For the heavy debt of gratitude the nation owes, we continue to dedicate the Journal to His Majesty the Fourth Druk Gyalpo, Jigme Singye Wangchuck on the occassion of the 62nd birth anniversary. The Institute pledges to inspire public trust, gain confidence in the legal system and enhance access to justice through continued legal education and dissemination of laws for a fair, just and content society. The Bhutan National Legal Institute team joins the Nation in offering our prayers for His Majesty's good health and long life.

Content

Preface

Bhutan Law Review is the Kingdom's first law journal. It is a brainchild, an emanation of noble vision and academic aspirations of Her Royal Highness Ashi Sonam Dechan Wangchuck, the Hon'ble President of Bhutan National Legal Institute. It is born out of the desire to promote and nurture a culture of reading, writing, legal research and incubate legal acumen among the Bhutanese legal fraternity. The Journal is aimed at providing the much-needed platform to the judges, lawyers and interested writers to engage in intellectual discourses on current and emerging legal and socio-legal issues in the country.

We had to compromise our ambitious vision of a peer-reviewed professional law journal aimed at legal readership due to lack or sufficient articles of desired quality and standard. We are currently catering to both legal and non-legal readership providing platform to our budding writers to tell the stories of our laws and legal issues facing the country as they see, perceive or understand. The Journal gives the Bhutanese and international readership the picture of the current state of the Bhutanese laws. The advantage is we get to hear the stories of Bhutanese laws and jurisprudence from the mouths of the Bhutanese themselves instead of foreign writers and secondary sources.

For all of us working for Her Royal Highness at the prestigious and a premier legal training institute and a future Think Tank, we derive immense satisfaction in placing the 8th Volume of the *Bhutan Law Review* in your hand in different avatar– on the eve of celebration of 62nd birth anniversary of His Majesty the Fourth Druk Gyalpo and the 50 years of establishment of the High Court, the citadel and an icon of Bhutanese legal system. With your help and cooperation we are confident the Journal will generally scale higher heights in terms of quality and reach. We believe the Journal will serve as a repository of discourses on Bhutanese laws and legal developments – an indispensable research tool and reference to future legal scholars.

While looking forward to hearing from you and receiving your comments and contribution for the subsequent volumes, we express our sincere gratitude to Her Royal Highness for the constant guidance and leadership. We are grateful to you for your support in enabling us to bring out the Journal. We remain determined and committed in our venture to bringing out the subsequent volumes of the Journal on time.

The Exposition of Constitutional Kuthangs

The Constitution of Bhutan was born out of the enlightened vision of His Majesty the Fourth Druk Gyalpo Jigme Singye Wangchuck. It laid a clear path for the people of Bhutan and reflects the selfless and extraordinary leadership of our Kings. The Constitution inspires our people with the blessings of liberty, justice, unity, peace and happiness. As a tribute to His Majesty the Fourth Druk Gyalpo 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 painting of 34 Kuthangs corresponding to 34 Articles of the Constitution. Each Kuthang captures the essence of the Article, its significance and the purpose. *The Bhutan Law Review* aspires to embrace such profound representation of wisdom in its successive Volumes as a continued tribute to His Majesty the King, His Majesty the Fourth Druk Gyalpo and the Tsa-Wa-Sum.

Article 1: Kingdom of Bhutan

The Crossed Vajras

The Crossed Vajras symbolises the indestructible and the unchangeable territorial boundaries of twenty Dzongkhags under the enlightened domain of governance as per the Article 1, Section 3 of the Constitution of the Kingdom of Bhutan.

The White Dragon

The White Dragon symbolises the pure thoughts and actions of the Bhutanese people in the form of loyalty, patriotism and a great sense of belonging to the Kingdom in spite of their ethnic, linguistic and cultural differences. The National Flag and the National Emblem of Bhutan enshrined in Article 1, Section 5 of the Constitution of the Kingdom of Bhutan are explained in Resolution 28 of the 35th Session of the National Assembly and specified in the First Schedule of the Constitution. The scripture held by the White Dragon in its right hand symbolises the Constitution as the Supreme Law of the State.

The Raven Crown[1]

The Raven Crown symbolises the presence of His Majesty the King has been blessed as the Precious Crown among the six princely symbols in the Store of Precious Power: Treasure Text of Rigdzin Godem. Moreover, during the reign of Trongsa Penlop Jigme Namgyal in the 19th century, His Holiness Jangchub Tsundru created the crown, installed the inner relics and consecrated it in recognition of Bhutan being perpetually under the protection of Protector Deity Mahakala, Dhumavati (a manifestation of Palden Lhamo) and the Raven - Headed Protector Deity. This crown has been blessed as a sacred object and a symbol of the successive Monarchs of the Wangchuck Dynasty worn during the coronation ceremonies to a meaningful effect.

The Joyful Coils of Jewel

The Joyful Coils of Jewel symbolises Bhutan as Avalokiteshvara's domain of activity where the teachings of the Buddha flourish among the King

1 Derived from Drukgi Gyalrab Salwai Dronme written by Lopon Pema Tshewang, the former Director of National Library of Bhutan.

and the people. The three coils of the jewel symbolises the Triple Gem. The swirling flow of the three coils resembling the current of a river and the gathering of the ocean symbolise the uninterrupted prosperity and governance of the Bhutanese nation based on harmonious and ethical relations between the executive, judiciary and legislative under the guidance of the successive kings.

Judicial Reforms: The Establishment of Specialised Courts[1]

Introduction

Bhutan, in the last decade has witnessed immense, rapid, and fundamental change in the legal domain. The origin of Bhutan as a nation State resulted from a democratic process – a social contract in 1907 leading to the enthronement of the first hereditary monarch, and as a society bound by traditional values, the Bhutanese political structure, presented a unique example of dynastic rule backed by theocratic ideology. The democratic process in Bhutan culminated in 2008 with the adoption of the Constitution – constitutionalism is a testimony of the fact that respect for the rule of law, due process *(rim-gewa),* social justice and the Judiciary are the greatest guarantor of order, promotion of democracy and freedom of humankind.

The Constitution is a product of peace. It is therefore, an embodiment of the most gracious and benevolent testimony of handing back power to the people by an absolute and enlightened Monarch. Hence, It embodies the vision of His Majesty to ensure rule of law, encourage sound political morality and give the country a political system that will provide good governance and fulfil the aspirations of the Bhutanese people. The constitution embodies the pursuit of peace, economic progress and political transformation in the Kingdom.

The rule of law is not an arid legal doctrine but is the foundations of a fair and just society, a guarantee of responsible government, and an important contributor to economic growth, as well as offering the best means of securing peace and co-operation.

Rule of law involves fair administration of justice and non-arbitrary exercise of power by those in authority and the undisputed regard and compliance of the laws by the people (for example - respect for traffic laws). – *His Majesty the King – NGOP 2013*

1 Address by Lyonpo Tshering Wangchuk, Chief Justice of Bhutan. The speech was delivered on 21 December 2016 during the inauguration of the establishment of the specialised courts in Thimphu.

Rationale for Establishment of Specialised Benches

All the lower Courts in Bhutan are single bench and Courts of general jurisdiction with no specialised courts. Therefore, in order to commemorate His Majesty the King's Decade on the Golden Throne, the Judiciary of Bhutan humbly establishes "***Specialised Benches"*** at the Thimphu Dzongkhag Court. The reform is initiated with the belief and conviction that Specialised Benches will facilitate in rendering speedy, fair and just adjudication in all criminal matters and corruption cases prosecuted by the Office of the Attorney General (OAG), commercial and monetary matters emanating from the financial institutions, family and child related disputes and other civil disputes.

Specialised Benches:

Criminal Bench I; Criminal Bench II; Civil Bench; Commercial Bench; and Family and Child Bench.

It is hoped that the Judges (generalists) assigned to these Benches will endeavour to acquire significant specialised knowledge in the subject matter of their respective Benches. This specialisation must bring about uniformity, accuracy, precision, predictability of judgement and informed interpretation of the laws. I am confident that professional **Specialist** judges will promote thoughtful in-depth analysis, logic, and consistency (use of FIRAC - Facts, Issue, Rules, Analysis, Conclusion - method of legal analysis), leading to greater credibility, transparency, integrity and above all enhance the confidence of the people in the justice delivery system.

A certain coherence and uniformity in jurisprudence is necessary to ensure the trust and confidence of the Courts users in the system we put in place. Therefore, I am hopeful that the specialised benches will help promote a national legal doctrine, informed and based on a common education of lawyers and bench clerks and legal literature.

We have chosen the profession by choice. It is a thankless job but the Judges must not shrik responsibility. If we are unable to take difficult decisions, one cannot do justice to the responsibilities of judging. Judgements must be written for the losing party – attempting to convince the loser with

a comprehensive and coherent reasoning sufficiently appraising all the relevant evidence.

In view of the rapid urbanisation of Thimphu, rural urban migration and the perennial quest and struggle to strike a balance between developmental activities, commerce and the need to ensure peace, harmony and stability in our small society, there is a possibility of increase in the volume of litigation. Therefore, it is hoped that the Specialised Benches and Specialised Judges will help cope with the rapid economic and social changes and deal with cases **effectively** - achieving the best possible results, and **efficiently** - requiring least amount of effort and rendering of decisions without delay, being transparent in the decision making process and being responsible and accountable.

