)

55 Contempt on the respected and lawful authorities (*bshes gnyen yong la skurpa btab*)

56 Setting of forest fire, causing pollution and the poisoning of ocean (*rgya mtsho chela dug chen btab° nags ri chen-po me yis bsregs*)

57 Theft of the religious monuments and artifacts. (...*sku gdung bchom*)

58 Remorselessness and delight of crime (*gsod-pa' dus su dg° dra° za b' dus su zhim' dra*)

eloquence of speech cannot mitigate the crime.⁵⁹ The identity of the accused also gets established with the corroboration through public knowledge and elimination of mistaken identity by spelling out the criminal records.⁶⁰

Therefore, the prosecutor submits that the accused is guilty of crimes against persons, property, wildlife and environment, public order, fraud and defamation and demands no mercy or compassion to be shown for the punishment of such evil and wrong doings.⁶¹ The prosecution accuses the defendant of the commission of the alleged crime willfully (the existence of guilty mind or *mens rea*), knowingly or intentionally and with motive of ulterior objective and achieving personal gratification.⁶² The prosecution seeks the justice of the Lord of the Dead to send the accused to hell for no one can undo the wrongs; submits that by showing compassion, it would overrule the popular views of the public against sins or crimes. In the final argument the prosecutor alleged that letting the accused go unpunished and free would mean unsafe society as criminal offences are considered the crime against the state and the society. *The Penal Code of Bhutan* enshrines the general principles of criminal liability of an accused - it provides that the act must be voluntary, done purposely, knowingly, recklessly, negligently and culpably.⁶³ For the conviction of criminal offence the prosecution should establish the facts and evidence beyond reasonable doubt and must demonstrates the presence of all elements of criminal liability such as the

59 Eloquence of speech cannot mitigate the crime and overrule the facts (*kha khas lche bdes chi la phan*)

60 The accused is identified by the submission of the identity of family and reference of different names acknowledged by the public. (*rga gar shar phyogs pa mans kyiis° bshanpa lag dmar zer ba yin° rga gar lbo phyogs pa rnans kyiis° sdig chan dmyal ba° bum zhes zer° rga gar nub phyogs pa rnans kyiis° rigs ngan gdol pa nag po zer° rga gar byang phyogs pa rnans kyiis° nag po kun gsod zer ba yin*)

61 If the accused is unpunished and go scott free, the popular views of the society will not prevail (*sem chan sa ya pham sbrags ste*)

62 Under Buddhism, the act of killing is completed when committed by means of four aspects, such as the preceding thought of intending “I will do such a misdeed!”, the deliberate engagement in the act and pursuing it with effort; the actual deed of killing, experiencing the act; and the conclusion of rejoicing in the act without feeling regret.” (*sdig pa° yan lag bzhi gzhi bsampa shyor ba mthar thug*) See “Dakini Teachings: Padmasambhava’s oral instructions to Lady Tshogyel” Translated by Erik Pema Kuenzang, Shambala Publications. Inc. Printed in the U.S.A, (1990).

63 Refer Chapter 6 of the *Penal Code of Bhutan*, 2004.

accused had the *mens rea*, intention, motive and the actual commission of the crime (*actus rea*).

The Defence of the Accused

The right to defence counsel is one of the basic elements of modern criminal trial procedure. It is a core right guaranteed under the fundamental rights of the *Constitution*.⁶⁴ The existence of the defence counsel (*Lha Karpo*) to defend the accused *Nyalbum* guarantees and demonstrates the right to fair trial proceedings recognized in the Court of the Lord Purgatory.

The *Lha Karpo* submits that the accused blinded by ignorance,⁶⁵ not knowing what is good and bad⁶⁶ had committed the crimes (sins) in dullness of mind (being in the state of insanity) and not after having the knowledge of the consequences. He pleads that the punishment may be mitigated due to the existence of some good deeds⁶⁷ and due to the mitigating circumstances of necessity and submits to the Lord for liberation through compassion.⁶⁸ *The Penal Code of Bhutan* requires the courts to consider mitigating circumstances while sentencing the accused.⁶⁹ Mitigating circumstances includes lack of prior criminal records of the accused; the crime was committed under extreme mental, emotional distress, by accident, consent of the victim or the victim, among other grounds for leniency.

The Submission of the Evidence

The presentation of facts and evidence before the court guarantees the right of the accused to be heard and be proved beyond reasonable doubts. During the trial, the delivery of justice is also enhanced by the presence of witnesses such as the Boar-headed demi-god who presents the entire daily criminal records, the presence of the Monkey (*Tren*), who submits his

64 See Article 7, section 21 of the *Constitution*.

65 Pleading ignorance of facts and lack of mental capacity to differentiate right from wrong (*dge sdig mi shes gti mug rmong pa yi ma rig dbng gis sdig pa byedpa yin*)

66 Lack of mental capacity under modern criminal law is also considered as one of the valid defence, which is invoked, in the present circumstances of the case.

67 Mitigate punishment due to some good work (*dge ba' las kyang chung zad byas pa yod*)

68 Submits that punishment for ignorance is not warranted (*'dila chad pa chad su mi' thsal lo*)

69 For details refer, section 23 of the *Penal Code of Bhutan*.

expert opinion to the Lord by weighing the balance (*Sang*) of truth over evil against the accused. The Snake-headed Raksha carrying a mirror also submits his own records of the sins (crimes) committed which is equivalent to the modern day submission of electronic or video graphic evidence. To establish the conclusiveness of evidence⁷⁰ and to substantiate corroborative evidence, the instruments used for the commission of offence are also displayed in an open trial through exhibits⁷¹ in the court of the Lord.

The Judgment

The judgment is the final determination of the case supported by reasons based on facts, evidence and relevant provisions of law.⁷² In the case of criminal offences, the pronouncement of judgment results in conviction or acquittal of the accused. In this trial, the conviction of the accused is represented by a black smoky trail directed towards hell of imprisonment while the virtuous Monk has been acquitted with liberation through a snowy white path leading towards the enlightened realm. The lord of the purgatory after having heard the submission of the accused *Nyalbum* in person, the trial having been conducted in open and in the presence of the public represented by his defense counsel *Lha Karpo*, and also after having fully considered the submission of the prosecutor *Due Nagpo*, renders a reasoned judgment (*ratio decidendi*) based on facts and evidence of the case. In pronouncing the accused guilty of the crimes after conducting exhaustive trial, the lord of purgatory holds that no one can nullify the results of one's own actions of the commission of offence.⁷³ It is further decreed that "one has to suffer for the wrongs committed by one's own action; even thousand Buddhas may not be able to liberate and protect the crimes of which one has to reap the fruits. No one can escape from the breach of laws."⁷⁴ There is nothing that the Lord can do even if remorse

70 Establishes conclusive evidence through the production of articles used for the commission of crimes. (*mtshon cha logs la btags rung yod' -da Ita nyid du Itas pas gsal ba yin*)

71 Exhibits, identifying the use of article (*bre srang rgyab tu kbur rung yod*)

72 There are generally four kinds of legal questions that require formal settlement. See Vinaya Text, Vol. 20, Part III, pp35.

73 Punishment is the results of one's own deed or crimes. (*rang gis las byas la smin tsa na° sang rgyas stong gis mthub kyang skyob sa med*)

74 No excuses for the breach of law (*las Kyi gshin rje' thrimd rar rshud tsa na° kha drag dtsan kyang 'di ru bya thabs med*)

is shown after the commission of the offence; the impartial judgment has to be based upon wrong against the right.⁷⁵ However, acknowledging the merits of virtue over evil and by atoning the sin serving the sentence (imprisonment in the hell), the compassionate lord orders that the sinner (prisoner) be liberated, so that he treads virtuous paths, attains Buddhahood and be born in the realm of the Buddhas.⁷⁶

Conclusion

Bhutan's past, present, and future are molded by strong principles of Buddhism and its values. These have profound impact on personal, social, cultural and legal environment in the country. Our criminal laws reflect rich legal and cultural legacies, embedded on noble principles of *truth*. The criminal justice system in Bhutan embodies justice, fairness, impartiality, integrity, equality, and the prevalence of *truth over falsity*. May these profound values of truth triumph and echo the real truth of justice.

75 Impartial judgment of wrong against right (*gyo srang gzulta legs nyes brtags spyad pas*)

76 Vindication through reformatory sentencing (*khyod kyi sdig sgrib myurdu dag nas kyang mthar thug sang rgyas go 'phang thob par shog*)

Mediation: Treading the Middle Path in Dispute Resolution for Community Vitality and Gross National Happiness¹

Introduction

In the ancient times, public grievances and disputes were personally heard and settled by the monarchs and the rulers.² When the cases grew in number and complexities, the work was delegated to learned, trusted and wise people. India still has the *Panchayat system* - a council of five wise village elders, and the *Lok Adalat* - semi-formal peoples' courts is popular to this day; and the latter is used to fast-track and decrease case pendency.

In Bhutan's context, what we term as local government and community leaders - the *Gups*, *Mangmis* and *Tshogpas* are the vestiges of that informal justice system, when the disputes were immediately settled where they arose in the community with little or no publicity. Hence the term '*Nangkha Nangdrig*' - meaning, confidential settlement of the disputes by the community leaders and wise and elderly people in the villages, without washing the dirty linen in the public.³

1 Contributed by Lobzang Rinzin Yargay.

2 See Stearns, P. (2012) 'The history of happiness', *Harvard Business Review*, January-February: 104-109. Also see, Andrew M. P., 'Virtuous Ways and Beautiful Customs: The Role of Alternative Dispute Resolution in Japan', *Temple International and Comparative Law Journal*, 11(1997), 31; and see, Utter, R. F., 'Dispute Resolution in China' *Washington Law Review*, 62(1987) 383-396.

3 See Duffy, J., 'Nangkha Nangdrig in the land of the Thunder Dragon: Psychology, Religion and the Potential of Mediation in the Kingdom of Bhutan' (2012) *Asian Journal of Comparative Law* 7, pp. 319-344; Also see, Michael Aris (1994), 'Conflict and Conciliation in Traditional Bhutan.' In *Bhutan: A Perspectives on Conflict and Dissent in Bhutan*, (eds.) M.Hutt, Gartmore: Kisadale Asia Research Series No.5 p7-42; Also see K.Ura (1994) , 'Decentralisation and Development in Medieval and Modern Bhutan.' in *Bhutan: Aspects of Culture and Development* (eds.) M.Hutt, Gartmore: Kisadale Asia Research Series No.4 pp.25-49; and Tshering Wangchuk, 'Alternative Dispute Resolution (Out of Court Settlement/Mediation): *Nangkha Nangdrig* in Bhutan' (2000). Paper presented at the Seminar on *Alternative Dispute Resolution in the SAARC Region*, Thimphu, Bhutan.

Alternative dispute resolution (ADR) is a dispute resolution process and technique where the disputing parties mutually resolve their disputes without litigations. The ADR has now gained widespread acceptance among both the general public and the legal profession in recent years in Bhutan. Most courts now require the parties to resort to ADR of some type, usually mediation, before admitting the cases for judicial scrutiny. It has many benefits in terms of time, costs, confidentiality, and autonomy over the disputes and greater control over the selection of the individuals who will facilitate resolution of the disputes.⁴

Many agree that the ADR, especially mediation in particular is not new to Bhutan; in fact, it predates formal judicial system. In the absence of formal courts, which were established only in the 1960s the main tool used to resolve disputes in the community was the informal and amicable dispute resolution system where the village elders, wise citizens and community leaders brokered peace between the disputing parties. Bhutan is a small, resource-strapped and landlocked country where people are its primary resource for the national development and progress. Therefore, the unsuitability of adversarial win-lose system in a small and interdependent society need not be emphasized more. The progress and happiness of the community depends on the strong social bond – the community vitality, which constitutes one of the 9 domains of the alternative development paradigm of Bhutan, the *Gross National Happiness* (GNH). This Paper attempts to relate the role of the laws and legal system in general; and the Mediation, being a *Middle Path* approach, in particular - to strengthening of community vitality and promotion of the GNH.

The Gross National Happiness

The primary purpose of the life, and in fact of all civilizations and countries is to seek happiness and prosperity for its people. Happiness and welfare of the people have always been at the center of development in Bhutan as well. Zhabdrung Ngawang Namgyal who founded the Bhutanese nation

4 See Whitecross, R.M. (2018), 'Thrims khang and the Setting for Justice: The Spatial Evolution of the Courts of Justice in Bhutan,' In *Buddhism, Culture and Society in Bhutan*, (ed.) Seji Kumagai. Nepal, Vajra Books, pp.100-101.

state in the seventeenth century and his successors have been said to have stated that the primary duty of the ‘government’ and the rulers was to enhance the happiness of the people, in fact happiness of all sentient beings – based on the Buddhist values of compassion and harmonious co-existence of all sentient beings. His lineage has expended and continued this noble vision through the successive monarchs.

But is the happiness and prosperity be achieved at all costs – destruction of natural environment, dilution of culture, income disparity and imbalanced development? Is the Gross Domestic Product (GDP), the only indicator of happiness and prosperity? His Majesty the Fourth King asked these questions early in his reign in 1970s. To Him, “the Gross National Happiness is more important than Gross Domestic Product” (GDP). This was actually a critique against the mad material progress measured solely by the yardstick of goods and services a country produces in a year. Since then, the GNH is now the development philosophy of the country.⁵ The unique development paradigm now not only engages the imagination and discourses of the international community but has earned space in the country’s highest law.⁶

Article 9 (Principles of State Policy) Section 2 of the *Constitution* states that:

The State shall strive to promote those conditions that will enable the pursuit of Gross National Happiness.

Therefore, all national policies, laws, plans and programs; and by the necessary implication all the judgments rendered by the courts must conform to the spirit, if not the letter of the GNH – in that it is required

5 See Christensen, K. (2011) ‘Gross National Happiness – A new approach to development?’ Paper prepared for the 2011 FAU conference: “The Future of Development Research: Exploring the Nordic perspective(s)” Copenhagen Business School, 24.-25, November, 2011.

6 See Thinley, J. (2007) ‘What is Gross National Happiness?’, in Centre for Bhutan Studies (ed.) *Rethinking Development: Proceedings of Second International Conference on Gross National Happiness*. Thimphu, Bhutan: Centre for Bhutan Studies, pp.3-11. Also see, Thinley, J. (1998) ‘Values and Development: “Gross National Happiness”’, Speech delivered at the Millennium Meeting for Asia and Pacific in Seoul, Republic of Korea 30 October – 1 November.

to enhance the happiness and welfare of the litigants; or at least cause minimum harm or pain to the people involved - given the fact that a typical adversarial judicial proceedings do not result in win-win outcomes as in ADR in general and mediation in particular. This indicates the emphasis on the interaction, dependency and collaboration between the people – the community vitality, social harmony and the national unity.