The appointment of Chief Administrator of the Alternative Dispute Resolution Centre, Procedure and Guidelines for Informal Money Lending and the establishment of Commercial Bench in Thimphu Dzongkhag Court must boost investment (both FDI and local) and commercial activities and alleviate the Ease of Doing Business in Bhutan.

Salient Features

The Supreme Court of Bhutan in accordance with the Rule Making Powers under Section 30 of the Civil and Criminal Procedure Code, 2001 for the purpose of giving effect to Article 21 Section 1 of the Constitution establishes Specialised Benches in the Thimphu Dzongkhag Courts.

Senior Judges are being transferred to the Specialised Benches so that they may use their experience to establish processes and systems to sustain the reform.

It is hoped that the Senior Judges appointed to the Specialised Benches will engage in capacity building (on-the-job training) of young Legal Officers and Bench Clerks assigned to them.

Judges assigned to the Specialised Benches will be retained for two years - Benches to be rotated amongst the Judges to ensure that complacency and monotony does not become the norm.

Bench clerks are the heart and soul of the Judiciary . Well trained and qualified Bench Clerks must serve as the custodians of our age old traditions and culture *(Driglam-namzhag)* and as guardians of our national language. Bench Clerks must always aspire to fulfil the hopes and aspirations of the people in their pursuit of justice. They must ensure continuity and institutional good memory.

The Chief Judge shall be allotted the Criminal Bench to ease grant of search, arrest and detention orders in cases investigated by the Anti-Corruption Commission (ACC) and the Royal Bhutan Police (RBP).

In cases of conflict of interest, the Chief Judge shall have the prerogative to reassign the cases.

Criminal matters related to children will be assigned to the Family and Child Bench.

Reforms are never static but a continuous process. There must be a continuous effort and desire to build the institution and improve the process, providing for the supremacy of the rule of law and enhancing the trust, confidence and access to justice.

We cannot divine perfection, but we must all aspire to achieve perfection. Having well written legislation and regulations solely is not enough – probably what matters most is how professionals in the justice system use their legal powers and the transparency is said to be the key to fair justice for all.

Conclusion

It is our endeavour and aspiration that the Specialised Benches and the Judiciary will participate and contribute meaningfully in the realisation of a good governance society by balancing social and developmental considerations in judicial decision-making. Providing impetus to the incorporation of contemporary developments in the field of criminal, family, and commercial law for promoting sustainable development, including access to justice, right to information and public participation. By promoting the implementation of global and regional conventions, treaties

and protocols; and strengthening the hand of the executive in enforcing related regulations. By engaging in a leading role in promoting compliance and enforcement of judgements to make the entire legal process relevant.

The Judiciary must adhere to the highest standards of ethics and integrity. As a service oriented institution, the Judicial officials must serve with dedication and humility - respect for the Court users to perpetuate good governance and social justice, contributing towards ensuring a fair and just society and always strive to promote the national objectives and interests at all times.

We must collectively respect and honour the judicial office as a public trust and preserve the integrity and independence of the Judiciary.

The strength and failure of the judicial system, its utility and credibility as a necessary organ of the State in a civilised society, the respect it evokes and the confidence it inspires will depend upon the way it satisfies the hopes and aspirations of the people who approach the Courts with ***"Clean Hands"***.

The 'Master of Punishment' or the 'Lord of Justice' - The Actual and Perceived Roles of Bhutanese Judges[1]

Introduction

The Bhutanese judiciary witnessed transformative development in the last 50 years. While retaining and promoting its indigenous characteristics, it imbibed some useful principles of international jurisprudence. Several laws were enacted which enhanced the rule of law, due process, fairness, equality and transparency. This created an enabling environment for a seamless transition of the country to a Democratic Constitutional Monarchy. The Bhutanese legal system is neither purely a civil nor a common law system. However, certain similar practices take us closer to the common law system such as the adversarial proceedings in which the cases are contested between opposing parties by presenting legal arguments and evidence by the parties. Judges play the roles of umpires and apply laws to the facts.

In Bhutan, one of the earliest symbols or the icons of law and justice was the High Court though some courts were operating from the Dzongs in some districts by the time it was constructed in 1967. People looked at the shingle-roofed, castle-like medieval building on the way to Trashi Chhodzong with awe and reverence. Obviously, those with the guilty conscience would have been overcome with hate and fear. Before the establishment of the Supreme Court, it housed the country's highest judicial institution. It was the receptacle of appeal cases from the districts and the laboratory in which judges breathed life into parliamentary statutes and engineered the society.

Above all, lying at the apex of the judicial pyramid, it was the seat of the country's highest judicial authority – a symbol of national sovereignty and *rule of law*. His Majesty, the Third Druk Gyalpo did not merely construct an iconic building in 1967 but laid down the very edifice of the laws for a

1 Contributed by Lobzang Rinzin Yargay. The author is Director General of the Bhutan National Legal Institute.

fair, just and content society. It silently greased the machine of the rapid growth and development which the nation witnessed in the last 50 years. As the Judiciary braces to celebrate 50 years of services to the country, the author takes a closer look at the justice system, which the institution of High Court nurtured – with focus on the actual and perceived roles of the high priests of 'temple of justice'– the judges.

Separation of Power

The concept of 'check and balance' or the separation of governmental power is traced to ancient Greece. Later, The English and French philosophers advocated it before it took roots in America. Here in Bhutan, when he side-stepped from active leadership, Zhabdrung Ngawang Namgyal did not leave the religious and secular authority in the same hand as evident from his dual system of governance. Cognizant of the consequences of concentration of legislative, executive and judicial authority in single institution or individual, successive monarchs paved way for establishment of the courts to resolve disputes and decide cases by a separate cadre of professionals – the judges. After nurturing it for years, the concept has been given its rightful place in the country's highest law – the Constitution.[2] This strengthened the independence of the judiciary[3] with the Supreme Court as the 'guardian' and the 'final authority' on the interpretation of the country's laws.[4]

Under the constant guidance of the Throne, the judiciary achieved all-round growth. In terms of infrastructure, almost all courts function from independent court buildings.[5] Thanks to the visions of the successive chief justices, Judiciary boasts a team of one of the most capable and competent professionals in terms of human resource today. Though people are often lavish with their criticisms and frugal with appreciations, the judiciary silently greased the engine of growth that saw the Kingdom metamorphosed into

2 See Article 1, Section 13 of the Constitution, 2008; Section 5 of the Judicial Service Act, 2007(JSA); Section 2 of the Civil and Criminal Procedure Code, 2001(CCPC).

3 However, mere absence of the interference in the adjudication of individual cases while the judiciary is resource-strapped is not real independence.

4 See Article 1, Section 11 of the Constitution of the Kingdom of Bhutan, 2008.

5 Judiciary comprises 20 district courts, 15 sub-district courts, the High Court and the Supreme Court.

a democratic constitutional monarchy. The pendency of the cases has been reduced. Judicial policies require the courts to dispose criminal cases within 108 days and civil cases within one year failing which a justification has to be tendered for the undue delay. The courts are user-friendly and judicial services are one of the fastest and most inexpensive in the region. Above all, the Bhutanese judiciary is one of the least corrupt and judges well qualified and efficient. The conferment of the prestigious *Druk Wanggyel* medal upon former Chief Justice by His Majesty the Druk Gyalpo in December 2009 and other international awards received by the judiciary are the testimonies to the increasing Royal trust and public confidence in the professional and dynamic judiciary.

The role of judiciary, as well as that of the judges however continues to be shrouded in myths and misperceptions. Judges are feared, hated, vilified and even threatened despite the sacrifices and the contribution they make toward nation-building. This article offers glimpses of the evolutionary path of the judiciary in the recent past. It also dispels some myths and misperceptions associated with or alluded to the judges and highlights the other less-known roles Bhutanese judges play.

The 'temple of justice' and 'lord of justice'

The word '*Thrim*' has more than one meaning in *Dzongkha*. It means 'law'. It also means 'punishment'. Further, it also means 'justice'. Therefore, '*Thrimpon*' means 'lord of law' or 'lord of justice', or the 'lord of punishment'. Similarly, '*Thrimkhang*' means 'house of law or justice'. It also means 'house of punishment'. However, when people continued to associate law (*Thrim*) with 'punishment' and the court (*Thrimkhang*) with the 'house of punishment' – with the associated, ironic negative connotation - the judge was called *Drangpon* ('lord of justice or truth'). Similarly, the court is now '*Thrimki Duensa*' ('place of justice' or 'before the law' literally); not '*Thrimkhang*' ('house of punishment').

True to the word *'Thrim'* (punishment), in the past, the courts often evoked more fear than respect. Judges came from diverse backgrounds – military, administrative, legislative, etc. Most of them picked up the art of judging or dispute resolution skills on the job. They brought rich experiences from different fields of life and looked at the cases from different perspectives.

This often led to divergent views on the application of the laws and resolution of disputes. In the era of little written or statutory laws and systematic resolution of disputes, the personality of the individual judges often played significant role in the disposal of the cases. The Royal Advisory Council (RAC) quasi-judicial body added another dimension to the cases when the cases which were appealed to His Majesty, the Druk Gyalpo were resolved jointly with the High Court judges. Lack of consensus often resulted in disposal of cases by individual judges rather than the '*Yongthri*' (the Full Bench).