Studies reveal that material wealth alone is not sufficient for the enduring happiness of a close and largely collective community like ours. GNH captures this essence of holistic approach to happiness of the society where there is parallel pursuit of material and spiritual development. The State is required to create enabling conditions for the people to seek happiness. GNH concept is no more a mere theoretical or a Utopian abstract philosophy. Its being developed into a quantifiable tool for effective operationalisation within the Kingdom, and replications in other countries.⁷ It has four pillars of development objectives – sustainable and equitable economic development, conservation of the environment, preservation and promotion of culture and good governance.⁸

A tool has been developed to screen all development policies and projects and align with the GNH. The tool evaluates what conditions are conducive to the happiness and wellbeing of the people, and country as a whole.⁹ The GNH Index is a holistic approach to measure the happiness and wellbeing of the population. It is a measurement tool used for policy making. It includes the nine domains which are further supported by the 33 indicators. The Index makes the analysis of the nation's wellbeing with each person's achievements in each indicator. In addition to analyzing the happiness and wellbeing of the people, it also guides how policies may be designed to

7 See Ura, K., Alkire, S. and Zangmo, T. (2012) 'Case Study: Bhutan: Gross National Happiness and the GNH Index', in J. Helliwell, R. Layard and J. Sachs (eds.) *World Happiness Report*. New York: United Nations, 108-158. Also see, Ura, K. 'Explanation of GNH Index'. Available: <http://www.grossnationalhappiness.com/gnhIndex/introductionGNH.ASPX> (accessed 2 February 2019).

8 See, Ura, K., Alkire, S., Zangmo, T. and Wangdi, K. (2012) *A Short Guide to Gross National Happiness Index*, Thimphu: The Center for Bhutan Studies.

9 See Gross National Happiness Commission [n.d.] 'Methodology of GNH Screening Tools'. Thimphu: GNHC. Available: <http://www.grossnationalhappiness.com/screeningTools/screeningTools.aspx> (accessed 3 February 2019)

further create enabling conditions for the weaker scoring results of the survey.¹⁰

The challenge therefore, for the justice sector and law enforcement agencies of Bhutan is to ensure that all the laws and legal services conform to the GNH requirements in order that it contributes toward creating enabling environment for the people to pursue happy life as mandated by the *Constitution*.

Treading the Buddhist Middle Path



The Middle Path

According to Buddhism, the desire for material wealth is the cause of suffering. Happiness and peace emanate from the spiritual well being, the presence of rich natural forests, the serene environment and abundance of biodiversity. Therefore, the GNH draws on the Buddhist principles

¹⁰ See Ura, K. Alkire, S. and Zangmo, T. (2012) 'Case Study: Bhutan: Gross National Happiness and the GNH Index', in J. Helliwell, R. Layard and J. Sachs (eds.) *World Happiness Report*. New York: United Nations, 108-158.

– reverence for nature and respect for all sentient beings, which is now equated with ‘sustainable development’ - a unique path, called ‘the *Middle Path Strategy*’ – based on the Buddhist principle of avoiding extreme pursuits. It aims for the superior performance by taking a balanced view, build consensus and through collaborative and inclusive strategies. It means ‘neutral, upright, and centered’. Lord Buddha is said to have attained enlightenment treading the middle path, after extreme paths of extreme self-deprivation and worldly sensual pleasures failed to bear meaningful results.

In the dispute resolution spectrum, mediation lies in the middle. It is neither avoiding or ignoring existence of disputes; nor competition or fighting protracted litigations through the successive tiers of the legal system. The mediation policy is collaborative - ‘live and let live’, not ‘live and let die’. It enables people to compromise, forgive and forget; and live as neighbors and friends by resolving the disputes amicably– most of the times, with simple remedies and solutions such as saying 'sorry', asking forgiveness, shaking hands, paying nominal compensation, restoring dignity and honor over a glass of tea, in their own familiar neighborhood.¹¹ In order to revive and strengthen this customary, informal community justice system which has been passed down for hundred of years in our country, in launching a major legal reform in the country the *Bhutan National Legal Institute* has been engaged in training and building the capacity of the community leaders and relevant stakeholders in the mediation of disputes especially in the non-urban community since 2012. The mediation is now a vibrant practice in the grassroots community taking justice to their doorsteps. With successive elected local government leaders being trained in the effective mediation of disputes by the Institute, hundreds of cases are prevented from reaching the courts. With the institutionalization of Court-Annexed Mediation system in the country, there will be a Court-Annexed Mediation

11 See National Environment Commission (1998) *The Middle Path*. Thimphu: RGoB. Also see, Rinzin, C. (2006) ‘On the Middle Path: the Social Basis for Sustainable Development in Bhutan’, *Netherlands Geographical Studies* 352. Utrecht: Copernicus Institute for Sustainable Development. Also see, Planning Commission (1999a) *Bhutan 2020: A Vision for Peace, Prosperity and Happiness, Part I*. Thimphu: Planning Commission, RGoB; and Planning Commission (1999b) *Bhutan 2020: A Vision for Peace, Prosperity and Happiness, Part II*. Thimphu: Planning Commission, RGoB.

Unit (CMU) each in all the courts, which will afford additional opportunities to people to mediate their cases within the courts system by the in-house judicial mediators.¹²

The essence of Buddhism is to seek happiness by eliminating causes of suffering or unhappiness. Happiness of not just oneself but that of others – including all sentient beings which inhabit the vast universe – with whom we share filial relationship due to continuous and cyclic rebirths in the world based on our Karmic consequences. Therefore, as a Buddhist country, seeking or securing happiness and peace to all sentient beings is a cardinal principle we uphold and practice on a daily basis. Besides, material or economic prosperity, one goal we have persistently tried to achieve through successive Plans since 1960s is happiness of the people. Therefore, it is only logical that we invest resources in the strengthening of a dispute resolution tool which treads the middle path and enhance the happiness.¹³

Buddhism, Law and Happiness

The *Rule of law* is a primary component of the good governance pillar of the GNH which presupposes an efficient and effective legal system for expeditious adjudication of disputes by the impartial and independent judiciary. In addition, the amicable resolution of the disputes in the communities spares the people of the divisive effect of the adversarial common law system resulting in winners and losers. This strengthens community cohesiveness and harmony which in turn leads to prevention of violence and the low level of crimes.¹⁴

-
- 12 See, Yargay, L.R. and Chedup, S. ‘The Court-Annexed Mediation: Enhancing Access to Justice through the In-house Court Mediation Services in Bhutan’, *Bhutan Law Review*, (2018)10: 92-111.
 - 13 Also see, Planning Commission (1999a) *Bhutan 2020: A Vision for Peace, Prosperity and Happiness, Part I*. Thimphu: Planning Commission, RGoB; and Planning Commission (1999b) *Bhutan 2020: A Vision for Peace, Prosperity and Happiness, Part II*. Thimphu: Planning Commission, RGoB.
 - 14 See Royal Government of Bhutan (2005) *Good Governance Plus: In pursuit of Gross National Happiness*. Thimphu.

Buddhist faith and values permeate all aspects of life in Bhutan - cultural, ethical, legal and social. It has shaped the institutions, organizations, arts, drama, architecture, literature and social structure. As a Mahayana Buddhist Kingdom, Bhutan has inherited a philosophy of life that is deeply rooted in religious traditions and institutions. Basic values such as compassion, faith, respect for all life forms and nature, social harmony, the spirit of community participation and prevalence of spiritual development over material achievements have played a significant role in shaping modern Bhutan.¹⁵ Except for a few commercial and corporate cases, people still value relationship and social harmony more than engaging in litigations and securing hollow or nominal legal victories. In most parts of the country, social sanctions are still very strong; and disputes are still viewed as taboo and litigious people are frowned upon as trouble-makers.¹⁶

The essence of the whole *Penal Code of Bhutan* is the prohibition of Buddhist 10 non-pious acts (*Mi dGewa bChu*). The modern day Bhutanese criminal trial system is based on the 14th century Buddhist master Karma Lingpa's *Bardo Thodrol – the Judgment of the Dead*. It is based on the concept of Karmic actions and consequences – which one is held accountable here and hereafter through systematic judicial hearings and proceedings culminating in judgment – conviction or acquittal based on the rebuttals submitted and evidence tendered in support of respective claims and controversies.¹⁷

All laws have the ultimate purpose of the achievement of happiness, including the criminal laws, which enhances happiness of the society by punishing the criminals and creating an enabling ambience of law and order for the people in the society to engage in meaningful pursuits. The main purpose is to protect the society, reform the deviants and discourage the offences, rather than punish the criminals or exact revenge on the

15 See Rinzin, C. 'On the Middle Path: the Social Basis for Sustainable Development in Bhutan', *Netherlands Geographical Studies* (2006) 352. Utrecht: Copernicus Institute for Sustainable Development.

16 See Yargay, L.R. 'Mediation in Bhutan: 'Raising Heads and Saving Faces'', *Bhutan Law Review*, (2014)8: 15-18.

17 See Dubgyur, L. 'The Influence of Buddhism on Bhutanese Trial System' (pp 1-12) in *Parasol of Silken Knot* (2005) Royal Court of Justice, High Court, Research Division, Thimphu.

offenders. This is very close to the mediation principles of being ‘soft on the people, but hard on the problems,’ and ‘looking forward’ to the future rather than raking up the past, incriminate the people and punish them after evaluative or adversarial trials.¹⁸

Community Vitality

For a small and interdependent society, maintaining harmonious and peaceful society, i.e., the community vitality is the most important of the 9 domains of GNH other than the good governance where the laws play a direct role. As with many concepts, community vitality lacks a universally accepted definition, often taking contextual color. The lexical meaning of vitality is being strong or active, the power which perpetuates or propels life. Therefore, anything that is alive has vitality, the stronger and more active having more vitality. It relates to physical, mental, and spiritual health. Popularly, community vitality is the strength of communities to survive and thrive.¹⁹

The idea of a competent community is identified as a precursor to community vitality, emphasizing the importance of developing and possessing a collective capacity to solve problems. Competent communities collaborate and work effectively in identifying the problems and needs of the community, achieve a working consensus on goals and priorities, agree on ways and means to implement the agreed-upon goals and priorities and collaborate effectively in the required actions,²⁰ Vital communities are characterized by strong, active and inclusive relationships between residents, private sector, public sector and civil society organizations that work to foster individual and collective well-being. Vital communities are those that are able to cultivate and marshal these relationships in order

18 See Fisher, R. and Ury, W. L. (1981) *Getting to Yes: Negotiating Agreement without Giving In*. Houston Mifflin Company. USA: Boston, New York.

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

20 See Wang, J. (2009) ‘To Think like an Island: Three-Capital Model in Pursuing GNH in Taiwan’ in D. Penjore and K. Ura (eds.) *Gross National Happiness – Practice and Measurement*, Centre for Bhutan Studies, Thimphu: Bhutan, 276-300.

to create, adapt and thrive in the changing world and thus improve well-being of citizens²¹. Participation in group activities, volunteering, number of close relatives, providing assistance to others, property crime, violent crime, walking alone after dark, trust, experience of discrimination, caring for others and belonging to community is the essence of community vitality.²²

In the Bhutanese context, community vitality includes the social capital of the country, which is sustained through co-operative relationships and social networks within the community. A vital community can be described as a group of people who support and interact positively with each other. A community must possess strong relationships amongst the community members and within families, must hold socially constructive values, must volunteer and donate time and/or money, and lastly must be safe from violence and crime. It is vital that volunteering and donations of time and money be recognized as a fundamental part of any community development. The values can act as tools through which activities can be implemented for positive change in communities.²³

Of the four 4 pillars and 9 domains of the GNH, the justice sector and the judiciary directly contribute to the 4th pillar of Good Governance and the 7th Domain of Community Vitality through effective disputes resolution and protection of rights and freedoms and promotion on rule of law. However, it is the ADR in general and mediation in particular which contributes toward maintaining and strengthening the community vitality due to its inclusive and collaborative nature of the mediation resulting in win-win situation thereby maintaining the existing cordial relationship between the people in the community. Litigation weakens community vitality due to win-lose outcomes which adversely affects the social relationship in the

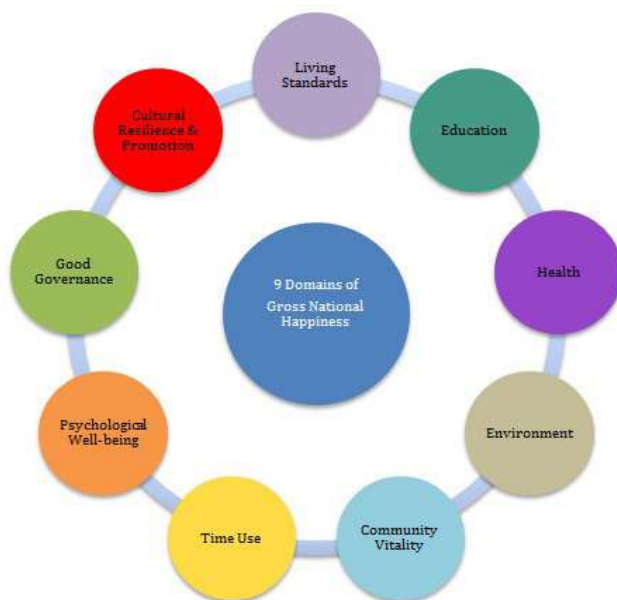
21 See Kamruzzaman, M.(2009) 'Religious Institutions-based Community-hood and Identity of a 'Muslim Community' in a 'Remote' Rural Village in Bangladesh' in Penjore, D. and Ura, K (eds.) *Gross National Happiness – Practice and Measurement*, Centre for Bhutan Studies, Thimphu: Bhutan, 257-275.

22 See Ura, K., Alkire, S., Zangmo, T. and Wangdi, K.(2012) *A Short Guide to Gross National Happiness Index*, Thimphu: The Center for Bhutan Studies;

23 See Macdonald, R.(2010) 'Taking Happiness Seriously - Eleven Dialogues on Gross National Happiness', Thimphu: Centre for Bhutan Studies.

community and the associated values of unity, harmony and cooperation. For a society to be truly happy the community must be full of vitality, i.e., the people in the villages and communities must collaborate, share and live together and help each other – thereby maintaining strong social bond. Studies reveal that, in absence of strong community vitality, an increase in material well-being does not necessarily result in proportional increase in the happiness of the people. An increase in income definitely raises the happiness of the people with low income, but stops to do so beyond a certain level. Besides, excessive focus on material development has led to a diminished sense of community in some countries.²⁴

Disputes and Community Vitality



Nine Domains of GNH

Conflict is inevitable and a part of everyday life. It occurs whenever individuals or groups are not getting what they want or are and are acting in their own self-interest. It is our inability to effectively *deal with conflict* and the

24 See Brockmann, H., Delhey, J. Welzel, C. and Yuan, H. (2009) 'The China Puzzle: Falling Happiness in a Rising Economy', *Journal of Happiness Studies*, 10: 397-405.

anger it generates that results in a host of negative consequences – anxiety, depression, frustration, illness, stress, injury or accident. Left unresolved conflict will inevitably escalate. Managed properly, conflict can be an opportunity for better understanding, clearer communication, improved relationships, increased productivity, better trust and support. The cost and consequences of unresolved disputes to the individuals, organizations and countries are enormous. For a resource-strapped small country like Bhutan people are its main asset. Therefore, it would be counterproductive to embroil them in protracted, frivolous and vexatious litigations at the cost of weakening community vitality and social capital²⁵. The Bhutanese legal system has perpetually strived to render inexpensive and expeditious legal services by enhancing accessibility or user-friendliness of the courts. Since enhancement of the happiness of the people is the essence of the GNH philosophy the state is mandated to create an enabling environment for its pursuit²⁶.

One of the most important factors for happiness is community vitality. Community vitality is interactions and relationship between people; it is sharing, volunteering, social cohesion, safety, family, and duration of stay in the community, etc.²⁷ Disputes and litigations weaken community vitality. The judicial branch of the government is primarily entrusted with the effective and efficient dispute resolution – thereby contributing toward enhancement of happiness in the country.²⁸

Studies reveal that beyond certain level material well-being or the absolute income does not make people happier. It is what we have that out neighbors

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

26 See Royal Government of Bhutan (2008) *Constitution of the Kingdom of Bhutan*. Thimphu. See Article 9 section 2.

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

28 See Freeman, D. (2009) ‘Development and (Un)happiness: A Case Study from Ethiopia’ in Penjore, D. and Ura, K. (eds.) *Gross National Happiness – Practice and Measurement*, Centre for Bhutan Studies, Thimphu: Bhutan, 241-256.
Wang, J.(2009) ‘To Think like an Island: Three-Capital Model in Pursuing GNH in Taiwan’ in Penjor, D. and Ura, K. (eds.) *Gross National Happiness – Practice and Measurement*, Centre for Bhutan Studies, Thimphu: Bhutan, 276-300.

do not have; or the relative income that make people happier.²⁹ In other words, higher GDP income is not necessarily accompanied by proportionate rise in happiness. For instance, the Chinese are found to be not becoming happier despite their rising economy.³⁰ The 2010 GNH survey shows that despite better opportunities and higher living standard Thimphu has the highest number of unhappy people. This is mainly because of lack of community vitality and social capital which is aggravated by competitive and stressful life. Denmark, which is one of the happiest countries in the world has not only high income but high degree of social equality and good governance.³¹ As the zealous GNH-advocate, stressing on the community vitality, the former Prime Minister said, “we have always derived happiness from living in harmony and serving others”³².

Mediation and Community Vitality

We are largely a collective society though traces of individualistic trends are visible in urban pockets.³³ We are a society in which people are integrated into strong, cohesive communities; and friends and families form safety nets to fall back on during difficult times. In rural areas we still wait eagerly for the annual village rituals where we assemble in each house in turn and share feasts and entertainments. Neighbors still rush in with helping hands when we fall sick; or volunteer labor for sowing seeds and reaping crops. Disputes, diseases and famines are avoided and propitious rituals are performed to prevent them. Unresolved disputes are believed to disrupt

-
- 29 See Layard, R. *Happiness: Lessons from a new Science* (2011) 2nd ed . USA: Penguin Books. Also see Oishi, S. Diener, E. and Lucas, R.(2007) ‘The Optimum Level of Well-Being: Can People Be Too Happy?’, *Perspectives on Psychological Science*, 2(4): 346-360.
- 30 See Brockmann, H., Delhey, J. Welzel, C. and Yuan, H. (2009) ‘The China Puzzle: Falling Happiness in a Rising Economy’, *Journal of Happiness Studies*, 10: 397-405.
- 31 See Sachs, J. (2012) ‘Introduction’, in J. Helliwell, R. Layard and J. Sachs (eds.) *World Happiness Report*. New York: United Nations, pp.3-9.
- 32 See Thinley, J. (1998) ‘Values and Development: “Gross National Happiness”’, Speech delivered at the Millennium Meeting for Asia and Pacific in Seoul, Republic of Korea 30 October – 1 November.
- 33 See Ugyel, L.(2013) *Dynamics of Public sector Reforms in Bhutan: interaction of values within a hybrid administration*. Crawford School Working Paper No 1301. p 10; Also see O’Flynn, J. and Blackman, D. (2009) Experimenting with organisational development in Bhutan: a tool for reform and the achievement of multi-level goals? *Public Admin. Dev.* 29:133–144.

the social harmony and hierarchy in the community; it indicates social decadence and lack of cohesion in the community. We are also a relatively high ‘power-distance culture’, where people heed the words of the senior members of the society. This makes the compromises in dispute resolution easier.³⁴

When the disputes arise in the community the senior members of the community society resolve them before they escalate. They apply the rules of shared norms and mutually binding value systems. The prevailing customs, moral and ethical precepts play important roles in persuading the parties to compromise. Apologies and forgiveness serve as important remedies. Mediation of dispute is basically about yielding or compromising on certain issues in order to gain over some.³⁵ A decision facilitated by community leaders emphasizing reciprocal duties and concessions eliminates the need for litigations. While the guilty are not stigmatized or blamed for the faults; the victims are able to vindicate their conformity to the social norms. Equitable settlements are fashioned by making mutual concessions and compromises with no clear winners or losers. Therefore, by strengthening the system of amicable resolution of disputes in the communities we are strengthening the community vitality, tolerance, peace and non-violence – to achieve the ultimate goal of happiness for our people.³⁶

Conclusion

Customary practice of mediation of disputes in the community has existed in the country for centuries. Legends and folklore abound where the prominent personalities in the community intervened when the disputes erupted and restored peace and harmony in the community. Even when the courts came, given the size of the society and simplicity of the people and the issues involved, going to the courts remained the last resort, and

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

35 See Yargay, L.R. ‘Mediation in Bhutan: ‘Raising Heads and Saving Faces’, *Bhutan Law Review*, (2014) 8: 15-18.

36 See National Environment Commission, RGoB (1998) *The Middle Path*. Thimphu; Also see C. Rinzin (2006) ‘On the Middle Path: the Social Basis for Sustainable Development in Bhutan’, *Netherlands Geographical Studies* 352. Utrecht: Copernicus Institute for Sustainable Development.

to an extent, it is still the case. This makes sense due to subsistence living and interdependency of people and the need for preserve community relationship and vitality where winning has no place but sacrifices, compromises and tolerance are the norms. Therefore, in Bhutan out of court settlement such as mediation has always been valued higher than retribution and the need of sanctions. This is due mainly to the influence of Buddhism on the thoughts and behaviors of the people to refrain from harming any sentient being and tread non-violent *Middle Path*. The method of resolution of disputes through mediation conforms to the give-and-take, balanced strategies that avoids the extreme measures.

Mediation is widely practiced in the communities. This not only diverts a number of cases from the courts, but it also help preserve peace and harmony and strengthen community vitality – one of the nine domains of Gross National Happiness (GNH) philosophy. The incriminating impact of the adversarial litigation system is not suitable for small, close-knit and interdependent communities. An excessive focus on material development and the accompanying divisive impacts of adjudication of disputes are known to weaken community vitality and social unity.³⁷ Bhutan is a Buddhist country. Buddhism is a religion of peace, harmony and moderation. Therefore, no dispute resolution system can be more compatible with it than the mediation, which tries to satisfy the needs concerns and worries of both or all the parties – leading to win-win outcomes thereby enabling the parties to return and live as friends and neighbors to their community forever. As the mediation becomes more facilitative rather than evaluative, it will spare the people and the country a lot of expenses of time, money and agony. More importantly, it will enhance the social capital; strengthen community vitality and national unity, for Bhutan to remain a truly happy country forever.

37 See Thinley, T. (1998) 'Values and Development: Gross National Happiness', Speech delivered at the Millennium Meeting for Asia and Pacific in Seoul, Republic of Korea 30 October –1 November.

*Child Justice in Bhutan: A Need for Awareness and Advocacy*¹

Introduction

The Bhutanese legal system has come a long way due to the continuous reforms initiated by our successive visionary monarchs, who said that every child is a unique and valuable human being, in whose hands the future of the country lie. Therefore, our children and youth are considered as a precious national resource. Given their importance it is also equally important for us to create the right conditions and conducive environment where they can realize their full potential. Realizing the need for recognition and protection of the rights of the children, Bhutan ratified the *Convention on the Rights of the Child* (CRC) of 1979 in 1990 without any reservation. In order to demonstrate commitment to protecting the rights of children and discharging our obligations in accordance with the philosophy of the said Convention, the Parliament of Bhutan in its 7th Session enacted the *Child Care and Protection Act 2011* (Act). It is a comprehensive document whose provisions are aligned with that of the provisions and fundamental principles of the CRC. Therefore, it is important for the Bhutanese legal system to keep abreast of the development in this area of law to honour our commitment as well as secure and protect rights of our children. This Paper seeks to examine how far we have come in terms of developing of the laws related to the protection of the rights of the children in our country.

The Age and Liability of Children

First, let us see what we understand by the term ‘child’, especially with reference to the *Child Care and Protection Act 2011*. According to the Act, a child is a human being who has not attained the age of 18 years. The age of the child is ascertained from the official records maintained by the government, such as health cards, birth certificates and census registration documents. In the absence of such documents of evidence of the age of the child, testimonies of relevant officials are relied upon considering

1 Contributed by Tharchean.

the physical appearance of the child. Expert medical opinion and other relevant evidence may be also relied upon.² The Act stipulates that a human being irrespective of sex is a child who has not attained the age of eighteen years. The age of the child becomes an issue especially when the child comes in conflict with the law or commits an offence - in order to fix the criminal liability.³

An act for which a child is charged for violation of penal law should be declared as an offence by a statutory law enacted by the Parliament. If the act is not declared as an offence by the law, the commission of such act shall not constitute the breach of the law. Even when an inquiry or proceeding has been initiated against a child in conflict with the law and during the course of such inquiry or proceeding, if the child ceases to be a child, the inquiry or proceeding shall be continued and the orders may be made in respect of such person as if such person is a child.⁴

It is clear that primarily, the childhood is to be determined based on the age of the child, not based on his/her physical growth and development. Thus, once the age of the child is determined, the rights of the child as guaranteed by the *Constitution of the Kingdom of Bhutan* and the *Child Care and Protection Act 2011*, and the CRC, need to be ensured and safeguarded.

If the age of the child who has been accused of breach of penal law or comes in conflict with the law is established to be below 18 years and the commission of alleged offence was proved beyond reasonable doubt⁵ by the prosecuting agency in accordance with the due process of law, the child will be liable only for half of the sentence prescribed for the offence.⁶ Depending on the nature of offence, the various alternative sentencing measures may be considered by the courts. In case of trivial or petty offences, the Court may admonish or reprimand the child, and dismiss the prosecution.⁷ Even when a child is found guilty of the charged offence, a

2 See section.17

3 See section. 18

4 See section.19

5 *The Constitution of the Kingdom of Bhutan*, Article.7, Section.16.

6 *Penal Code of Bhutan, 2004 (amended)*, Section.115.

7 See section.162

court may send the child home to facilitate and promote the reintegration of the child into the society.⁸ Besides, the Act also authorizes the Court in appropriate cases, to grant probation and suspension of sentence,⁹ community service,¹⁰ and payment of *Thrimthue* for the offence.¹¹ These concessions are not available for the adult offenders. It is thus evident that the Bhutanese legislation has fully taken into consideration the well being and the best interests of the child to enable them to grow up into a productive citizen.

Protection of Children

Children represent the next generation of our society. As the nature of childhood is associated with immaturity, they are not endowed with the requisite capability to protect and defend his or her rights and interests. They are the most vulnerable section of the society. It is very important that the rights of the children are respected, safeguarded, and protected since they are unable to manage their affairs, and create conducive environment for their improvement and development. Children are the greatest gift to the humanity,¹² and indispensable asset to country as future leaders. Therefore, we must advocate their rights and defend them from violations and abuses.¹³ Besides, children are unable to exercise their choices; this compels them to accept the choices made for them by the adults. However, even with the best intentions, the choices made by adults are not the best choices for the children.¹⁴ Given the heavy weight of responsibility lying on their shoulder, it is important that we prepare them for the greater task of nation-building and attend to their needs, problems, concerns and interests. Based on the principle of *doli incapax* the penal law has special

8 See section.163

9 See section.165

10 See section. 171

11 See section.172

12 Justice Dipak Misra, “Child Rights - Understanding the Concept, Philosophy and Role of Courts in Protection of Child Rights” (2012) 8 Delhi Judicial Academy Journal at 3.

13 Khalil, G. (2001) *Child Rights: The Historical Evolution* (Chemaly & Chemaly), at 16; Dr. Ghassan Khalil had conducted ToT on Child Justice in Paro, Bhutan. Presently, he heads the UNICEF Office in Georgia.

14 Ibid. at 93.

consideration for the children offenders. A child is presumed to be not fully endowed with discretion. The child has not attained sufficient maturity of understanding and the ability to appreciate the nature and consequences of his or her conduct. Therefore, this principle recognizes the difference between the commissions of an offence by a child from an adult person.