The adjudication processes involved persuasive tactics aimed at withdrawal or amicable resolution of the cases with moralistic and spiritual tones. With no appreciable literacy of laws, the litigants reconciled with the articulate directives of the judges - returning home with sparsely written judgments with little or no reasons or justification for the decisions arrived at. While people were god-fearing and law-abiding, some cases passed through a series of courts and hands of many judges in the quest by some litigants to seek justice. Many reached the Royal Palace as the justice eluded. This sometimes resulted in bitter and protracted litigations which drained the resources of the litigants as well as that of the courts. The proceedings mainly constituted verbal submissions which often placed articulate parties at advantage, being able to convince and persuade the judges. Resource-strapped litigants often got exhausted along the way as they scaled the judicial ladder.

The Thrimzhung Chhenmo

Beginning early 1950s till late 1970s, disputes were mostly settled based on the *Thrimzhung Chhenmo* (the Supreme or the General Laws) – a repository of procedural as well as substantive laws on diverse subjects both civil as well as criminal matters. The *Kadyon* contained procedural directives which guided the courts in the discovery of truth. These laws constitute the modern-day code of conduct of judges and civil and criminal procedures code. In early 1980s, laws on land, inheritance, marriage and loan which constituted individual chapters in the *Thrimzhung Chhenmo* were enacted into separate laws. This was followed by enactment of several other laws by the National Assembly in 1990s and early 2000. The *Thrimzhung Chhenmo*

reflects the high intellect and law-making skills of our monarchs and law givers. It continues to inspire the legislators, judges and legal practitioners alike. It is an invaluable source of laws and a cradle of Bhutanese jurisprudence due to its profundity. It is a true witness to the laws of the time, repository of values, conduct of the people, and the advanced stage of Bhutanese civilization – the most strands and the essence of which inform our Constitution.

Dawn of judicial professionalism

Laws have played a pivotal role in our development journey, and will be even more important as we travel further on the path of democracy. A gradual and constant stream of legal professionals flowed into the judiciary beginning with the establishment of the *Post-Graduate Diploma in National Law* course at the Royal Institute of Management in 1995. This was a significant milestone in the evolution of the judiciary. Since then many law graduates have joined the legal system. Today, the judiciary is manned by country's finest legal minds and professionals who have specialized in different fields of laws, besides being firmly grounded on Bhutanese literature and timeless Buddhist values of compassion, tolerance and non-violence. Judiciary continues to attract and retain the brightest legal minds - to be worthy of being the guardian of the Constitution[6]; and to truly dispense justice 'without fear or favor',[7] for no justice will flow from the judges whose hands trembles to render bold decisions. It is hoped that the Judiciary will continue to enjoy the appropriate state patronage so that judges will not be compelled to stoop low to eke out a decent living – for in their strength lies the strength and the vitality of *rule of law* which is essential for the deepening of the democratic norms and values in the country.

Document-intensive litigations

In the past, the litigations were mainly verbal with little or no documentation. The judgments were a single or a few-page long document which records little plaints, pleadings and judicial proceedings. Courts were literally the

6 See Article 1, Section 11 of the Constitution
7 See Article 21, Section 1 of the Constitution; Section 103 of the JSA; Section 13(3) of the CCPC.

battle-grounds of verbal contests and elegant sayings. The judges were often inquisitorial and interrupted the parties during submissions. The parties had full faith in the neutrality, fairness and integrity of the judges. The judgments were not always predicated on statutory laws. Often it was based more on logics than laws; and equity more than justice in their attempts to preserve relation and harmony in the society to strengthen community vitality. Today, the courts are relatively quieter. The litigation has become document-intensive. Plaints and pleadings are exchanged between the opposing parties. It is an open and transparent contest – more of legal knowledge than eloquent words. Even the professional practitioners do not make long verbal arguments. Instead they submit long written pleadings. Proliferation of firms providing drafting services testifies the fact. Similar is the trend at the courts. The hearings are becoming increasingly short. More and more judges speak less and less and listen more and more – preferring the long, written and reasoned judgments to do the speaking on their behalf.

Without fear or favor

A judge is required to decide cases without fear or favor[8]. However, you never know when your archery team mate will turn into a plaintiff or a defendant and appear before you. It is indeed difficult to associate or depend upon people who are affected by the decisions, often adversely. Further, the principles of 'professional secrecy' and the 'judicial isolation' indeed isolate judges from the society leaving them devoid of social capital and emotional intelligence due to limited social contacts.

Judges do not 'sit' on the elevated platform or occupy superior position in the society. It is the law which is supreme and judges as civil servant simply decide the cases as the intermediary of the state and representative of the Throne in their respective jurisdictions. The court is a solemn institution designed to seek truth. It is an institution which secures rights, compels obedience to laws and performance of duties. Judges are trained and mandated to seek and tell truth – and the truth hurts risking reprisals and vengeance in a small society. It is for this reason that they are not subject

8 See Article 21, Section 1 of the Constitution; Section 103 of the JSA; Section 13(3) of the CCPC.

to periodic public validation through elections to enable them to discharge this duty without fear or favor.

His Majesty the Fourth Druk Gyalpo acknowledged the unique and difficult nature of judges' responsibilities and the importance of the roles played by the judiciary in 2001 when His Majesty granted a duty vehicle and an official residence to the judges. These privileges motivated the judges, enhanced the dignity, image and independence of the judiciary – which translated into better judicial services and enhanced access to justice. Since then, many bright minds and upright persons have opted judicial career. Judges today not only resolve any and all cases arising in their respective jurisdictions, but are the administrative heads of the judiciary in their respective districts charged with the management of the public resources, administration of the courts and judicial personnel.

Neutral umpires

There are many challenges of being "a lord of punishment" (as some people still perceive) in a small and close-knit society. Parties often allude failure at the courts to the favor or influence of the judges and the judicial personnel even though the courts decide cases on their merits. Some people still think that those who speak loudest or eloquent or wealthy and influential win the cases. As the litigation become more documents-intensive, people often compare the number of documents or papers they submit to the courts to that of their opponents, oblivious of their evidentiary weight or values. Some people 'decide' their own cases before they come to the courts. They try to use courts only to vindicate their claims and positions. There are some who try to use the courts to settle their scores with their opponents. They expect the judges to advocate their causes or make up the deficiencies of their cases.

The reality is that courts are neutral institutions which offer level-playing fields[9]. Judges only 'referee the games' ensuring fair play. Therefore, parties are required to come to the courts with clean hands and clear conscience to play their own games and 'win the contests'. Moreover, judgments are not made impulsively at the whims and fancies of the judges. Cases are

9 See Section 101 of the JSA; Section 4 of the CCPC.

subjected to rigorous judicial scrutiny with a series of hearings during which grains are separated from the chaffs resulting in reasoned, rational and realistic judgments – considering the effect and the impact on the parties, community and the country at large.

Wide Discretion

Courts indeed lack wide discretion to decide the cases. The judges do not determine the range of sentences, fines and damages arbitrarily. Each issue or controversy in a case must be resolved based on facts, evidence and the applicable laws.[10] Many factors are taken into consideration such as the gravity of the offences committed, the criminal record of the defendants, the nature and seriousness of injury, mitigating and aggravating circumstances, etc. to arrive at the decisions or determine the range of penalties and fines.

A judge's duty is to resolve disputes by applying the prevailing laws on the facts and controversies which come before him. Justice is not always dividing the apple – which is in fact equity if one of the parties is not entitled to receive half of the apple. Actually, justice actually means giving what is due to a person which might mean giving the whole apple to one party and sending the other party empty-handed as deemed fit or appropriate in the nature and circumstances of the cases.

People believe different judges give different decisions on similar cases. The fact is that cases may be similar but no two cases are exactly the same. This necessitates varying interpretation or application of the same law befitting unique facts and circumstances of each case. Cases are no mathematical problems to be solved by a single universal formula. However, merit or the inherent strength of the case remains the main criterion though the extent to which the parties persuade courts through compelling arguments and evidence is important. The background, values and sentiments of the individual judges, the conduct and demeanor, language and diplomacy of the parties and their representatives play lesser role in case outcomes.

Kidu

Courts enforce rights granted by the laws and which people are entitled to after fulfilling certain conditions. In other words, Courts do not and cannot

10 See Section 28(d) of the CCPC.

grant gratuitous favor or the *Kidu* – which is a Royal prerogative tool for affirmative interventions. Rights are something which you are entitled to in return for performing certain duties. *Kidu* is a favor or gratuitous gift granted by higher authorities to the disadvantaged and less privileged people. In Bhutan, only His Majesty the Druk Gyalpo is vested with such authority and prerogative.The exalted position (such as 'all knowing precious lord' etc.) to which some people elevate the judges and the unrealistic expectations of 'gratuitous favor' 'prayed' for in the petitions and pleadings allude more authority and mandate to the judges than they actually are vested with.

Often, petitioners do not express their true grievances or issues clearly. This leads to wrong outcomes often called 'injustice' leading to maligning of the judges and courts. In marriage cases, for instances the plaintiffs often express only wrongdoing on the part of the spouse with no prayer for the desired relief or remedy – other than the *kidu* to get the respondent summoned to the court. When the courts grant reliefs which are not actually contemplated or desired by the parties, they cry foul against the courts or form the basis or grounds for appeal.