Recognizing the importance of the child as a complete human being, William Wordsworth, an English poet, said that “Child is the father of man”¹⁵ and John Milton had remarked that, “Child shows the man as morning shows the day.”¹⁶ Similarly, the great American thinker, Emerson, stated that, “When a child is born I see the growth of human race.”¹⁷ In full recognition of the value and the importance of children, the Supreme Court of India in *Sheela Barse v. Union of India*¹⁸ observed that, “If a child is a national asset, it is the duty of the State to look after the child with a view to ensuring full development of its personality.” In *Sheela Barse v. Secretary, Children’s Aid Society*,¹⁹ the Court noted:

Today’s children would be the leaders of tomorrow who would hold the country’s banner high and maintain the prestige of the nation. If a child grows wrong for want of proper attention, training and guidance, it would indeed be a deficiency of the society and of the government of the day. A problem child is indeed a negative factor. Every society must, therefore, devote full attention to ensure that children are properly cared for and brought up in a proper atmosphere where they could receive adequate training, education, and guidance in order that they may be able to have their rightful place in the society when they grow up.

15 Ibid. at 1.

16 Ibid.

17 Ibid.

18 1993 (3) SCALE 417.

19 1987 AIR 656, 1987 SCR (1) 870.

In *Gaurav Jain v. Union of India*,²⁰ the Court enunciated that;

Children of the world are innocent, vulnerable and dependent. They are all curious, active and full of hope. Their life should be full of joy and peace, playing, learning and growing. Their future should be shaped in harmony and cooperation. Their childhood should mature, as they broaden their perspectives and gain new experience. Abandoning the children, excluding good foundation of life for them, is a crime against humanity. The children, cannot wait till tomorrow, they grow every day, along with them grows their sense of awareness about the surroundings. Tomorrow is no answer, the goal of their present care, protection and rehabilitation is the need of the hour.

The President of the Bhutan National Legal Institute, Her Royal Highness, Ashi Sonam Dechan Wangchuck in the opening address of the three-day National Child Justice Conference held in Thimphu from 13 - 15 November 2013 stated that:

Promoting rights of the child and enhancing child justice had been closest to her heart. If we were to take our nation from a smooth democratic transition into a future of even greater success, we could not, without realizing and considering the roles of our children in nation building. All key agencies working towards the protection, promotion, and enhancement of rights of child and child justice system in the country had to come together sharing a common purpose of fostering responsible citizenship. As the future of the country lies in the hands of the youth, it is important for the present generation to take care of the future generation as the latter matter to the former, and help them realize their sound development of personality for the well being of the nation.

Evolution of Child Rights

The history of evolution of the child rights is interesting. Till the eighteen century,²¹ a child was not recognized as a human being, with inherent human values. Let alone their rights, children were viewed differently, subjecting

20 1990 AIR 292, 1989 SCR Supl.(2) 173.

21 *Supra* note 14, at 9.

them to various forms of adverse treatments, such as “dipping them in urine to make them acquire immunity against evil spirits, pulling their tongues out, and intoxicating them with alcohol to calm them down.”²² Such practices were not healthy particularly for the young children. It harmed their physical and psychological growth. People also meted out inhuman treatment, for instance, the “children were thrown from high rocks or were put at birth into cold water in order to test the strength of their physical constitution. If their delicate bodies were unable to bear the cold, they would not be reared. Only those with a sturdy physical constitution deserved to live, in order to become strong warriors in the future.”²³ Some societies regarded, wife and children as the property of the husband, and they served at his will without corresponding duty toward them from the former.²⁴

As the civilizations progressed, the awareness of the rights of the children grew, especially with the thinkers and philosophers. Among others, the French Philosopher Jean-Jacques Rousseau acknowledged the childhood and declared that:

*Nature required the human being to be a child before becoming an adult. Therefore, the childhood phase should be respected as a natural and positive human phase when the child grows progressively, while necessarily allowing him to realize the natural evolution of his childhood.*²⁵

Rousseau acknowledged that childhood is a distinct phase from the adulthood with specific needs. Hence, he regarded the child as an independent entity with special requirements.²⁶ Therefore, he paved the way for the healthy development of children’s rights in the world, which was further reinforced, with the establishment of the United Nations Organization (UN) in 1945.

The birth of the UN helped to address the children’s issue by bringing it on its agenda. Children’s rights were considered as human rights, and with

22 Ibid.

23 Ibid at 10.

24 Ibid at 13.

25 Ibid at 15.

26 Ibid.

time, it succeeded in becoming an independent social category.²⁷ Gradually, the child rights movements gained momentum and were successful in adopting the CRC.

The Declaration of Geneva 1924, the Declaration of the Rights of the Child 1948 and the *United Nations Declaration of the Rights of the Child 1959* were formulated based on the principle that “Mankind owes to the child the best it has to give,” and the CRC has been founded on the principle of the “best interests of the child.” This principle requires that the best interests of the child guide all actions concerning or affecting him or her.²⁸ Thus, the core values of the CRC constitute the following:

- a) The right to non-discrimination (art.2);
- b) The best interests of the child as a primary consideration (art.3);
- c) The right to life, survival and development (art.6); and
- d) The right to express views and to have these views taken into account in particular in all judicial and administrative proceedings (art.12).

The Royal Government of Bhutan, in its commitment to protect, promote and safeguard the rights of the child, ratified the CRC in September 1990 without any reservations. Being a member of the UN, and acknowledging her obligation toward the fulfillment of the CRC, Bhutan adopted the *Child Care and Protection Act* in 2011, with provisions aligned with the Convention. Besides, the *Constitution of the Kingdom of Bhutan* contains various salutary provisions. Article 9, Section 16,²⁹ for instance, mandates the State to provide free education to all children of school-going age up to tenth standard. It is against this bedrock of legal regime that the rights of the children are protected in the country.

Awareness and Advocacy of Child Rights

Due to the physical and mental immaturity, children need special safeguards and care, coupled with appropriate legal protection. The question is ‘who do they need the protection from?’ The answer is obvious. Children

27 Ibid at 17.

28 Ibid. at 113 and *Child Care and Protection Act of Bhutan*, Section.3.

29 *Constitution of the Kingdom of Bhutan*, Article. 9, Section. 16.

need to be protected and safeguarded from men – parents, family and society – from situations that may put children at a risk of harm. It is often the adult people who impact upon the rights of the children. Dr. Ghassan Khalil³⁰ stated that children's problems become greater and more complicated when those who advocate and who defend the children's rights also become violators.³¹ The adults are the ones who directly violate the children's rights by committing offences, among others, such as assault and battery, cruelty and degrading treatment, serving alcoholic beverages, providing narcotic drugs and psychotropic substances, child prostitution and child pornography including child trafficking. They also indirectly use children as their tools in committing offences, namely, making or causing them to beg and using them as shields during armed conflicts. All these acts constitute offences against child and they are now prohibited by the Act.³²

Often people do this unwittingly due to lack of awareness and information. Without the cooperation and the compliance by the adults the rights, safeguards, and protection measures of the child and consequences of violation enshrined in the CRC and the national legislation remain mute spectators.

In order to deepen the understanding of child rights and child justice among the judicial fraternity, law enforcement agencies and relevant stakeholders in the country, the Bhutan National Legal Institute (Institute) organized a three-day *National Child Justice Conference* in Thimphu from 13 - 15 November 2013. The aims and objectives of the Conference were:³³

1. Assess the child justice situation in Bhutan and to explore the areas wherein the relevant stakeholders need to work in close coordination with other actors towards strengthening and promoting child rights in Bhutan in accordance with the existing national laws and the relevant international instruments on child justice;

30 *Supra* note 14 at 16.

31 *Ibid.*

32 *Supra* note, chapter 14.

33 The Conference Material, *Bhutan National Legal Institute*.

2. Develop comprehensive understanding of the international and national standards, practices and norms of child rights in Bhutan and framework on child justice;
3. Share the best practices and experiences in dealing with child rights at both national and international levels with emphasis on prevention of juvenile delinquency, diversion, prevention of re-offending, reintegration, and alternative measures to deprivation of liberty of children; and
4. Develop and agree upon a common framework on priority actions on child justice and coordination mechanism by the various agencies of the government and United Nations Children's Fund (UNICEF) including key stakeholders in undertaking plans and programs through the National Commission for Women and Children at the national and Dzongkhag levels.

The Conference brought resource persons and participants both from within and outside the country and identified areas of future cooperation and collaboration in improving and strengthening the child care and protection mechanism in accordance with the national laws and the relevant international instruments on child rights and child justice in the country.

Similarly, in an effort to strengthen the child justice system in the country, the Institute, in collaboration with UNICEF-Bhutan conducted a Training of Trainers (ToT) Course on Child Justice for the judges and legal officers from the organizations including Royal Bhutan Police, in Paro in 2013. Dr. Ghassan Khalil, a Senior Consultant for UNICEF-Bhutan, facilitated this training.

It was a specialized ToT on Child Justice, which embraced a multidisciplinary approach. It introduced basic concepts, principles, and best practices for children's rights and child justice. The training also provided a deep understanding of the children and juveniles' issues, and equipped the participants with necessary skills to appropriately deal with children, and other actors of the child justice system in order to protect and safeguard the rights of children.³⁴

34 *ToT Material developed by Bhutan National Legal Institute.*

In order to advocate and promote the child rights; and enhance the knowledge on the child rights and the duties of the people in protecting and safeguarding the child rights in the country in accordance with the CRC and the national legislation, Institute established Law Clubs in the schools³⁵ and conducted advocacy and dissemination programs³⁶ to the people.

The National Women and Child Commission (NCWC) as the competent authority under the *Child Care and Protection Act 2011* has also been working persistently at all levels to provide timely and effective assistance to women and children in difficult circumstances and children in conflict with the law. It also provides protection services such as counseling, legal information, instant facilitation and referrals around the clock.³⁷ This is expected to bring about the change in the societal attitudes towards children, and recognizing and respecting their legal rights and freedoms, so that children grow up in a healthy environment and become productive citizens.

Conclusion

Child's right is defined in many different ways within a wide spectrum of social, religious, civil, legal and political rights. Children are one of the most vulnerable groups despite their importance in the society. Due to tender age, a child lacks maturity and capability to understand and defend one's rights from violations. Children are the future of our country. Their capacity to take the country forward depend on how well we protect their rights. When faced with a situation of danger or where a child is exploited, a child being innocent does not understand its rights and know how to protect themselves. It is for this reason that child rights laws are implemented. Fortunately, the child's rights have become much clearer now than it ever was in the past.

35 *School Law Clubs Inception Document*, Bhutan National Legal Institute, 2012 and *School Law Clubs' Guidelines*, Bhutan National Legal Institute, 2012.

36 Tharchean, 'The Law and Dissemination Programmes,' (2017) Vol. VII *Bhutan Law Review* 19

37 *Kuensel and Bhutan Broadcasting Service Corporation*.

On the part of our children and youth, they have to be mindful and grateful of the fact that they are given care and protection by the laws. They are a precious resource of the nation, and they have to take the nation forward. That is why it is important that they should not abuse the love, care and protection afforded by the national laws and international legal instruments, instead, they should consider it seriously and regard the childhood phase as an opportunity to grow up well to enable them to assume a constructive role at adulthood befitting to oneself and the nation.

Nangkha Nangdrig (Mediation): A Panacea for Dispute Resolution in Bhutan¹

Introduction

It is the noble vision of His Majesty the King to ensure that potential parties to the disputes enjoy the opportunity to resolve their conflicts on a mutually acceptable basis through mediation. This will sustainably promote peace and harmony in the society for all times to come. The Alternative Dispute Resolution (ADR) is a concept that is enshrined in Article 21(16) of the *Constitution of Kingdom of Bhutan 2008* (Constitution). It is known as *Dham Kha Chen gi Khoen Dhum*. The ADR is now governed and regulated by the *Alternative Dispute Resolution Act of Bhutan 2013* (the ADR Act). The government has recently established an independent body - *Alternative Dispute Resolution Center* (ADRC) and appointed its Chief Administrator to administer the affairs and business of the center and frame related policies and rules. The arbitration, both domestic and international, conciliation, mediation and negotiation are covered by the *ADR Act* although terms for arbitration, conciliation, mediation and negotiation in *Dzongkha* are confusing. In this Paper, I elucidate the inherent benefits of mediation of disputes- especially in a collective and community-oriented society, and its unsuitably to some categories of disputes.

Mediation in Bhutan

Bhutan has a long history of resolving disputes through ADR mechanisms, such as mediation. According to some sources, traditional mediation, commonly known as 'Nangkha Nangdrig' has been an integral part of Bhutanese culture and tradition, dating as far back as the 7th century. The formal justice system was established only in the 1960s. Prior to that, for centuries mediation was the primary dispute resolution system. It was mainly based on the principles of *compassion and peaceful coexistence* of

1 Contributed by Pema Needup.

the community-oriented Bhutanese society. This traditional practice has declined over the last decades. However, recent efforts have borne fruits to revive it.²

The legal formalization of the practice of mediation in Bhutan was enshrined in sections Da 3-1 and Da 3-2 of the *Thrimzhung Chenmo (Supreme Laws) of 1953*. The option to resolve civil disputes through mediation is now incorporated in section 150 of the *Civil and Criminal Procedure Code (Amendment) Act of Bhutan 2011* (CCPC). Now, almost all the statutes contain provisions requiring disputes to be resolved through mediation process first, before resorting to litigations. In addition, judges are mandated to inform litigants of their right to mediate their disputes out of court. While the importance of negotiated settlements is recognized by the judicial system, there is no procedural mechanism established for conducting the mediation process. Thus, mediation procedures have varied widely, depending on who conducts the mediation and local customs and practices.

The *Bhutan National Legal Institute* (Institute), the research and training arm of the Royal Court of Justice, the Judiciary of Bhutan began training local government and community leaders, and other relevant people in the professional mediation of disputes since 2012. It has also been educating the public about the beneficial use of mediation in the community under the initiative of Her Royal Highness, Ashi Sonam Dechan Wangchuck. In conformity with modern mediation standards and trends, the Institute has been promoting interest-based and facilitative mediation in the country. The Local Government and community leaders are now fervently engaged in the mediation of community disputes, which erupt in their respective areas.

2 See Yargay, L.R. 'Mediation in Bhutan: 'Raising Heads and Saving Faces'', *Bhutan Law Review*, (2014) 8: 15-18.

As per the *National Mediation Report 2017*, hundreds of cases are diverted from mainstream judicial system to win-win outcomes, thereby cementing the social bond and relationships between the citizens.³ In addition, several private mediation services are sprouting in the country, especially in the urban areas. At the same time, the traditional mediation system has been reinvigorated with community mediation services, which are always provided free of cost.

The judiciary is also poised to introduce and institutionalize the Court-Annexed Mediation (CAM) system in all the courts in the country, whereby the judges can refer appropriate civil cases to the Court-Annexed Mediation Units (CAMU). This creates another opportunity for the people to resolve disputes amicably with the assistance of the in-house mediation services of the courts. This will not only help courts to decrease the dockets, but enhance access to justice.⁴ In the words of one Texas judge, *“I am interested in mediation because the cases settle earlier, and that gives me more time to be judge, to spend that time I can gain to improving the quality of justice in my court.”*

Benefits of Mediation

There is no universally accepted definition of mediation. It is a process of assisted-negotiation in which a neutral third party (mediator) who has limited or no authoritative decision-making power assists the parties to voluntarily reach a mutually acceptable settlement of the issues in dispute.

Mediation and litigation are polar opposites. Parties who opt for trial have relatively little control over either the process or the outcome. The trial proceeding is a formal and public one, conducted under detailed procedural and evidentiary rules, with a judge in control. A judge decides the outcome, and in doing so is bound to follow established legal principles

3 See *National Mediation Report 2017*, Bhutan National Legal Institute, Thimphu.

4 See Yargay, L.R. and Chedup, S. ‘The Court-Annexed Mediation: Enhancing Access to Justice through the In-house Court Mediation Services in Bhutan’, *Bhutan Law Review*, (2018)10: 92-111.

and procedures. It pits the disputing parties against each other, causing much ill will amongst them. One of them has to win and the other has to lose. This not only harms their social relationship, but also the economic conditions of the concerned parties. Nevertheless, the process of litigation is usually expensive and cumbersome causing a lot of delay and unnecessary costs leaving a stain and stigma of enmity on both the parties.

Referring to the downside of the litigation, President Abraham Lincoln has profoundly stated:

*Discourage litigation;
Persuade your neighbours to compromise whenever you can;
Point out to them how the nominal winner is often a real loser;
– in fees, expenses and waste of time.*

Similarly, Samuel Johnson has said:

*The plaintiff and defendant in an action at law are like two men
ducking their heads in a bucket, and daring each other to remain
longest under water.*

Conversely, mediation is often voluntary, faster, cheaper, informal, confidential, and typically, the mediator has no authority to make a binding decision unless both parties agree to give the mediator that power. This means that the parties have greater flexibility and control over the outcomes that is mutually satisfactory (win-win) to both parties. Because of its collaborative, rather than adversarial process, and because mediation is not inherently a win-lose process, important relationships can often be saved. Finally, for mediation produces better results more quickly and at a cheaper stake, compliance with mediated dispute resolutions is generally higher than with lawsuits. Therefore, Joseph Grynbaum has aptly stated, “An ounce of mediation is worth a pound of arbitration and a ton of litigation.”

Process and Stages of Mediation

Mediation is an informal and flexible dispute resolution process. There is no best way to mediate a dispute. Mediation process varies with mediators and the parties, the conflict and mediation program. While stages of mediation are very important, none of our laws mention them. There are no guidelines on the mediation process as yet. Broadly, mediation stages can be divided into five stages:

1. Pre-mediation or Getting to the Table (Planning);
2. Opening the Mediation (Mediator's opening statement);
3. Exchanging Information (Parties' opening statements or story-telling);
4. Identifying and Negotiating Solutions (Identifying underlying needs/interests and generating options); and
5. Finalizing Settlement Agreement.

Role of the Mediators

The role of a mediator is contained in Section 172 of the *ADR Act*. The mediator assists and facilitates the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their disputes. The mediator does not impose his or her views or solution on the parties. Mediator only facilitates the process, and solution has to come from the parties. A mediator has no right or duty to provide legal advice to the parties even if he/she happens to be a lawyer. The parties should seek legal advice solely from their legal counsel. During impasse, a mediator may evaluate the case, give the parties an idea of what the consequences might be if the case is taken to court and then give the parties a few ideas or possible solutions that could help resolve the dispute.

Even though mediation is a party-centered process, the mediator has to take charge of the process. A mediator has to maintain a high degree of confidentiality at all aspects of the mediation process. Confidentiality

is an essential ingredient of effective mediation. The principal statutory authority for mediation confidentiality is contained in section 169 of the ADR Act and section 30 of the *Evidence Act of Bhutan 2005* (Evidence Act). It provides that anything said or transpired in the course of negotiated settlement or during mediation shall not be admissible as evidence in a court of law. In the same vein, the parties cannot call a mediator as a witness to testify before the court of law.

Cases which can be Mediated

Ideally, almost all disputes of civil nature can be mediated if the parties are willing to try although it may not be suitable for every case. There can be misapprehensions about the cases, which can or cannot be mediated. Generally, no criminal cases can be mediated. However, some non-violent crimes like those involving verbal harassment or assault may be successfully mediated. The parties may also negotiate the claims for compensatory damages if they are willing to compromise. In Bhutan, matrimonial cases without the marriage certificates cannot be mediated, without the leave of the court. This is spelt under section Kha-9.3 of the *Marriage Act of Bhutan 1980* (Marriage Act). Further, no parties can mediate a case, if a court of competent jurisdiction has already decided the case, or is pending or *sub judice* before a court.

Mediation Agreement

If the parties resolve the disputes mutually, the mediator may help the parties to draft the settlement or mediation agreements, usually on the same day.⁵ Unless, the agreements are contrary to law, they are upheld by the courts and enforced. Unlike the general contractual agreements, mediation agreements do not require the attestation and signature of the witnesses. The agreements are signed by the mediator and the parties; and the counsels if any⁶. Sections 35 and 36 of the *Evidence Act* have no application to the mediation agreement. Parties cannot raise objection to the validity of settlement agreement within ten days of the agreement because it is an agreement by voluntary consent.

5 *Alternative Dispute Resolution Act of Bhutan, 2013* s.174 and 175.

6 Section 150.3 of the *Civil and Criminal Procedure Code (Amendment) Act of Bhutan 2011*.

Challenges in Mediation

Although, it is informal, cheaper and faster, mediation of disputes is more difficult than the adjudication of cases. Most people think that mediating dispute is as easy as splitting an orange into two halves, or dividing it fifty-fifty. In the courts, established legal principles, procedures, legal provisions, rules and statutory Acts guide the judges. In mediation, a mediator cannot follow any of these, save his diplomatic and persuasive tactics and strategies. Section 171 of the *ADR Act* provides that the provisions of the *CCPC* and the *Evidence Act* may not bind negotiated settlement proceedings. Without little or no coercive tools and force of the laws in their hands, the mediators must solely rely on their diligence, skills, knowledge and patience, empathy and the desire to help the parties and bring peace in the community.

Despite the obvious advantages, mediation has many flaws. It cannot solve all and every kinds of civil disputes. Certain types or categories of disputes do not lend themselves well to mediation. Mediation may not be successful if the mediators are inexperienced, untrained and unskilled for some cases as it requires specific knowledge and expertise in that field. Similarly, mediation is not suited to a case where at least one of the parties has a strong aversion to the process. However, parties who are merely indifferent to or not especially keen about mediation still frequently benefit from the process and many cases settle even in these circumstances. On the other hand, where the aversion to mediation is particularly strong, then the process will likely fail. Mediation will likely fail if the parties do not participate in the negotiated settlement proceeding in good faith with the intention to settle the dispute. A party, for instance may attempt mediation, not to settle the dispute, but to carry out an illicit discovery, i.e., to test the opponent's weakness; to tease out disclosure of an improvident settlement position to later advantage; to intimidate the opponent into abandoning the case; or to further some other improper purpose, such as to disclose publicly that mediation is ongoing.

Mediation also may not be effective if there is a power imbalance. The danger is that weaker parties will be unable to assert their position or needs and will accede to agreements, which are not in their best interests. Parties to mediation may or may not be represented by legal counsels. If a party to a dispute is self-represented, then the unrepresented party is

at a disadvantage and will seek to rely on the mediator for advice either expressly or implicitly. This places the mediator in an awkward position.

Further, mediation may not be effective if the confidentiality is at stake. Confidentiality lies at the very heart of mediation. Confidentiality of mediation process should be maintained at all stages. Mediation may not be fair and just if a mediator fails to identify the underlying needs and interests of the parties. Seemingly, a dispute may be resolved but outcome may not be win-win to the parties. It may simply result in cutting an orange into two halves. Mediation may not be suitable if the cases in which one party seeks to clarify the law or requires a binding precedent or a judicial determination because mediation does not produce any rulings. If someone wants to make an impact on broader society or send a public message to a community or another party, mediation is not the right choice because it is a private and confidential process. Where injunctive relief is necessary to protect one party, a lawsuit may be a better choice.

Finally, in certain cases the parties simply want a judicial determination of their rights, win or lose; not a mediated resolution. In that event, they are entitled to a fair trial and ought not to feel pressured in accepting a compromise they are not interested in. Parties are entitled to have their rights decided in a court with appropriate procedural safeguards.

Conclusion

Bhutan is small country where people know each other and live together as a collective community in an interdependent and peaceful atmosphere. For all its advantages and effectiveness, adjudication of disputes in the courts results in win-lose outcomes, which affect the social harmony. Mediation was the primary dispute resolution tool used by our community for centuries. When the modern professional courts came, the customary practice risked decline. However, it is widely used in the rural areas and resorting to the courts is still the last resorts. In the urban areas, the mediation is beset with the lack of trained or professional mediators both within and outside the courts.

It is at this is time that the Bhutan National Legal Institute stepped in with the revival plans and strategies. The mediation system has once again become very vibrant in the community with the nation-wide training of the local government and community leaders. With the plan to introduce Court-Annexed Mediation services in the country, the future of mediation in the country is very bright. Though it is not a panacea for all categories of disputes, if conducted effectively, mediation affords parties opportunities to access the soft justice quickly and at relatively low cost compared to the complex and expensive court processes. Therefore, it is still *“better to lose in the village than to win in the court of law”*, as it has been for centuries.

Child Justice in Bhutan: Challenges and Opportunities¹

Introduction

Bhutan has made a commendable progress in protecting the rights of children since the adoption of the *Convention on Rights of the Child* (CRC), which was further, distilled into our domestic legislation, through the enactment of the *Child Care and Protection Act of Bhutan 2011*.

Bhutan ratified the CRC without any reservation on 1 August 1990 becoming the 18th State Party. The *Optional Protocol* to the CRC on the *Involvement of Children in Armed Conflicts* 2002 was ratified on 9 December 2009, and the *Optional Protocol* to the CRC on *Sale of Children, Child Prostitution and Child Pornography* 2002 was ratified on 26 October 2009. However, Bhutan has not yet signed the *Optional Protocol* to the CRC to *Provide a Communications Procedure* 2014. Bhutan has strengthened its framework on child protection, with different stakeholders involved in various stages of child protection.

Although there are numerous legislations, with different implementing agencies in place, challenges in this field, still remains. Issues such as corporal punishment in schools, monastic institutions, at homes, and child marriages continue to impede the full enjoyment of children's rights. Bhutan is a country that is fervently devoted to protect, promote and safeguard the rights of our children. She must address such issues to ensure that, she not fulfills only her international and national obligations, but also to build firmer foundations of our children to allow them to grow in a harmonious environment. In this Paper, I look at the challenges and opportunities for child justice in Bhutan.

International Child Rights Instruments

The International Community has been responsible for strengthening the rights of children internationally. Considering that both soft law and hard laws were important to reinforce their commitment, they have enacted different child right instruments:-

1 Contributed by Phuntsho Wangchuk.

- a) *International Convention for the Suppression of the Traffic in Women and Children 1921*
- b) *League of Nations Declaration on the Rights of the Child 1924*
- c) *Universal Declaration of Human Rights 1948*
- d) *Declaration on the Rights of the Child 1959*
- e) *International Covenant on Civil and Political Rights 1966*
- f) *International Covenant on Economic, Social and Cultural Rights 1966*
- g) *Convention on the Rights of the Child 1989*
- h) *Optional Protocol to the CRC on Sale of Children, Child Prostitution and Child Pornography 2002*
- i) *Optional Protocol to the CRC on the Involvement of Children in Armed Conflicts 2002*
- j) *Optional Protocol to the CRC to Provide a Communications Procedure 2014.*

Notwithstanding the ratification of CRC by Bhutan, followed by numerous child rights-based legislations, some challenges still impede the full realization of children's rights in Bhutan.

Child Marriage

Child marriage, or marriage before the age of eighteen, is a gross violation of the rights of children. Although the CRC does not explicitly mention about it, child marriage inherently is a stumbling block to the full enjoyment of the rights of children. Child marriage strikes at the basic tenets of child rights; infringes on their well-being, survival and development, non-separation from parents, right to life, education, and health, among others. Child marriage has severe consequences on children, particularly girls. It jeopardizes a girl child's youthful development, in most cases, due to early pregnancy, which results in prenatal complications, losing of educational and career opportunities. As marriage breed contempt, many young brides are susceptible to experience domestic violence at an early age. Factors that encourage and force children to marry at early age include poverty, local customary practices, illiteracy and reasons of personal security. According to United Nations Children's Fund (UNICEF) Bhutan, 30.8

per cent of women in Bhutan get married before the age of eighteen.² The legally marriageable age in Bhutan is eighteen years for both men and women- the violation that results in the denial of the *Marriage Certificate* and imposition of fines amounting to *Ngultrums* 300 to 1000. These trends of early marriages happen in the remote parts of the country. Girl children are married off early to reduce the burden of education, and ease their parents in their household chores. Mostly, the husbands work outside the four doors; and the role of women are reduced to raising babies and making a home. However, early marriage in girls increases the risk of domestic violence, divorce, single parenting, including other risk factors.

Child Labour

The International Labour Organization (hereinafter ILO) labels all intolerable work carried out by children as child labour, which denies children's right to education and opportunity for physical and psychological development.³ Some of the main causes of child labour are poverty, illiteracy and lack of public awareness. Child labour violates children's right to health, education, growth and development. Scientifically, it has serious physical as well as psychological consequences on children. It exposes children to different working conditions, including hazardous working conditions that may terminally affect the health of children. A study found out that a child of seven to eight years of age, if involved in household chores, are exposed to substantial risk of harm if they begin household chores.⁴ In South Asia Region, 6.3 percent of children between 16 to 17 years of age are employed, with 46.7 percent engaged in family work, 26.2 percent engaged in work for pay and 20.1 percent in unpaid work.⁵ Children from rural areas are more likely to be employed and less likely to attend school, 7.4 percent of rural children between 7 to 17 years of age are employed

2 Child Protection, Adolescent and Youth. *UNICEF Bhutan*. Retrieved from <http://www.unicefbhutan.org.bt/our-programmes/child-protection-adolescent-and-youth/>

3 Humbert, F. (2009). *The Challenge of Child Labour in International Law*.p.18.

4 Barth, F., and Wikan, U. (2011). Situation of Children in Bhutan: An Anthropological Perspective. *The Centre for Bhutan Studies*. p.21.