Conclusion

In response to the rapid economic development sweeping the country, the judiciary has transformed itself into a modern institution capable of resolving complex controversies and legal problems accompanying sophistication of the society and advancement of civilization. Conflicts accompany developments and changes which require new laws to tackle. But more laws also mean more crimes and disputes to adjudicate; and therefore, more cases to the judiciary. While the main role of the judges is to resolve disputes and pronounce judgments based on facts and evidence in accordance with the laws; and enforce orders, decisions and sentences and administer justice expeditiously, fairly and independently without fear or favor and undue delay;[11] judges in Bhutan also fulfill other non-judicial functions such as court administration, management of personnel, finance, information system, protocol, personal relation, etc. These not so well-acknowledged and recognized roles of the judges indeed consumes much time, leaving less time for his main role of adjudication of disputes and research of laws.

11 See Article 21 of the Constitution

Besides, most people are not well aware of these non-judicial roles performed by the judges. Most disturbingly, much authority is alluded to the judges than they really wield. They are perceived as powerful people sitting on the elevated seats. They are hated and feared as possessing unfettered discretionary authority to interpret laws to suit their whims and fancies. Some still expect them to grant *Kidu,* punish their enemies or do 'justice' to their case without concrete case or controversy to adjudicate or relief to consider.

The purpose of this article would be fulfilled if it could dispel few myths and misperceptions shrouding the judges and the judiciary. While our courts may not be 'temples of justice'; nor the judges the 'lords or priests' but our courts are definitely, not the 'house of punishment' and nor judges the 'masters of punishment' but ordinary mortals trying to perform divine task of 'giving justice' when people are wronged.

50 Years of Judiciary – A Brief account of major Reforms[1]

This year marks 50th Anniversary of the establishment of Royal Court of Justice and its service to the nation and the people. While the appointment to Drangpon (Thrimpon) dates back to 1960, the establishment of the High Court in 1967 by His Majesty the Third Druk Gaylpo marks the beginning of modern judicial system. Among many institutional initiatives and reforms, His Majesty the Third Druk Gyalpo envisioned an independent Judiciary for fair and effective administration of justice.

For last five decades, the judiciary of Bhutan played pivotal role in strengthening the Rule of Law, safeguarding the sovereignty and the security of our nation, enhancing unity, peace, and tranquillity through administration of justice and periodic judicial reforms. With the introduction of democracy and ever increasing legislations, the Judiciary has a significant role in upholding the Rule of Law, and maintaining social harmony as a basic foundation of our democracy.

His Majesty the Fourth Druk Gyalpo has always emphasised the need for strong and independent Judiciary. To fulfil this noble vision, His Majesty initiated major legal reforms and developments, both procedural and substantive. Enactment of separate and specific Acts based on the consolidated *Thrimzhung Chhenmo* of 1953 is one of the profound reforms, which still endures with least changes and amendments. Other important initiatives of His Majesty the Fourth Druk Gyalpo includes enactment of Civil and Criminal Procedure Code 2001, Penal Code 2004, Evidence Act 2005, the Judicial Service Act 2007, and the Jabmi Act, 2003. As a Buddhist nation, our judicial philosophy is highly influenced by profound Buddhist belief, and the abolishment of the capital punishment on 20 March 2004 by a Royal Decree was the most remarkable penal reform. The most historic and unprecedented reform was the drafting of the Constitution of the Kingdom of Bhutan that enabled peaceful transition from monarchy to democracy in 2008.

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His Majesty the King Jigme Khesar Namgyal Wangchuck continues with the reforms and changes initiated by His Majesty the Fourth Druk Gyalpo. The adoption of the Constitution of the Kingdom of Bhutan in 2008 is the most historic. Article 21 of the Constitution guarantees both institutional and personnel independence of the judiciary to administer justice without fear, favour and undue delay in accordance with the Rule of Law. The Constitution placed strong trust and confidence in the Judiciary to uphold the spirit of the provisions of the Constitution by upholding the Rule of Law, and protect the rights of the citizens. It also clearly defines the roles of each branch of the government based on the separation of powers. The establishment of the Supreme Court of Bhutan in 2010 has further strengthened the independence of judiciary.

The judiciary has also undergone a major institutional reforms in the last five decades. The introduction of the National Judicial Conference (NJC) in 1976 is one such major reform. The NJC is a platform to discuss various legal issues, deliberate on the opportunities and challenges, exchange of ideas, knowledge, and experiences among the judicial fraternity, enhance uniform application of laws, and further strengthen the judicial system. Other institutional reform was the establishment of a separate judicial cadre in 1990. This initiative enabled Judiciary to manage human resource independently, and this was further strengthened with the enactment of the Judicial Service Act in 2007.

Today, the Judiciary is devoted to establish separate and independent court structure in every Dungkhag and Dzongkhag. As Chief Justice Gordon Hewart in 1924 said, *"it is not merely of some importance, but of fundamental importance that justice should not only be done, but should be manifestly and undoubtedly seen to be done",*[2] the separate court buildings are an integral part of administration of justice. The judiciary of Bhutan believes that the court building manifest physical separation of powers affirming the principle of independence as enshrined in the Constitution.

The Royal Court of Justice initiated major changes and developments under the leadership of former Chief Justice of Bhutan Lyonpo Sonam Tobgye. The Information and Communication Technology (ICT) was

2 *R v. Sussex Justices, Ex parte McCarthy* ([1924] 1 KB 256, [1923] All ER Rep 233)

introduced in 1991, and the Case Information System was introduced to facilitate the retrieval of precedents for enhancing a uniform sentencing as well as to study the trend of the cases in various courts with the submission of Case Statistics Report to the Chief Justice by the respective courts on a monthly basis. Moreover, important judicial decisions are made available on the judicial website.[3]

The judiciary has also come a long way in Human Resource Development. The establishment of the Bhutan National Legal Institute (BNLI) under the Judicial Service Act of 2007 was a significant development in the history of judicial education and research. Under the visionary and dynamic leadership of Her Royal Highness Princess Sonam Dechan Wangchuck, the BNLI not only serves as the training arm of the judiciary, it also provides legal education and dissemination services at the grassroots level as a part of access to justice program. The initiation of mediation training by the BNLI for the Local Government Leaders has encouraged mediation as a systematic tool for an effective and less costly approach in resolving disputes at the community level. The Mediation Training Impact Assessment Report 2016 shows an increasing number of civil disputes being resolved at the community level which resulted in a significant reduction of caseloads in the courts. Further, the BNLI's research endeavour in various fields of law will ensure that the judicial personnel are informed on both the domestic and international laws.

The Judiciary continues to grow from strength to strength under the leadership of the present Chief Justice Lyonpo Tshering Wangchuk. The establishment of the specialised courts in the Thimphu Dzongkhag is one of the major initiatives. Specialised courts will enable to tackle special societal challenges in our country such as family and child matters, and facilitate speedy, fair and just adjudication of cases. This has deliberately embraced the modern concept of court administration allowing the Judges to concentrate on their specialised function of judging. Besides, the Judiciary also introduced e-judicial services (through G2C Services) whereby applications for various judicial services can be filed online without having to physically appear before the courts.[4] Such initiative will

3 (http://www.judiciary.gov.bt/index.php/Welcome/get_pages?id=62).

4 (Marriage Certificate can be applied at: <https://www.citizenservices.gov.bt/Judiciary/openApplication.html?method=openApplication&applType=MC>)

not only save time and cost of the people but improve access to courts as the judicial services are made easily available from the comfort of the offices and homes.

As the Judiciary celebrate its 50th years of existence, it is a proud moment for all of us. The series of reforms and developments have convinced us to believe that our people are being served by an institution that is modern in outlook and customer-focused in practice. Though judicial efforts remain fraught with challenges and difficulties we accept it as a work in progress.

We are encouraged by the achievements over the years, with simplified procedure for litigants. The improved physical facilities through the construction of courts is an effort to provide a safe and secure environment for justice, and the sharpening expertise and human resources to adequately respond to the increasing demands of the institution; complemented by the latest technology to improve access and professional delivery of justice.

As the judiciary ushers into a new era of globalisation and modernisation, its emphasis will be on those inextricable areas linked to the vision of our forebears and to realise the philosophy of Gross National Happiness (GNH) through judicial excellence including a high performance and professional culture, and organisational stewardship.

The legitimacy of the judiciary is grounded in public trust and confidence in conditions of *par excellence,* commitment and accountability. This can be further relied on the hallmarks of service, timeliness, efficiency, and rigid adherence to principles of integrity, equality, fairness and accessibility. Thus, we envision a future through its operational excellence that the perennial challenge of trust and confidence of the justice system be made an issue of the past.

Although judiciary has achieved major reforms in last five decades, there remains challenges and opportunities ahead. While the Judiciary's endeavour to change people's perception of the institution and garnering people's trust and confidence in the system will be an unending challenge, the judiciary as an important democratic institution has enormous opportunities ahead to fulfil the noble vision of His Majesty to build a vibrant democracy and a just and content society.

Today the Judiciary is blessed with dynamic leaders and qualified judicial personnel. However, in the future, we perceive that Judiciary will receive more competitive professionals whose work culture will be synonymous with a culture of highly motivated and appropriately skilled staff, working with a common purpose, and providing optimum services with minimum hardship to the consumers of justice. With time, the independence of the Judiciary will be even more respected, strengthened and deepened. And finally, the judicial legitimacy will be strengthened as we continue to draw inspiration of the people through judicial professionalism and operational excellence.

Amicable Resolution of Community Disputes – Appraisal of the impact and the state of Mediation (*Nangkha Nangdrig*) Trainings[1]

Introduction

Rapid economic development is accompanied by more economic and commercial activities, which inevitably result in more conflicts and disputes which calls for more and more laws. Unfortunately, as the laws circumscribe conducts of the people, more laws also mean more disputes and crimes. More disputes and crimes mean more cases to the judiciary which exert pressure on the limited judicial resources. Therefore, if some or most of the cases are mediated or prevented from reaching the courts, both the judiciary and the people stand to benefit. The judiciary can allocate its resources on cases which deserve intervention, and the people in the community will be spared of their time and expenses.

Above all, expeditious and amicable resolution of the disputes will not only save resources for the people, but preserve their relations and promote harmony in the society. In its quest to revitalise and strengthen the age-old informal amicable dispute resolution system (*Nangkha Nangdrig*), the Bhutan National Legal Institute began studying the system and training the mediators to build their capacity to understand, process and resolve the community disputes in professional manner. This articles attempts to appraise the state of the Mediation system and analyse its efficacy and efficiency as a dispute resolution tool.

Rationale

Communities are the building blocks of the nation. For a nation of our size, means and geopolitical circumstance, peace and unity is of paramount importance. One means to achieve this is to prevent disputes and resolve them expeditiously before it strains social relationship. One of the efficient

1 Contributed by Tenzin. The author is a Trainer and Researcher at the Bhutan National Legal Institute.

and effective methods to achieve this is to resolve disputes through Alternative Dispute Resolution such as mediation. Mediation of minor civil disputes in the communities also constitutes decentralisation of judicial services to the grassroots communities. This can also be considered as empowerment of rural communities or affirmative intervention to tackle income inequality as they are spared from going to the courts to get their disputes resolved.[2]

Origin

Amicable settlement of disputes with the help of a neutral third party is an inherent cultural practice in Bhutan. It played a significant role in the peaceful settlement of disputes in the history of the Bhutanese legal system. It is revealed that the practice existed as early as the eight century.[3] However, the official codification of mediation took place in 1950s when the *Thrimzhung Chhenmo* was adopted.[4] Later in 2001, the *Civil and Criminal Procedure Code (CCPC)* further emphasised the importance of mediation in civil cases.[5] Similarly, Article 21 clause 16 of the *Constitution of the Kingdom of Bhutan*, 2008 mandates the parliament to establish impartial and independent tribunals and Alternative Dispute Resolution Centres by legislation. The Local Government Act requires the Gewog to mediate minor civil cases. *The Alternative Dispute Resolution Act, 2013* allows mediation of disputes amicably through negotiated settlement.[6]

Revival

However, the statutory provisions did not translate into actions on the ground. As the population grew younger and the elderly citizens drifted to the urban centres, the skills and practices of amicable resolution of disputes with the help of elderly people and wise citizens in the communities declined. Registration of simple and trivial community

2 See Yargay, L R, 'Mediation in Bhutan: 'Saving Faces and Raising Heads', *Bhutan Law Review*, 4 (2015), 13 – 16.

3 See Bhutan National Legal Institute, *Mediation Training Impact Assessment Report* (June 2016).

4 See Section Da 3-2 of the *Thrimzhung Chhenmo* which stated that all type of cases can be negotiated and settled out of court except those cases that are prohibited under the law.

5 See Section 150 of the CCPC.

6 See Section 163 and 164 of the *Alternative Dispute Resolution Act, 2013*.

cases at the courts reveal lack or breakdown of the informal system of community dispute resolution. Therefore, there was an immediate need for the revival and institutionalisation of the system so that justice is provided in the community.

Royal Patronage

It is at this juncture that an intervention was launched by the Bhutan National Legal Institute (BNLI) in 2012 under the visionary and dynamic leadership of the Honourable President, Her Royal Highness Ashi Sonam Dechan Wangchuck. The BNLI conducted a comprehensive mediation trainings for all the local government leaders - beginning with the Mangmis and Tshogpas and later the Gups and other relevant stakeholders. More than the reduction of cases in the courts, the trainings were aimed at preserving neighbourly relationship between the people in the community.

In her inaugural address to the 65 Mangmis of the 7 western Dzongkhags at Punakha on 22 February 2012, the Hon'ble President of the Bhutan National Legal institute, Her Royal Highness, Ashi Sonam Dechan Wangchuck said that "I am concerned that the age-old culture and practice Nangkha Nangdrig is in decline. Disputes are bound to arise when we interact with each other. But I don't believe we must compulsorily go to courts to resolve them. Our elderly and wise citizens have been helping people resolve minor cases in the communities since time immemorial which saved time and resources as well as preserved social relationship and harmony. You have been chosen to be trained to fulfil this role now. I hope you will use the knowledge and skills you gain in this training to resolve the disputes and enhance the community vitality and the happiness of our people thereby fulfilling the wishes of His Majesty the Druk Gyalpo and His Majesty the Fourth King."[7]

7 See *The Speeches of HRH, Ashi Sonam Dechan Wangchuk*, Bhutan National Legal Institute.

Table 1 – Number of Local Government leaders trained in mediation skills and techniques

Year	Designation	No. of Participants	Total
2012	Mangmis	205	205
2013	Women LG Leaders	130	130
2014	Chiwog Tshogpas	200	
2015		271	
2016		422	
2017		270	1163
2017	Gups	205	205
		Total	**1703**

As shown in the table above, the BNLI has trained a total of 1703 leaders comprising 205 Gups, 205 Mangmis, 130 women local leaders, and 1,163 Chiwog Tshogpas on mediation skills and techniques as of now. The trainings were well- received and the requests for the same are pouring from the Dzongkhags. The trainings build the capacity of the Local Government leaders to handle, manage and resolve the community disputes by using mediation skills and techniques.

In addition, the Institute upon request trained other relevant stakeholders. Labour disputes are often complex and require adequate skills and knowledge to resolve amicably. Therefore, twenty labour officers were trained in 2016 on mediation skills and techniques. The training equipped them with the required skills and knowledge to mediate the labour disputes that arises between the employers and employees.

Similarly, the Institute also trained thirty participants on Arbitration upon the request made by the Construction Development Board (CDB). The CDB is the only organisation which has institutionalised the practice of arbitration related to construction disputes and has maintained a list of arbitrators who are empanelled when construction disputes are referred for arbitration.

Impact study

The mediation trainings were conducted to ease court congestions as well as prevent litigants from spending undue cost and time. The trainings also aimed to enhance community involvement in the dispute resolution process, facilitate access to justice and uphold the rule of law, provide effective dispute resolution mechanism, and ultimately to achieve the greater objective of Gross National Happiness. Having made substantial investment in revival and strengthening of the system, it is imperative to assess the effectiveness of the mediation training- whether it has achieved the goals and objectives. Therefore, the BNLI collected, compiled and published the *Mediation Training Impact Assessment Report* in June 2016[8] covering the period between 2012 and 30 June 2015.

Table 2 : Dzongkhag-wise number of cases settled out of court through mediation

Sl . No.	Dzongkhag	Cases Mediated	Cases Litigated	Total
1	Bumthang	378	362	**740**
2	Chhukha	1357	1439	**2796**
3	Dagana	677	581	**1258**
4	Gasa	208	81	**289**
5	Haa	509	380	**889**
6	Lhuntse	296	1124	**1420**
7	Mongar	2997	1241	**4238**
8	Paro	665	2958	**3623**
9	Pema Gatshel	313	1575	**1888**
10	Punakha	351	960	**1311**
11	Samdrup Jongkhar	438	764	**1202**
12	Samche	807	831	**1638**
13	Sarpang	347	1073	**1420**
14	Thimphu	160	3762	**3922**

8 See, Bhutan National Legal Institute, *Mediation Training Impact Assessment Report* (June 2016).

15	Tashigang	2545	1046	**3591**
16	Tashiyangtse	693	327	**1020**
17	Trongsa	786	392	**1178**
18	Tsirang	384	288	**672**
19	Wangdue Phodrang	1089	1147	**2236**
20	Zhemgang	316	603	**919**
Grand Total		**15316**	**20934**	**36250**

(Source: *Mediation Training Impact Assessment Report*, BNLI 2016)

The report reveals that out of the total cases of 36250, 15316 cases were mediated in the communities without resorting to litigation in the courts. However, the 20934 cases went to the courts. Therefore, enhancing the capacity of the mediators is expected to inspire trust and confidence in the mediators and mediation system and reduce the number of cases reaching the courts. It is to be noted that the Report only highlights the cases mediated at the 205 Gewog offices level. It does not include the number of cases mediated by the country's 1044 Chiwog Tshogpas. However, despite its efficacy in weaning out several cases out of the adjudication system and the strengthening social harmony and community vitality, feed backs received and monitoring and evaluation of the Mediation practices in the country reveal problems which refresher courses need to solve.

Hard on the people

Previously, our rural mediators maintained an air of authority and tried to dominate, manipulate and impose the decisions they thought were appropriate for the disputing parties. They did not consult or hear the parties, or analysed their needs, interests and concerns and hurried to the decisions parties often did not own or honour. Now the focus has changed from the people to the problems. Community leaders are now increasingly soft with the people and hard with the problems thereby preserving the status quo and strengthening relationship in the communities – building blocks of the society.