5 Khan, S. and Lyon, S. (2015). Measuring Children's Work in South Asia: Perspectives from national household survey. *International Labour Organization*. p.45.

compared to 3.6 percent of urban children belong to the same age group.⁶ Notwithstanding the fact that the minimum age of employment is eighteen years of age according to the *Labour and Employment Act of Bhutan*, children aged from 13 to 17 are permitted to work in certain conditions by the *Acceptable Forms of Child Labour Regulations 2009*.

Corporal Punishment

The CRC provides that, “State Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.”⁷ In line with the provision of the CRC, numerous measures have been introduced to prohibit corporal punishment in schools such as the *Notification of the Ministry of Education, 1997*, the *Teacher and Student’s Code of Conduct of 1997*, a Resolution adopted by the 11th Annual Education Conference in 2008, and the *Guidance on School Discipline of 2011*.⁸

However, the *Penal Code of Bhutan* authorizes the use of force for the purpose of care or discipline. The use of force by parents, guardians, or care giver of an incompetent or incapable persons is justified, when the force is used to safeguard or promote the welfare of such persons including the prevention of serious misconduct; the force used does not cause death or serious injury; and the force used is not more than which is necessary.⁹ The *Child Care and Protection Act 2011* also provides that, “any corrective measure shall be culturally appropriate and in accordance with rules framed for discipline of children.”¹⁰

ILO Membership

Bhutan not a Member of the International Labour Organization (ILO). It is one of the few UN member States, which is not a member of the ILO. The ILO has adopted numerous conventions pertaining to the economic exploitation of children. Bhutan is not a party to the ILO Convention

6 *Ibid.*

7 See Article 19(1) of the CRC.

8 Prohibition of Corporal Punishment of Children in South Asia: a progress review. (2011). *South Asia Initiative to End Violence Against Children (SAIEVAC)*.p. 17

9 See Section 109 of the *Penal Code of Bhutan 2004*.

10 See Section 214 of the *Child Care and Protection Act of Bhutan 2011*.

No.138 concerning the *Minimum Age for Admission to Employment of 1973* and the *ILO Convention No.182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour of 1999*.

Adoption of the OPIC

While Bhutan has adopted the *Optional Protocol to the CRC on Armed Conflict* (OPAC) and the *Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography* (OPSC), it has not ratified the *Optional Protocol to the CRC on a Communications Procedure* (OPIC). Therefore, Bhutan must consider ratifying the OPIC. Ratification of the OPIC would further facilitate the filing complaints by or on behalf of an individual or group of individuals within the country's jurisdiction if there are any violations on the rights of the child.¹¹ This will also streamline and restructure the reporting mechanism on issues affecting children. The OPIC empowers the Committee to transmit a request to the concerned State Party to take necessary interim measures to avoid irreparable damage to the victim(s) on receipt of such communication pertaining to violation of a child's rights. Written explanations or statements providing clarification on the matter and the remedy that the State Party may have provided need to be submitted to the Committee within six months.¹²

The OPIC also provides for the Committee to make friendly settlement with the concerned party with the view to respect the obligations contained in the CRC and the *Optional Protocols*.¹³ Therefore, ratifying the OPIC would facilitate filing of complaints in cases of violations of a child's rights to the Committee. The absence of such a mechanism would curtail concerned individuals or groups of individuals to communicate to the Committee on the alleged violations of the rights of children provided under the CRC, and the two Optional Protocols – OPAC and OPSC. Adoption of the OPIC would contribute in realizing better protection of rights of children in Bhutan.

Effective Implementation of Existing Laws

The fundamental objective in implementing international norms and standards on children's rights is to improve their lives.¹⁴ Effective

11 See Article 5 of the OPIC.

12 See Article 8(2) of the OPIC.

13 See Article 9(1) of the OPIC.

14 Hanson, K., and Nieuwenhuys, O. (Eds.). (2012). *Reconceptualizing Children's Rights in*

implementation of international human rights instruments and domestic legislations is, therefore, the basic foundation towards realizing the protection of children's rights. As discussed in the foregoing chapter, although numerous child related domestic legislations have been enacted and the enforcement agencies identified, lack of effective implementation of legislations have been a major hurdle.

Amendment of the Laws

Some legislation, which partially discusses child rights have been in existence for for a long time. Although amendments have been made to those laws, some provisions still remain the same. Laws like any other phenomenon, laws should change with times to suit to the contemporary needs. *The Marriage Act of 1980* exemplifies the best legislation of the times, which portrays coherence of language, and the content, but the fines, which is still invoked today is four decades old. Compared to present economic scale, the fines have become very minimal. Given the minimal amount of fine for child marriage provided by the *Marriage Act*, it would not deter people from arranging child marriages.

As mentioned in the previous chapter, some legislations, which talks about the rights of children partially, are obsolete to serve purpose of the present times. According to Davis, due to vulnerability and incapacity of children to make decisions or act for themselves, laws have been protective of them.¹⁵ *The Marriage Act of Bhutan* and the *Inheritance Act of Bhutan 1980* need to be relooked and revised. A robust and definite set of inheritance rights for children is necessary to ensure they get share of ancestral and family properties at the time of divorce or death of their parents. A well defined set of inheritance rights would not only be beneficial to the courts to render fair and impartial justice but also entitle children to claim their right of inheritance. Presently, right to inheritance is based on the will of the parents to bequeath the property.

Awareness and Education

Financial inadequacies, coupled with lack of human resource have resulted in creating less awareness and education programs on child rights. In many parts of Bhutan, especially the people residing in the rural areas are still

International Development: Living Rights, Social Justice, Translations. pp.16-17.

15 Davis, S.M. (2011). *Children's Rights under the Law.* p. 426.

unaware of child rights and legislations thereto. In light of the above issues, following recommendations are proposed.

Dissemination of information on the rights of child is an important method of creating awareness and education on children and their rights. On the similar matter, it is important for the implementing agencies to disseminate and advocate creating awareness on the provisions of CRC, and other international child right instruments, including regional child rights instruments and domestic child rights' legislations to children, students, parents, heads of monastic institutions, guardians, caregivers and general masses in rural parts of the country.

ILO Conventions

One of the objectives of the ILO is to promote the protection of children.¹⁶ ILO Conventions aims to prohibit economic exploitation of children and child labour. *ILO Convention 138* states about the *Minimum Age for Admission to Employment*. This can be achieved by strengthening a national policy designed to ensure the abolition of child labour to allow fullest development of children.¹⁷ Another important ILO Convention is the *Convention No.182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour of 1999*. These Conventions are often invoked and referred by the Committee.¹⁸ Therefore, Bhutan must consider joining the ILO and ratifying the two ILO Conventions to implement immediate and effective measures to prohibit and eliminate the worst forms of child labour urgently.¹⁹

Conclusion

Children are the assets of the nation. In line with the CRC, Bhutan has adopted numerous legislations to protect and promote the rights of children in the country. However, owing to the challenges brought in by inadequate human, financial and other support systems, Bhutan is unable to enforce the mandates of the legislations in full. These issues should be addressed at the earliest to facilitate better living for our children in a secure and safe environment. These efforts should be addressed through

16 See ILO Constitution.

17 See Article 1 of the *Minimum Age Convention 1973*.

18 Sweptson, L. (2012). *A Commentary on the United Nations Convention on the Rights of the Child, Article 32: Protection from Economic Exploitation*. p.6.

19 See Article 1 of the *ILO Convention No.182*.

committed coordination, consensus and common goals. As a Buddhist nation fostered by values of compassion, positivity, non-violence and kindness, Bhutan must direct its policies in consonance with such values. It is of paramount importance to ensure that every child is able to grow in an environment where his or her rights are well protected and respected. Investing wisely in the lives of our children today fortifies our commitment to secure the future of Bhutan. It is therefore, highly recommended that Bhutan observe and fulfill its international treaty commitments in its entirety. It must also consider ratifying core international human rights and child rights instruments to promote our children to help them grow in an environment that affords protection and care to its fullest.

Freedom of Expression and the Rise of Anonymity on the Social Media¹

Introduction

A democracy is characterized by healthy discourses on the priorities of the nation that enables informed decision making, and its ability to incubate critical appraisals by the public. This aptly suits the other name of democracy as the “*Government for the People, of People and by the People.*”² This creates a fertile ground for a healthy political and policy discourse that balances “*rights with duties*”. A review of the actions of the government, an analysis for better governance, requires unrestrained voice, which is considered by many countries as important. Recognizing its importance, now or later, the drafters of the *Constitution*, under the farsighted leadership and wisdom of His Majesty the Fourth Druk Gyalpo, enshrined it in the *Constitution of the Kingdom of Bhutan*.³ Free Speech and Press is critical component of a free and fair democracy.

However, it is found that even mature democracies are unable to appreciate critical reviews. Philosopher Zechariah Chafee, citing the United States Supreme Court decision in *New York Times v. Sullivan* ⁴ said that freedom of speech in a modern democracy is necessary to build an informed citizenry on the fundamentals of truth.⁵ Today, the expansion of Internet and the development of social media platforms for virtual interactions have slackened the noose on “free speech and expression”. The rise of anonymity in social media platforms has become another channel of “*expression and voice.*”

1 Contributed by Sonam Tshering.

2 A well-known phrase by Abraham Lincoln.

3 The freedom of speech, opinion, and expression is enshrined at Article 7(2), while the freedom of the press, radio, and television are included at Article 7(5).

4 376 U.S. 254 (1964).

5 Chafee, Z. *The Social Interest in Free Speech*, 2007 BYU L. Rev. 259, 2 (2007), Charles L. Barzun (2017)

Freedom and its Limits in a Democratic Polity

Freedom of speech and expression is a concept that is ingrained in Western values. This was fostered to allow the citizens to actively participate in nation-building. Presently, such channels are exhausted through public and private discourses, debates, and other formal and informal means of communication. Such discourses are punctuated by sharing of ideas, and issues concerning personal, community or the country. These discourses have become an important vein of a vibrant democracy. However, right to such informative and communicative interchanges rest on the need to share truth through a voice. *The Constitution of Bhutan* has established full safeguards to such rights to ensure that Bhutanese democracy is built on foundations of information-sharing and reviews. As “*no right comes without a duty*”, the right to freedom of speech and expression is not an absolute right. Free speech does not go along with defamation, or false accusation of the other. Such rights have its established limits; and exercise of it requires both caution and personal restraint.

The Age of “Netizens”

Reputations, including personal or professional are built on edifices of hard work, sincerity, and unbreakable commitment for personal or professional growth. However, with easy access to Internet, information and widespread use of social media platforms, and other grievance pouring channels, reputation are susceptible to be destroyed in just few clicks of a button.⁶ Therefore, vigilance and check on “defamatory speeches” is becoming a necessary tool in eye of the expanding Internet use. With the advent of the Internet and more so after the rapid growth of social media, structure of global Internet has enabled so-called “Netizens” to exercise their freedom of speech and expression making it instantly accessible to persons across the world. Today, virtual transactions over the Internet are unrestricted – imprudently allows the users to share their ideas and express their opinions.

6 Fertik, M. & Thompson, D. Wild West 2.0: How to Protect and Restore your online Reputation on the untamed Social Frontier, 2 (2010).

While one would not expect harmful speech to confine itself to traditional media, certain characteristics of the Internet guarantee the prevalence of such speech in cyberspace. These features include the ease of access, ability of any individual to publish, and remain relatively anonymous.⁷ Although, the advancement in technology has immensely furthered the freedom of speech, but uncontrolled use of such social media platforms can lead to invasion of personal and official privacy. *The Constitution of Bhutan* enshrines that any right ceases to operate if it infringes upon the rights and freedoms of others.⁸ It is therefore, important for every citizen to be responsible and recognize that no right is absolute; every right carries a duty, which in this case, is a duty to respect others, their reputation, and their privacy including their family.

The Rise of Anonymity

The rapid development in information technology has provided a fertile ground for the so-called “netizens” to express, and expose either identities anonymously or pseudonymously on the social media. This leads to suppression of identity, and generation of counterfeit identities - encouraging unrelenting expression. For example, the *Civil Service Rules and Regulations*⁹ disallow a civil servant to opine against policies, which is contrary to his beliefs or the public interests. In this case, a person may use the social media platforms to anonymously express his objections. Bhutan does not host any of the social networking sites, and this makes it more vulnerable to such dangers and impacts.

Professor Anne Wells Branscomb has stated that:

True anonymity in the Networld would mean that no one could trace the source of an electronic message. The possibility of genuine anonymity implicates both the positive value in protecting the sources of certain information as well as the danger inherent in allowing individuals to speak and write without detection. For some computer users, anonymity is merely fun and games. For other anonymous

7 Berkeley Technology Law Journal, *Communications Decency Act 230*, 17 Berkeley Tech. L.J. 401 (2002), Paul Ehrlich (01/01/2002)

8 Article 22(f) of *Constitution of Kingdom of Bhutan 2008*

9 *Bhutan Civil Service Rules*, Rule 3.3.16.2, (6th Ed. 2018)

*posters, however, the ability to remain unknown removes many of the layers of civilized behavior as they realize that they can escape responsibility for negligent or abusive postings. There are numerous situations in which anonymity seems entirely appropriate and even desirable. Psychologists and sociologists point out that people benefit from being able to assume different personae. It is therefore natural that individuals use electronic communication to disguise themselves, as in costume balls in the multiuser dungeons (MUDs) that Howard Rheingold describes. As one student admitted, 'It's my hallucinogen of choice.... I love being able to slip into another body, another persona, another world.'*¹⁰

Similarly, Professor Jacqueline Lipton has observed that:

*Cyberspace also enables perpetrators to manipulate the victim's identity online. Cyber abusers can both impersonate their victims and can manipulate others' reactions to their victims. They may pretend to be their victims and send inflammatory messages to online discussion groups or social networks under the guise of the victim. Wrongdoers may also engage in identity theft for financial purposes. Additionally, retaliation against the Cyberspace also enables perpetrators to manipulate the victim's identity online. Cyber-abusers can both impersonate their victims and can manipulate others' reactions to their victims. They may pretend to be their victims and send inflammatory messages to online discussion groups or social networks under the guise of the victim. Wrongdoers may also engage in identity theft for financial purposes. Additionally, retaliation against the victim often follows. It might include the victim being banned from certain websites, being threatened by those who perceive her conduct as inappropriate, or being propositioned by people who have been misled into thinking that she is interested in engaging in unorthodox sexual activities.'*¹¹

To remove the garb of anonymity, free expression should be used wisely and sparingly. Although freedom of expression is desirable for any country, but such freedom do not allow unrestrained freedom of expression, which

10 Branscomb, A.W., *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment In Cyberspaces*, 104 Yale L.J. 1639 (1995)

11 Lipton, J.D., *Combating Cyber-Victimization*, 26 Berkeley Tech. L.J. 1103, 1115 (2011)

defies the landscape of Bhutanese citizenry and Bhutanese nationality. Some opine that such restrictions on expressions would lead to opening up back door information apertures, with outburst of damaging opinions.