Evaluative Mediators

Prior to the trainings, it was found that people were resorting to mainly evaluative mediation instead of facilitating the parties. As a result the mediators dwelt on the incriminating faults and mistakes committed by the parties. They were very critical of the submissions of the parties and judgmental during the mediation proceedings. Now the mediators have realised that the mediation is a voluntary process over which the parties have autonomy to design a mutually acceptable solutions; that the role of the mediator is simply to facilitate negotiation with acceptable solution between the parties.[9]

Adherence to the laws

In the past the mediators were of the misperception that the mediation must be based on the statutory laws. The fines, penalties and damages were based on the specific laws, for instance in cases related to marriages, the matrimonial compensations were exactly the same as provided by the laws. This converted the mediation proceedings to judicial proceedings and the mediators played the authoritative or inquisitorial roles of judges. This defeated the very purpose of informal resolution of the disputes based on the needs and interests of the parties – which implies that so long the receiving parties agree, any amount of fines and damages can be agreed to and paid based on the capacity of the parties – which may be more or less than stipulated by the statutory laws.

Formality

Some mediators are demanding the complaints in writing compulsorily. Again, the purpose of amicable community resolution is inexpensive and informal procedures. No writings and records may be required in minor cases which erupt in the rural communities. Some even summon witnesses and do detailed investigation. Mediation is no adjudication. The purpose in mediation is not discovery of truth and determination of faults and guilt. It is dialogue, negotiation and compromise. It is affording platform to the parties to sit together and express regrets and say sorry for the misconducts and mishaps.

9 See Section 172 of the *Alternative Dispute Resolution Act, 2013*.

Fear of courts

Some mediators are wary of the judges summoning them to the courts and punishing them for improper mediation. While mediators are not devoid of accountability for what they do during mediation, they are friends of the courts since they supplement and complement judicial efforts to give justice to the people.

However, there will never be a time when all the cases are mediated. It only supplements the judiciary in resolution of minor civil cases. The criminal cases and the serious civil cases cannot be mediated. Moreover, the expertise of the qualified legal professionals cannot be substituted by lay mediators and local government leaders. The successful mediation ends with a settlement agreement which is a valid contractual document which should be enforced at the courts of laws as per *Alternative Dispute Resolution Act*.[10] In case of failed mediation, the matters end there. The matters can be taken to courts where the courts will conduct independent adjudication and resolve the matter on the merits irrespective of what transpired in the failed mediation proceedings. The mediators need not be summoned to the courts regarding what took place during the failed mediations as the facts would be clarified by the parties nor can it be used as evidence in the courts.[11]

Conclusion

The amicable resolution of disputes through ADR tool such as mediation brought tremendous benefit to the people in terms of access to justice, especially to those communities which are far away from the courts – all of which are located in the district centres. Mediation decentralised judicial services and took justice to the doorsteps of the rural communities. It empowered the people to tailor solutions based on the needs and interests and mutually acceptable to the parties rather than have the third unknown person (judges) thrust decisions upon them through right or power-based adversarial process. This has also helped in retention of the social hierarchy

10 See Section 177 of the *Alternative Dispute Resolution Act, 2013;* Section 150.3 of the CCPC.

11 See Section 169 of the *Alternative Dispute Resolution Act, 2013;* Section 30 and 35 of the *Evidence Act, 2005*.

in the community as the parties abide by the decisions facilitated by the elderly citizens and their elected local government leaders. Having received the much-deserved acclaim from the highest law-making institution of the country in addition to the gratitude and appreciation expressed by the people – the Institute shall continue investing in its core expertise area of promoting signature mediation training programs for a fair, just and a content society.

Arbitration in Bhutan: The Role of the Judiciary[1]

1. Introduction

Increasing growth of international trade and globalization has brought a sea of change in the way the international business transactions take place. This, in turn, has necessitated the dispute settlement mechanisms to respond to the needs and requirements of the contemporary international trade and its problems. Arbitration has emerged itself as one of the most sought-after method of dispute resolution both at the domestic and international level notably for the settlement of commercial and investment related disputes.[2] The reasons why arbitration has become one the most preferred method of dispute resolution at the international level are, amongst others, the flexibility in arbitral procedures, party autonomy, and the benefits of neutral and un-biased third party tribunal.[3] Further, factors such as protection of trade secrets, maintaining a cordial relationship with their partners influences the decision of the parties to opt for arbitration.

Arbitration is one of the methods of the Alternative Dispute Resolution (ADR) and it is one of the most preferred methods at the international level to resolve transnational disputes concerning commercial and investment disputes. Arbitration is a consensual means of settlement of disputes by a non-governmental decision maker which renders legally binding and enforceable decision.[4] Simply stated, it is one of the methods of ADR where neutral third party adjudicates the disputes and renders the legally binding decision.[5] The main crux of arbitration is the fact that it is an out of court settlement mechanism of dispute.

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1 Contributed by Garab Yeshi. The author is Registrar at the Thimphu District Court.

2 See Christoph Schreuer, 'Investment Arbitration' in Cesare PR Romano, Karen J Alter et al (eds), *Oxford Handbook of International Adjudication* (Oxford University Press 2015) 296; Gary B. Born, *International Arbitration: Law and Practice* (2nd edn, Kluwer Law International Law 2015) 1-10.

3 ibid 296.

4 Gary B. Born, *International Commercial Arbitration: Commentary and Materials* (2nd edn, Kluwer Law International 2001) 2.

5 Markham Ball, 'The Essential Judge: The Role of Courts in a System of National and International Commercial Arbitration' (2006) 22 AI 73.

In a fast growing era of international trade, states have embraced more flexible ways for the settlement of commercial and investment related disputes outside the courtroom to attract the international investments and to open up the country for business by providing favourable dispute resolution mechanisms. On the similar note, the Royal Government of Bhutan (RGoB) strives to make Bhutan an attractive investment destination.[6] To that end, the RGoB has initiated many reforms including fiscal and non-fiscal incentives like granting tax holidays and providing facilitation services and administrative simplifications for foreign investors[7] to attract investments in Bhutan and to open up Bhutan for global trade.[8] With regard to legislative reform, Bhutan enacted the Alternative Dispute Resolution Act of Bhutan in 2013 (ADR Act) which incorporates the legal framework of arbitration in Bhutan.

Although arbitration is an out of court dispute settlement mechanism, the courts are indeed actively involved in the arbitration proceedings. Some authors have described the relationship between the court and arbitration as the one which 'swings between forced cohabitation and true friendship.'[9] Against this backdrop, the paper attempts to make an inquiry on the role of judiciary in arbitration proceedings under the ADR Act. To that end, the paper will first briefly discuss the legal framework of arbitration in Bhutan and then it will discuss the role of courts under the ADR Act at all stages of the arbitration proceedings. In addition to it, the paper also discusses the role of courts under the New York Convention[10] concerning the recognition and enforcement of the foreign arbitral awards in Bhutan citing case laws from other jurisdictions.

6 UNCTAD, 'An Investment Guide to Bhutan, Opportunities and Conditions 2013' 15 < http://theiguides.org/guides/bhutan.pdf> accessed 18 July 2017.

7 ibid.

8 ibid 34-35; Foreign Direct Investment Rules and Regulations 2012 (Amended 30 December 2014) < http://www.moea.gov.bt/wp-content/uploads/2017/07/pub-4wv968yk.pdf> accessed 18 July 2017.

9 Nigel Blackaby, Constantine Partasides, Alan Redfern and J. Martin H. Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press 2009) 439.

10 Convention on the Recognition and Enforcement of Foreign Arbitral Award (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3.

2. **Background**

The ADR Act is a principal law governing the arbitration procedure in Bhutan enacted based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law in 2013.[11] Subsequently, Bhutan ratified the New York Convention and deposited its instrument of accession on 26 September 2014 becoming the 151st state party to the Convention.[12] Until then, there was no legal framework for the settlement of disputes through arbitration in Bhutan, and moreover, there was no international obligation to recognise and enforce the foreign arbitral awards in Bhutan and therefore, it was not possible to seek the enforcement of the foreign arbitral awards formally in Bhutan. However, it does not mean that the arbitration as a form of ADR was non-existent prior to 2013. In fact, Bhutan has a long history of settlement of disputes by a third party widely referred to as '*nangkha nangdrik*' since time immemorial.

Over the years, Bhutan has been able to attract many Foreign Direct Investments (FDI) and it still continues to do so. However, to this day, there is no single Bilateral Investment Treaty (BIT) signed by Bhutan with other states, and moreover, Bhutan is not a party to the Convention on the Settlement of Investment Disputes between States and National of Other States (ICSID Convention), an important convention which provides the self-contained arbitration procedure for the settlement of investment disputes amongst states and nationals of its state parties. Therefore, the only governing regimes on arbitration in Bhutan are the ADR Act and the New York Convention. The ADR Act provides legal framework for both domestic and international commercial arbitration and the New York Convention governs the procedure for the recognition and enforcement of the foreign arbitral awards in Bhutan parallel to the ADR Act.

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11 UNCITRAL Model Law on International Commercial Arbitration (adopted 21 June 1985).

12 'The New York Convention Contracting States' < http://www.newyorkconvention.org/countries> accessed 19 July 2017; UNCITRAL, 'Bhutan and Guyana accede to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards' < http://www.unis.unvienna.org/unis/en/pressrels/2014/unisl207.html> accessed 19 July 2017.