Social media platforms in Bhutan have witnessed the rise of anonymous writers, who posted the photos of the aspiring candidates with stories and allegations against them. Such vindictive forums remained uncontrolled either by the Internet Service Providers (ISPs) nor the concerned government agencies. In fact, one of the largest social media group, the *Bhutanese Forum* has a large number of members, are responsible for creating unverified rumors and stories. Bhutan is seeing a steady development in this paradigm. Our society is gradually turning away from a “duty based society” to a “right based society”. This has also spurred the growth of writers without identities.

Conclusion

This is the age of the Internet. The advent and expansion of the Internet has led to the rapid growth of social media. There is no question about the benefits the Internet bring us. Besides opening doors to treasure of online literary resources, it gives users opportunities to the people to stay in touch with their friends and relatives; as well as what is happening in the rest of the world. This has enabled the “Netizens” to express their opinions and share their ideas on it freely. However, it is filled with fake profiles and anonymous identities. The anonymity of the Internet has been a double-edged sword, offering a few benefits but even more drawbacks. The ability to hide behind the screen names seems to bring out the worst in people.

However, we must remind ourselves that freedom is not free. With freedom comes the responsibility and restraints. Freedom of free speech and expression end; where the rights to privacy and reputation begin. Therefore, rights and duties must go together. We should not misuse the cloak of virtual anonymity and defame others unfairly and unjustly. The freedom of speech and expression, although soul to any democracy, has its own limitation.

Law and Media - The Media's Expectations from the Judiciary in a Democratic Context¹

Introduction

The Judiciary is one of Bhutan's oldest and most important institutions. As the country progresses, the role of media is becoming important to secure democratic principles, and shoulder the responsibilities of a vibrant democracy based on rule of law and information. *The Constitution of Bhutan* guides the democratic polity of Bhutan, its processes and helps to spread the democratic culture and principles. So this paper discusses the expectations of the Media from Judiciary. I equally point out the expectations of ordinary citizens from the judiciary. Judiciary of the Kingdom of Bhutan stands as a safeguard to rights, liberties and freedoms of its people. These freedoms are essential to uphold the principles of democratic polity and adapt to the era of changing democratic culture and ethos. As the apparatus of institutions evolve with time, the judiciary as an important machinery of the government- responsible for the rule of law, justice and fairness for the people has also got to advance to meet the demands of the time. Evolution is a continuous process that requires positive nurturing to assist in this process of constant institutional evolution.

Protection of Free Speech and Free Press

In many countries, freedom of press is challenged by aggressive litigation and narrow interpretation of free speech and media. In other words legal harassment seen in countries where free media is not encouraged allows freedom of media to be curtailed into silence by different actors. Bhutan is a young democracy, and media is unrestricted and free. However, such enjoyment may be short-lived with changing electoral processes and outcomes. Therefore, in such instance of media restriction, the judiciary

1 Contributed by Tenzing Lamsang.

stands as the custodian of the media by upholding liberal attitude and interpretation of the Freedom of Speech and Media guaranteed under the *Constitution of Bhutan*.² This, of course, does not mean that the press can publish what it wants without evidence or verification, as the freedom of speech is not an unlimited right. However, protections should be given if it involves public interest and the stories are factual. One good example would be the defamation case of *Dasbo Benji v. Druk Phuensum Tshogpa (DPT)*, where the party charged the other with defamation, which involved general critical statement against a public organization like a political party. Although, the case ended through withdrawal of it, but any rulings on similar or others cases of the same nature can have a significant positive or negative impact on press freedom in Bhutan.

The Judiciary and Public Relationship

Judiciary is a repository of values, strict conduct and adherence to the rule of law. In all parts of the world, *Judicial Code of Conduct* necessitates appropriate behavior by the litigants, legal professionals and persons accessing justice. This is important, as the judge has to ensure the process of justice should not be stymied by bad behavior, uncouth language or threats in the courtroom. Due respect and decorum should also be maintained towards the presiding judge and the courtroom. In Bhutan, judiciary is seen as a strict disciplinarian, that sometimes hurdles justice through intimidation. The settings and the grandeur of the courts add to the woes of the already overwhelmed litigants. For some litigants, judges invoke natural fear and anxiety. Some media personalities, including journalist have complained of reprimand by the judiciary- over minor infractions in news reporting and media coverage. While judicial decorum, as upholders of discipline, values of etiquette are necessary; there can be a very thin line between what constitutes decorum and judicial prowess. The cumulative impact over the years makes approaching the courts both daunting and formidable. Less intimidating atmosphere-and a more litigant friendly court may enable easy access to justice and judicial services.

2 See Article 7 Clause 2 and 5 of the *Constitution*.

The Language of the Court

The Supreme Court of Bhutan on 3 February 2016 issued a *Notification* requiring courts to accept submissions only in *Dzongkha*. However, interestingly the Thimphu District Court in its judgment in *Dasbo Benji v. DPT*, challenged this assertion of the Supreme Court of Bhutan saying that the common view that *Dzongkha* is the court language is not only misconceived and wrong but also against the principles of fair trial. The District Court's rather courageous assertion stated that firstly, there is no specific law that says *Dzongkha* as the language of the court and secondly, argued that it is the right of the litigants to have their cases adjudicated in the language they understand. The Court reasoned that the inability of a litigant to understand the language used in court could create significant barriers to justice. *The Constitution of the Kingdom of Bhutan* states that in any instance of a difference in meaning between the *Dzongkha* and the English texts of the *Constitution*, each text shall be regarded as equally authoritative and courts shall reconcile the two texts.³ However, at the same time, *Dzongkha* is the national language of Bhutan, and it is essential to promote it in all spheres of correspondence and speech, even in the courtrooms.⁴ Importantly, a poorly kept secret is that majority of the journalists and media personnel while being fluent in spoken *Dzongkha* are poor in written *Dzongkha*. A judgment in *Dzongkha* is inapprehensible to most people-including the literate populace. This is no exception to media personnel. To ease information, and promote the holistic understanding of the judgments, a summarized English version of the judgments could greatly enhance access to information and improve the quality of judicial news reporting. Such changes can be implemented by initiating virtual upload of judgments on the judicial websites; a Media Focal Person of the Judiciary can be entrusted with the task to brief on the judgments to media persons, if the media for reporting in the interest of the public requires the judgment. Such initiatives can enhance the reporting culture of the media houses and encourage informed media reportage. It will not allow any verdict or judgment to loose the meaning while translating the judgments from *Dzongkha* to English by the mainly English-based media in Bhutan.

3 See Article 35 Clause 4

4 See Article 1 Clause 8

The Access to Judicial Documents

Judicial documents are an important premise for fair and conversant reporting. Uploading of all judgments on the websites of the judiciary including decisions of the Supreme Court, High Court, Dzongkhag Courts and Dungkhag Courts will ease access to judicial documents and promote a cognizant media reporting on the judiciary. Although judgments are awarded to the parties involved in the suit, accessing them, on private, is unprofessional media practice, which both discomfort the party and the reporter. An overhaul on the media access system of the judiciary can greatly augment better media coverage and complete reporting.

Reporting of Verdicts

Reporting of verdicts requires irreproachable analysis and study. A misquote may create disagreement between the reporter and the reported. Moreover, challenging a verdict or a judgment and casting aspersions on the judge may be contemptible within the laws. However, the press should be given more latitude and freedom in analyzing and pointing out the factual and legal aspects of a verdict, including pointing out factual and legal inconsistencies. A verdict is a public document, and once it is awarded – the media may report it with their analysis without stirring defamatory aspersions. The Media Houses believes that genuine and corrigible reporting enhances legal awareness, and legalistic scrutiny. One example of such reporting is making the comparatives of the Judgment with the provisions of the *Constitution*. This, however, has to be done with a good amount of research and responsibility.

Sub judice

Sub judice is the legal principle that a case once it is registered in the court of law, persons, including media representatives are not allowed to speak or write about it to avoid influencing the case or the judgment. No case can be reported, even if appealed, as it goes within the ambit of *subjudice* once it is appealed to the higher court.

Contempt of Court

Credible media coverage plays an important role both as information and education. With increased media coverage, many public institutions, including private entities have come under media scanner based on events and evidences. However, the judiciary has eclipsed the media glare. This is done to promote trusts and confidence of the judiciary-and promote it as an infallible *giver of justice*. The Contempt of Court proceedings also deter the media professionals from reporting about the judiciary, which puts a glass ceiling on reporting. A sensible media reporting on any judicial personnel shall not be seen as reporting against the judiciary, but shall be construed as a measure of putting a check and balance through a reasonable public criticism and scrutiny.

Protection of Sources

Protection of sources and identity is a must for ethical and skilled reporting. The court of law, if in its opinion, requires the sources of the information of the media reports, any journalist or media personnel is bound by the law to assist the court. In the west, non-disclosure of the source of information for the media has resulted in criminal sanctions. In such cases, the courts must demand the sources of information, if the information provided in the media is incorrect, and slanderous. There should be a good balance between protection of the rights of the informants and the right to discovery of the sources.

Judiciary - a Soft Target

Unlike popular perception, the judiciary is the softest target among the three arms of the government. If the media writes any stories against Ministers or Members of the Parliament, it may result in losing confidence of the people in them, and the public memory forgives them as times passes. Their portfolios, although dependent on credibility and clean image, they may have other ideals for the promotion of their interests and goals. Political skills and delivery of political promises are some of them. Online supports including support in the social media also greatly tarnish or improve their image. Political personalities can also have various support systems and the tools to get back at their critics. However, persons of

judicial cadre are a different one. A taint on the image of judge can distort the image of justice, confidence in the judiciary and the delivery of justice. As the judiciary rests on the laurels of credibility and legal legitimacy, a “single dark spot” on the judiciary may have a cascading effect. Unfair and unreasoned media trials can derail the image of the judge, and put him to biased public opinion. Incessant and non-factual onslaught on the judiciary may not only harm the judges personally, but also tarnish the image of the judiciary as “givers of justice and upholders of rule of law”. Therefore, media shall not only be responsible, sensitive and professional in reporting on the judiciary, it should stand against reporting of one-sided views; hearsay stories and siding with the litigants, who have lost the case. A fair media reporting is a necessary tool to promote harmony, social cohesion and respect for the judiciary as the ultimate givers of justice.

Conclusion

Judiciary has made tremendous progress and passed most bold judgments in the recent times. The famous *Case concerning Constitutional validity of Tax Revision by the Government* and *Gyalpozhing Land* verdicts are notable strides made by the judiciary. The judiciary in important and critical times facing the nation will have to stand to interpret important laws in the country, changing the course of governance and public policies. The judiciary is an important institution that promotes the rule of law, equity and justice in the country. Our courts cannot become givers of justice that is defined by public opinion, prejudices and hysteria. The system of judiciary should be based on strong decision-making power, and the rule of law. The judiciary on its part is not here to win a popularity contest like other executive portfolios, but it must also consider the various above issues raised and carry out necessary positive changes so that it is seen more to be a *defender of the laws* and the rights of the people. The judiciary must also adopt a reformatory democratic culture and continue initiating progressive reforms to render justice to its people.

Tell Us About ‘Justice’ – A Search for the Common Strands of Law and Justice in Bhutan¹

Introduction

His Majesty the King has reminded that if our Vision for the nation is not contained in the pages of the books that our young children hold, in the words of our teachers as they lead their classrooms, and in the education policies of our governments, we may fail to have any vision. In this line of thought, His Majesty’s insightful words invigorate a sense of deep thinking and reflection, to every citizen, and to persons working in the mainstream education sector. His Majesty has further reiterated that Bhutanese can dream of world-class Information Technology Parks, International Financial Center, competing at international standards, but we shall also remember that we can have none of these if our schools and colleges do not bestow such talents and skills.² His Majesty also mentioned that we know little about the technical subjects. Pursuant to these noble counsels of His Majesty the King, we are pleased to have the opportunity to further His Majesty’s call- to teach our students to prepare, equip and achieve the noble aspirations and the visions of Bhutan’s future. In similar line, the Justice Sector in Bhutan equitably plays an important role to secure and advance justice for the Bhutanese people.

First, “*What is the vision for the Bhutanese justice sector?*” Incontestably, it encompasses the standard, internationally recognized aspects of what makes a justice sector strong. One such standard, perhaps the most comprehensive global standard to date, can be found in the 2030 *Agenda for Sustainable Development*. This Agenda, which replaced the *Millennium Development Goals*, is comprised of seventeen separate *Sustainable Development Goals (SDGs)*, each of them paired with a series of more technical targets and indicators that can measure whether progress is being achieved. *SDG*

1 Contributed by Stephan Sonnenberg, Kristen DeRemer, Kuenzang Dolma, Ugyen Thinley, and Rinchen Dema.

2 His Majesty Jigme Khesar Namgyel Wangchuck, (2009, February 17). *His Majesty the King’s Speech at the 3rd Convocation of the Royal University of Bhutan*. Retrieved from <http://no.dou.bt/2009/02/17/convocation-royal-university-bhutan-2/>.

Tell us about ‘Justice’

16, which pertains to Peace, Justice and Strong Institutions is specifically reflected in the 16 *National Key Result Areas (NKRA)* of the 12th Five Year Plan of Bhutan, which talks about strengthening of institution and justice services. These targets are aimed at promoting rule of law, unimpeded access to justice; promoting accountable and transparent institutions at all levels.³ None of these twelve targets seem particularly revolutionary in Bhutan, and the justice sector-by and large - has already been focusing on their pursuit well before the introduction of the *SDGs*. In fact, the *SDGs* themselves were significantly foreshadowed and directly informed by Bhutan’s own homegrown development strategy of Gross National Happiness (GNH).⁴

But Bhutan’s definition of “justice” arguably also goes beyond what is contained in the *SDGs* and other such “universal” standards. In 2016, the Office of the Attorney General, with the support of the United Nations Development Programme, asked Jigme Singye Wangchuck School of Law to facilitate a workshop aimed at bringing together a range of stakeholders from across Bhutan’s justice sector to discuss what “justice” might mean in a Bhutanese context. Specifically, the audiences were asked to brainstorm areas where Bhutan’s Development Philosophy of GNH might inform the Bhutanese definition of “justice”. The workshop focused on how Bhutan might measure progress in line with annotated vision of “justice”.