In most of the other jurisdictions, arbitration is treated as independent from the courts due to the fact that it is consensual dispute settlement process which allows the parties to settle their dispute without having to make recourse to the courts of law. The principle of competence - competence is an important feature of arbitration which provides for the arbitral tribunal to decide on any disputes regarding their own jurisdiction.[13] This principle is recognised under Chapter V of the ADR Act. It empowers the arbitral tribunal to rule on its own jurisdiction including any objections to the validity of arbitration agreement.[14] To that end, the principle of competence - competence limits the intervention of courts in arbitration proceedings. In fact, the ADR Act explicitly provides that the court shall refrain from intervening in the arbitration proceedings except where the Act permits.[15]

Although arbitration is considered as independent dispute resolution forum, but it is moot to say that the courts are not intended to play any roles in the arbitration proceedings. Like the UNCITRAL Model Law, the role of courts under the ADR Act is very limited, yet it plays an important role in support of arbitration. Under the ADR Act, all the four tiers of courts are involved at different stages of arbitration proceedings depending upon the circumstances.[16] Such involvement of courts could be attributed to inherent shortcomings in arbitration. The brief account of the role of courts at different stages of arbitration proceedings are, amongst others, enforcement of arbitration agreement, the appointment of arbitral tribunals, ordering provisional measures, setting aside the arbitral awards, to recognize and enforce international arbitral awards which will be discussed under three main headings hereinafter.

3. Before the Commencement of Arbitration Proceedings

3.1 Enforcing the Arbitration Agreement

The main basis for the arbitration is the *arbitration agreement* between the parties to refer their dispute to arbitration. Parties sometimes submit their

13 Born (n. 3) at 1047-48.
14 The ADR Act, Section 80.
15 ibid., Section 33.
16 The Constitution of the Kingdom of Bhutan, Article 21 (2).

dispute to the court despite having a valid arbitration agreement.[17] Such initiation of court proceedings by the parties are mainly intended to avoid arbitration, or due to the urgency of the matter, or the parties could not wait until arbitral tribunal is constituted to bring the matter before it.[18] This is where the court plays an important role by reinforcing the party autonomy.

The earliest stage where the court gets involved under the ADR Act is when the court enforces the arbitration agreement just like under the UNCITRAL Model Law. Arbitration agreement means 'an agreement in writing between the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.'[19] Under the ADR Act, courts are engaged in enforcing arbitration agreement in two instances. Firstly, the court enforces the arbitration agreement by referring the parties to arbitration once the court establishes that there exists arbitration agreement unless it finds that such agreement 'is null and void, inoperative, or incapable of being performed'.[20] Secondly, the arbitration agreement is enforced by the court by directing the party who brought the action before the court back to arbitration if the court satisfies itself that the applicant at the time of filing petition before the court, the arbitration proceedings was already set in motion.[21] On the contrary, the court may order the parties to discontinue the arbitration proceedings if it finds that the arbitration agreement is null and void, inoperative, or incapable of being performed under Section 35 of the ADR Act.[22]

17 According to Article 7 of the UNCITRAL Model Law, 'arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.'

18 Julian DM Lew, 'Does National Court Involvement Undermine the International Arbitration Processes?' (2008) 23 ICSID Review-FILJ 260, 496.

19 The ADR Act, Section 32 (1).

20 bid., Section 34.

21 ibid., Section 35.

22 ibid., Section 36.

3.2 Establishing the Arbitral Tribunal

The parties are given greater autonomy in appointing an arbitrator or arbitrators of their choice under the ADR Act.[23] Further, the parties are free to agree on the procedure for the appointment of an arbitrator or arbitrators in accordance with the ADR Act. In other jurisdictions, the courts are entrusted with residual power to appoint the arbitral tribunals when the parties have failed to constitute the arbitral tribunal or when there are no applicable rules of arbitration in appointing the arbitral tribunal.[24] For example, under the English Arbitration Act,[25] if there is an agreement between the parties to the effect that if the appointment procedure has failed to appoint the arbitrator or arbitrators, any one of the parties upon notice to the other party may request the court to exercise its power including the appointment of the arbitrators and as well as revoking the appointments.[26] Moreover, under English law, appointment of arbitrator(s) by the court has the same effect as that of an appointment made by the parties.[27] Likewise, under Austrian Arbitration Procedure, the Austrian courts are provided with the residual power to appoint an arbitrator or arbitrators in case if any one of the parties have failed to appoint or otherwise failed to appoint an arbitrator or arbitrators in accordance with the agreed procedure.[28]

On the contrary, under the ADR Act, Courts are not entrusted with the residual power to appoint the arbitral tribunal unlike in other jurisdictions and under the UNCITRAL Model Law. According to the ADR Act, if any one of the parties or parties have failed to appoint the arbitrator or arbitrators or otherwise if the appointed arbitrators of the parties have failed to appoint the presiding arbitrator, then in such circumstances, upon the request from any one of the parties, the ADR Centre is empowered to appoint the arbitrator or presiding arbitrator.[29] Moreover, the ADR Centre

23 ibid., Sections 48-51.
24 Charles C. Correll, Jr & Ryan J. Szczepanik, 'No Arbitration is an Island: The Role of Courts in Aid of International Arbitration' (2012) 6 WAMR 565, 573.
25 The English Arbitration Act 1996.
26 The English Arbitration Act, Section 18.
27 The English Arbitration Act, Section 18 (4).
28 Code of Civil Procedure (Part Six, Chapter Four, Arbitration Procedure) ('Austrian Arbitration Procedure'), Article 587.
29 ibid., Sections 56, 57.

is granted with the power to appoint the arbitrators where the parties have agreed to the appointment procedures but the party or parties have failed to act in accordance with the agreed procedure,[30] or the parties or appointed arbitrators of the parties have failed to reach an agreement under such procedure,[31] or otherwise a third party fails to perform its function in accordance with agreed procedure.[32] Thus, in this regard, under the ADR Act, instead of courts, the ADR Centre is granted with the residual power to appoint the arbitrator or arbitrators except where there are other means of appointment agreed by the parties.[33]

3.3 Challenge Procedure

Further, under the ADR Act, the courts are provided with the role only second to the ADR Centre in the challenge procedures for the appointment of the arbitrators like the UNCITRAL Model Law[34] and other jurisdictions including UK[35] and Austria.[36] Under the ADR Act, unless otherwise agreed by the parties on separate challenge procedure, the challenge of the arbitrator is decided by arbitral tribunal itself and in the case of the sole arbitrator, it is decided by the ADR Centre.[37] However, the party who is aggrieved by the decision of the arbitral tribunal or ADR Centre may appeal to the High Court,[38] and accordingly the High Court is empowered to decide either to dismiss the challenge by directing the parties to continue the arbitral proceedings with the appointed arbitrators or it may appoint new arbitrators by substituting the old ones.[39] Apart from these roles of the courts, another role of the courts prior to the commencement of the arbitral proceedings is to grant interim measures upon the request of a party which will be discussed under the next heading.

30 ibid., Section 58 (1).
31 ibid., Section 58 (2).
32 ibid., Section 58 (3).
33 ibid., Section 59.
34 The UNCITRAL Model Law, Article 13 (3).
35 The English Arbitration Act, Sections 23, 24.
36 Austrian Arbitration Procedure, Article 589.
37 The ADR Act, Section 70.
38 ibid., Section 71.
39 ibid., Section 72.

4. During Arbitration Proceedings

4.1 Granting Provisional Measures

Courts are involved during arbitration proceedings for different purposes in accordance with the ADR Act. One such instance of involvement of courts under the ADR Act during arbitration proceedings is in relation to granting provisional measures or interim measures. Courts' involvement in granting such interim measures is mainly intended to support arbitration.

Provisional measures are temporary measures intended to protect parties and properties in question before the arbitral proceedings are concluded.[40] It is defined as 'a remedy or a relief that is aimed at safeguarding the rights of parties to a dispute pending its final resolution'.[41] It mainly aims to preserve the factual and legal situation in order to protect the actual claim of the parties from the tribunal which otherwise would be futile in pursuing the claim before the tribunal if such interim protections are not sought. During arbitration proceedings, sometimes it become inevitable for the parties to seek provisional measures from courts, failing to seek such provisional measures on time would render the final award futile and the rights of the concerned parties will not receive adequate protections.

Basically, under the ADR Act, the primary power to grant interim measures is accorded to the arbitral tribunal. Similar to Article 17 of the UNCITRAL Model Law, Section 114 of the ADR Act empowers arbitral tribunal to grant interim measures upon satisfaction of certain conditions by a party requesting interim measures.[42] With regard to interim measure granted by the arbitral tribunal, it is the role of the competent court to recognize and enforce such measures issued by the tribunal.[43] The court may refuse to enforce the award if the court is satisfied that there exist one or more grounds to set aside the award, or the court may also refuse to enforce if the interim measure has been suspended by the issuing tribunal or issuing court of another jurisdiction in case of international commercial arbitration.[44]

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40 Born (n.3).
41 Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration* (Kluwer Law International 2005) 6.
42 The ADR Act, Section 115.
43 ibid., Section 123.
44 ibid., Section 125.