The Workshop crystallized what “justice” might mean in Bhutan that goes beyond the parameters and definition contained in the *SDGs*, particularly, *SDG 16*. The pursuit of justice in a Bhutanese context requires adopting a broader definition of “justice” than the traditional court-based context. Perhaps the most important finding that emerged from the Workshop was that the Bhutanese justice sector stakeholders’ concept of “justice” in Bhutan was broader than just those cases that might be heard in a Bhutanese courtroom. In particular, the Workshop participants felt that matters of social equity, for example social inequality or socio-economic

3 UNDP (2018), *Goal 16 Targets*, retrieved from <http://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-16-peace-justice-and-strong-institutions/targets.html>.

4 JSW Law (September 2016), Justice Sector Planning: A Contribution by the Justice Sector to the Gross National Happiness Commission in Preparation for the 12th Five Year Plan (2018-2023): White Paper,” *on file with author*; Booth, Nick (July 2018) *Working Across National Legal Cultures: the Ethics and Challenges of Rule of Law Capacity Building Collaborations?*

mobility, might not be justiciable in a formal sense but would typically be included in the lay person's definition of "justice."

Matters of environmental conservation and cultural preservation also play into this broader definition of justice. Those communities, whose traditional livelihoods and patterns of life were disrupted by Bhutan's development, often feel a loss, which they characterise as an "injustice." This poses a profound challenge to Bhutan's justice sector. Formal justice institutions are inadequately equipped to deal with such "less or non-justiciable" forms of justice claims. One view gathered from the workshop is to attribute justice to other rights and liberties. This helped to "open wider horizons" on what included in the term "justice". Supposedly, we can say, "Justice shall not only include rights" but also include "equitable responsibilities" as a responsible citizenry.

And must the pursuit of "justice" be confined only to the institutions of the so-called "justice sector" itself, especially when so many Bhutanese point to the institution of the Monarchy as the ultimate source of justice in this country? In a modernized post 2008 era context, we must perhaps look beyond the justice sector and its affiliated institutions to best understand the pursuit of justice in Bhutan.

The experiences of other jurisdictions, such as South Africa and India, where courts have become increasingly receptive to individuals and communities bringing forward Economic, Social or Cultural (ESC) rights claims, provide Bhutan with only limited guidance, since Bhutan's own constitution specifically defines these kinds of claims as non-justiciable.⁵ Bhutan, however, has well-developed parallel institutions that routinely address such claims, and must therefore be considered as an integral part of Bhutan's comprehensive justice sector landscape. The first is the system of *kidu*, whereby individuals can bring claims to a formalized institution under Royal patronage and receive equitable relief for a variety of otherwise non-justiciable social injustices. The second is Bhutan's well-established system of traditional and local dispute resolution, which handle an array of social ills and trivial disputes that might otherwise not be adequately handled in a formal judicial process. The pursuit of justice in a Bhutanese context

5 Lyonpo Sonam Tobgye, (2015) *The Constitution of Bhutan: Principles and Philosophies*. p.174, 182.

Tell us about ‘Justice’

requires strengthening both the formal as well as the informal justice system. The first insight is the realization that any development initiatives focused on strengthening Bhutan’s justice sector must crucially focus not only on the formal justice system, but also on the two parallel systems mentioned above that have evolved to handle what in this article we will refer to as “less or non-justiciable justice claims.”

The participants of the Workshop articulated the near universal consensus that the delivery of justice in Bhutan relies crucially on the preservation of its very active system of *Nangkeha Nangdrik*, or the traditional dispute resolution. This consensus derives not only on the realistic assessment that Bhutan’s formal justice system that lacks the capacity to handle the sum-total of disputes currently handled by informal dispute resolution mechanisms, but also on a strong sense that *Nangkeha Nangdrik* is simply more in line with the Bhutanese culture. In other words, participants felt that traditional means of resolving disputes are simply better than their formal alternatives that are steeped in rich Bhutanese tradition and culture. This sentiment echoes in across Bhutan’s justice sector landscape.

In promoting the *Bhutan National Legal Institute’s* effort to revitalize the informal dispute settlement, led to creation of Alternative Dispute Resolution Centers. Drawn from such inspiration, the specific mandate that Jigme Singye Wangchuck School of Law teach its law students to appreciate the values of so-called “Alternative” (or as we prefer to refer to it as “Appropriate”) forms of Dispute Resolution; the justice sector has already recognized the crucial importance of traditional forms of dispute resolution as part of its justice sector development strategy. The newly released *Strategic Plan for Bhutan’s Justice Sector* also emphasizes the need to invest in Bhutan’s informal dispute resolution systems. This Strategy was developed in 2017, building significantly on the 2016 workshop, and is intended to expand upon the justice-sector relevant sixteenth National Key Result Area (NKRA) contained in Bhutan’s 12th Five Year Plan (FYP).⁶ The Strategic Plan as well as the relevant provisions of the 12th FYP, makes numerous mentions of the importance of strengthening not just Bhutan’s formal justice sector institutions, but also its informal dispute resolution

6 Gross National Happiness Commission (2017) 12th Five Year Plan Guideline, retrieved from <https://www.gnhc.gov.bt/en/wp-content/uploads/2017/05/gnh.pdf>

processes. Those informal dispute resolution systems are of particular importance in the context of resolving civil disputes, involving land, contractual, and non-abusive family disputes.

The same argument can also be made for Bhutan's *kidu* system, which continues to provide equitable relief to sections of individuals and communities across Bhutan. This system is rarely defined as part of Bhutan's "justice sector."

The Pursuit of Justice

Finally, the participants at the 2016 Justice Sector Workshop concluded that Bhutan should focus on the development of a legal order that facilitates and encourages not only free-market forms of economic activity, but also economic activity designed to cultivate local and more sustainable markets.⁷ Indeed, the participants felt that given Bhutan's unique geopolitical situation, the emphasis of Bhutan's legal order should perhaps even weigh in favor of the latter form of economic development. This insight poses a direct challenge to some of the standard international private law orthodoxies emphasizing the establishment of free markets, and policies designed to encourage fluid labour and financial markets. If Bhutan wishes to cultivate vibrant and sustainable local economy, many of these orthodoxies would need to be revisited in a Bhutanese context.

Legal Needs Assessment

His Majesty said, "I can say so many good things today about the success of our country, about the hard work of our people. We have done our work well, our policies have been good - everything we have done, we have done with the interests of our people and country in mind, that is why we are here today as a unique and successful nation. But it also important to see what our weaknesses are, where we have not done very well, where we need to do better."⁸

The study, which was launched in November of 2018, is designed to rigorously study the three areas highlighted above. Over the coming two years, the five of us authoring this article will travel to each of Bhutan's

7 Supra, note 3

8 Supra, note 1

Tell us about ‘Justice’

twenty Dzongkhags, spending between two and three weeks in each Dzongkhag, deciphering the past and anticipate how the future would be. Our purpose is to lay an evidence-based foundation that will inform areas of structural vulnerability, or areas of particular need, as Bhutan continues to develop its justice sector institutions. Is Bhutan, for example, emphasizing the development of formal justice sector institutions at the expense of some of its less-formal parallel institutions? And are some of the profound social processes underway in Bhutanese communities changing the way individuals seek justice? Are traditional forms of dispute resolution, some of which perhaps are better suited to deliver justice for certain types of disputes, at risk of going extinct? These are some of the questions we hope systematically to document as we travel through Bhutan’s many diverse regions.

Just as important, however, is our goal to highlight best practices. In each of the *Chiwogs*, *Genwogs*, and *Dzongkhags* we visit, we will seek out innovative and inspirational dispute resolvers. We will seek to document their dispute resolution methods, many of them refined over decades of practice. We will hear parables of justice, or stories these dispute resolution elders have gathered to inspire parties to work together, to resolve their disputes, and to re-establish the harmony of their communities. We will also speak to individuals involved in disputes, seeking to hear from them what they understand as “justice,” and how the various dispute resolution processes available to them can deliver on that promise. We will also seek to understand in a more granular way, drawing directly on the Centre for Bhutan Studies’ pioneering work developing a measurable definition of Gross National Happiness, how the experience of being involved in a dispute impacts the individual and communal experience of perceived happiness or well-being.

Conclusion

In this project, we seek to learn from entrepreneurs who operate in Bhutan’s local and sustainable economies; how they have managed to thrive, and what legal and other barriers they must surmount to find success. Jigme Singye Wangchuck School of Law, and the five researchers authoring this article, is proud and excited to be involved in this important process. We humbly beseech all readers of this article to lend their crucial support to this endeavor. We believe it will improve the way we teach, improve the way

Bhutan measures “success” as it continues to develop its justice sector, and ultimately improve the way individuals and communities in Bhutan are able to resolve their disputes.

Book Review

Goh Bee Chan, *Law Without Lawyers, Justice Without Courts - on Traditional Chinese Mediation* (2002) Ashgate Publishing Limited, U.K. pp 125 ISBN 1840 14744X

Law without Lawyers, Justice without Courts - on Traditional Chinese Mediation is one of the recent Books on Chinese legal system in general and alternative dispute resolution (mediation) in particular. The Book compares the concept of mediation of disputes in traditional China and Western countries. It examines the Chinese cultural tradition including their attitudes towards law, abhorrence for the formal justice system, and preference for informal dispute settlement over courts.

Confucianism permeated all facets of life in China. The philosophy postulates the existence of harmony in the cosmos. On the earth, this harmony begins with the emperor and ended with the peasants. Accordingly, the main function or the aim of the government and law enforcement institutions was to preserve and perpetuate this ethical and moral order. Fostering compromise by yielding or giving away on certain issues in order to gain over some was the norm. The need to maintain the hierarchical social order and harmony inhibited assertion of individual rights; the rights-based claims were regarded as socially disruptive. Litigation of disputes in courts was the last resort and the preference for extra-judicial settlement of disputes continues even to this day. Disputes were suppressed, neglected or resolved through conciliation or mediation in favor of the social harmony over individual justice. It was in fact *dispute dissolution and prevention* (emphasis added) rather than *dispute resolution* (emphasis added) that was the function of the public authorities.

In the last few decades there has been rapid growth in popularity of use of mediation in Western countries such as the United States and Australia. According to the Book, alternative dispute resolution process such as mediation had been in existence in China for thousands of years. It was not only used to resolve civil disputes but even minor criminal offences

were mediated extra-judicially. However, due to cultural divergence in conflict perception, mediation as understood and used in the West and the traditional Chinese version are different. The Chinese concept of mediation is highly informal and flexible. There are adjustments and compromises on one hand, and coercive adjudications at other. Traditional Chinese mediation is vertically structured based on the social hierarchy and obligations; where as in the West it is horizontally structured and centered on rights and liabilities of the disputing parties. Chinese believe that litigations tend to commercialize human dignity, conscience, pain, reputation and morality; it disrupts social fabric and creates animosity due to 'win-lose' consequences in contrast to the 'win-win' of the mediation. Mediation serves to prevent harmful social conflicts that may interfere with the values of socialism. Besides, it serves to disseminate and perpetuate ideologies, principles, values, goals of the ruling party.

Though mediation is popular in the West for its informal nature it is confronted by the challenges of choice of mediators and enforcement of awards. Moreover, Western mediators are simply regarded as the neutral facilitators and strangers to the parties reflecting individualistic principles. On the contrary, Chinese mediators act within the cultural expectations of being well known to the parties, higher in status, authority and influence, and therefore can be interventionist, proactive or even dictatorial. Moreover, mediation awards are mainly enforced through social sanctions in contrast to the involvement of courts in the West.

In the West, law is omnipresent and the pursuit of rights and wrongs through adversarial procedures and institutions (Common law traditions in particular) give rise to individual winners and losers. On the other hand, written or formal law in China was only a political necessity and penal in nature. It was rejected in favor of the Confucianist moral teachings as harsh and inhuman and the last corrective agencies. Legislator, as the law giver indicated moral decline. Confucianism emphasized cultivation of moral virtues, human values and social harmony in conformity with cosmic order with stress on education and refinement of character.

Along with the passage of Confucianist values of social order and harmony in the traditional Chinese life, the negative attitude towards law has persisted. This is captured by the popular Chinese saying '*heqing, heli*,

hefa', i.e., 'first follow your personal sentiment, then follow the dictates of reason, then follow the law'. The Book highlights the traditional Chinese family life, customary rules and social values such as saving 'face', 'good relations' (*ganqing*), 'personal relations' (*guanxi*), 'personal good will' (*ranqing*) and 'yielding' (*rang*). These customary rules of behavior and corresponding social sanctions were vital in the preservation of harmonious relation with one another and were transmitted from one generation to another by customary practice, word of mouth or through education.

The traditional Chinese are regarded as ethnologically non-litigious people who preferred to resolve their disputes through traditional informal dispute resolution process, mainly mediation. It was believed that entering a court of law was like entering a tiger's mouth. Similarly, an emperor is quoted to have said that he desired "that those who have recourse to the tribunals should be treated without any pity, and in such a manner that they shall be disgusted with law, and tremble to appear before a magistrate." To the traditional Chinese, harmony and litigation stood opposed to each other. The prevailing customs, the moral and ethical precepts were more important in everyday life of the common people; law and legal system had little or no role to play. Social sanctions and public opinion compelled people to obey local leaders and the punishments (mainly offering of feasts and tea parties to the village) were 'inflicted' to preserve social harmony and to reintegrate or reform the guilty; it was not intended to punish or ostracize them.

The Book provides a glimpse into the life and practice of rural Chinese Malaysians. Extra-judicial mediation is still the primary mode of dispute settlement among these traditional people. The ordinary business life of these people has long been regulated by the different strata of traditional Chinese social organization. Accordingly, law, lawyers and courts play little or no role in their private lives. They have preserved their non-litigious attitude and the traditional Confucian notion of a harmonious society. They fear and hate implementation of harsh laws and severe legal penalties. However, this tradition is being eroded gradually due to their physical distance from China and influence of Western education among the younger generations of the society. The Book provides comparative analysis of mediation as understood and practiced in China and Western countries.