4.2 Courts' Assistance in Taking Evidence

Additionally, the courts are also involved in arbitration proceedings in assisting the arbitral tribunal in relation to taking evidence. The courts' assistance in taking evidence become necessary in the arbitration proceedings given the limited jurisdiction and lack of police powers of the arbitral tribunal and moreover, only a court is in a position to order the third party to produce evidence or ask the testimony from witnesses.[45] In this regard, Section 111 of the ADR Act stipulates that '[t]he arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of the Kingdom of Bhutan to take evidence or summon and direct witness to testify in accordance with the applicable laws on evidence.' Accordingly, the court may execute the request of the arbitral tribunal or a party in taking evidence.[46]

5. After the Arbitral Award is Rendered

The main purpose of arbitration is resolving the disputes between the parties and to vindicate the rights of the parties in the form of arbitral awards. But these awards rendered by arbitral tribunals would be meaningless if it is not enforceable. To that end, courts play a crucial role at the enforcement stage by giving legal effect to the arbitral awards through recognition and enforcement. The next stage after an arbitral award is rendered is the initiation of annulment proceeding by the unsuccessful party or enforcement proceedings by the prevailing party incase if the unsuccessful party fails to comply the arbitral award voluntarily. In both the proceedings, the court has a substantial role to vindicate the rights of the parties in arbitration.

5.1 Setting Aside the Arbitral Award

As indicated by the international practices and experiences in other jurisdictions, parties do voluntarily comply with the arbitral awards but not every time. Sometimes they challenge the arbitral tribunal of its awards by initiating an annulment or setting aside proceedings before the court,

45 Correll and Szczepanik (n 23) 578.
46 The ADR Act, Section 112.

usually by the unsuccessful party. That is when the role of courts comes into play. Under the ADR Act, the High Court is entrusted with the role of setting aside of both domestic and international arbitral awards. An action for setting aside the arbitral award should be made within 30 days in case of domestic arbitration and within 90 working days for international commercial arbitration from the date on which the parties have received the arbitral award.[47]

Section 150 of the ADR Act provides seven grounds under which the High Court may set aside the arbitral awards.[48] Out of these seven grounds, first five grounds are available for the parties to invoke before the High Court[49] and rest two could be invoked by the court on its own.[50] Firstly, the High Court may set aside the arbitral award if a party was under some incapacity to conclude the arbitration agreement.[51] Secondly, if the arbitration agreement was invalid under the laws which parties have chosen or otherwise in accordance with *lex arbitri* meaning the Bhutanese law.[52] Thirdly, the High Court may set aside the award on the ground of failure to observe due process by the arbitral tribunal including lack of proper notice of appointment of an arbitrator or of arbitral proceedings or otherwise the party seeking to set aside the arbitral award was impeded to present his or her case.[53] Fourthly, the High Court may set aside the award on the ground of excess of jurisdiction. In this regard, the ADR Act deals with a dispute that is not contemplated or within the terms of submission to the arbitration by the parties, or if the tribunal has made a decision beyond the scope of the submission by the parties to the arbitration.[54] Lastly, the High Court may also set aside the award if the composition of the tribunal or the procedure adopted by the tribunal was not in accordance with the agreement of the parties.[55]

47 ibid., Section 152.
48 ibid., Section 150.
49 ibid., Section 150 (1).
50 ibid., Section 150 (2).
51 ibid., Section 150 (1) (a).
52 ibid., Section 150 (1) (b).
53 ibid., Section 150 (1) (c).
54 ibid., Section 150 (1) (d).
55 ibid., Section 150 (1) (e).

In addition to the first five grounds as discussed above, the High Court is empowered to review the arbitral awards on further two additional grounds also called as *ex officio* grounds and they are 'arbitrability' and 'public policy'. Arbitrability in accordance with the ADR Act means whether the 'the subject-matter of the dispute is capable of settlement by arbitration'.[56] In this regard, the ADR Act stipulates matters which cannot be subjected to both domestic and international commercial arbitration under Sections 46 and 47 respectively. In case of domestic arbitration, matters such as criminal offences, matrimonial disputes, guardianships, insolvency and winding up, testamentary, inheritance, taxation, and matters which are against public policy and morality.[57] To this end, the High Court is empowered to examine the awards and could possibly set aside under these grounds. Another ground where the High Court could review arbitral awards is on the ground of public policy. Under this ground, if the arbitral award is in conflict with the public policy of Bhutan, then in such circumstances, the High Court may set aside the awards.[58]

The High Court upon receipt of the application to set aside the award on any one or more grounds as enumerated as discussed above may set aside the arbitral award in whole or in part or may confirm the award.[59] A party aggrieved by the decision of setting aside or refusing to set aside the arbitral award may appeal to the Supreme Court of Bhutan.[60]

5.2 Recognition and Enforcement of Arbitral Awards

Another important role of the courts under ADR Act is in relation to the recognition and enforcement of the awards. For the purpose of recognition and enforcement of domestic arbitral awards, if the parties have not taken the recourse against the arbitral award by making application to set aside the award under Section 150 of the ADR Act or if such recourse was dismissed by the High Court, the enforcing court shall enforce the arbitral award in accordance with the Civil and Criminal Procedure Code of Bhutan as if it was the decree of the court.[61]

56 ibid., Section 150 (2) (a) (emphasis added).
57 ibid., Section 46.
58 ibid., Section 150 (2) (b).
59 ibid., Section 153.
60 ibid., Section 154.
61 ibid., Section 159.

A party seeking the recognition and enforcement of the international award in Bhutan shall submit the duly certified copy of the award and arbitration agreement before the High Court[62] since the ADR Act empowers the High Court to recognise and enforce the foreign arbitral awards in accordance with the Civil and Criminal Procedure Code of Bhutan. On this regard, Section 159 of the ADR Act states that;

> [A] foreign award shall be recognized as binding and shall be enforced in the Kingdom of Bhutan by the High Court in accordance with the Civil and Criminal Procedure Code unless the High Court establishes, upon a request by the opposing party the existence of a ground referred to in Section 150 of this Act, or if it finds that the award has not yet become binding on the parties or is set aside or suspended by a court of the country in which, or under the law of which, that award was made.

Further, for the purpose of recognition and enforcement of the foreign arbitral awards, the High Court is empowered to determine the nationality of the award.[63] This is because the High Court may only enforce those foreign arbitral awards rendered in one of the state parties to the New York Convention to which Bhutan is obliged to enforce the awards under international law.

The grounds for the setting aside of the arbitral awards as provided under Section 150 of the ADR Act as discussed earlier is also the grounds for refusal to recognise and enforce the awards by the High Court.[64] Furthermore, the recognition of foreign arbitral awards are governed by the international conventions, multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by Bhutan.[65] To this day, the New York Convention is the only international convention that Bhutan has concluded, therefore, the High Court shall conform to the provisions concerning the recognition and enforcement of the award as provided under New York Convention by virtue of ratification of the Convention

62 ibid., Section 160.
63 ibid., Section 157.
64 ibid., Section 159.
65 ibid., Section 158.

by Bhutan. To that end, the High Court has substantial roles under Article V of the New York Convention where the High Court may refuse to recognize and enforce the foreign arbitral awards.

5.2.1 Grounds to Refuse the Enforcement of Foreign Arbitral Awards under the New York Convention

Similar to the grounds of setting aside of awards as discussed earlier, the New York Convention contains seven grounds under which the High Court may refuse to recognize or enforce the international awards. Article V (1) incorporates five grounds which may be invoked by any one of the parties seeking to resist the enforcement of the award and Article V (2) provides two additional grounds which could be invoked by the courts on its own motion.

The first ground under which the High Court may refuse to recognize and enforce the awards is if the parties were under some form of incapacity or if the arbitration agreement is not in conformity with the law to which parties have subjected to it or under the law of the country where the awards were made.[66] This ground was applied successfully in the decision of the Supreme Court of England and Wales in the case of *Dallah Real Estate v. Ministry of Religious Affairs.*[67] There was an agreement containing arbitration clause concluded between Dallah and Pakistani government owned Awami Hajj Trust.[68] Later this Awami Hajj Trust ceased to exist after the fall of the government in 1996 and it was held not be an organ of the government. The arbitral tribunal assuming the jurisdiction rendered an award against the government of Pakistan. However, the government of Pakistan resisted the enforcement of the award on the ground that it was not valid under French law-where an award was made.[69] The Supreme Court rejecting the finding of arbitral tribunal's own jurisdiction refused the enforcement of the award on the ground that the government of Pakistan

66 The New York Convention, Article V (1) (a).
67 *Dallah Real Estate and Tourism Holding Co. v. The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46.
68 ibid., Para 2.
69 ibid., Para 1.

was not a party to the arbitration agreement.[70] The Supreme Court stated that 'the tribunal's own view of its jurisdiction has no legal or evidential value when the issue is whether the tribunal had any legitimate authority in relation to the government at all.'

On the other hand, in *O Ltd (Hong Kong) v. S GmbH (Austria),*[71] the defendant invoked this ground as provided in Article V (1) (b) to resist the enforcement of the award, wherein, it contended that the power of attorney to conclude an arbitration agreement must be given in the written form. The Supreme Court of Austria rejected the argument on the reason that although such formality is required under Austrian law, however, it is not so required under the New York Convention and accordingly enforced the award.

The second ground is that of due process which is considered to be the most important ground under the New York Convention.[72] Due process in accordance with the New York Convention means the party against whom the award was invoked was not given proper notice of appointment of the arbitrator or arbitral proceedings or otherwise was unable to present his case.[73] This provision mainly intends to guarantee procedural fairness to the parties [74] and arbitral proceedings are conducted by giving due regard to due process by the arbitral tribunal. In *Société Overseas Mining Investments Ltd v. Société Commercial Caribbean Nique,*[75] the prevailing party of the award had not pleaded the ground upon which the arbitral tribunal based the award in favour of the prevailing party, the French Cour de Cassation held that the tribunal by failing to invite both parties to make its view pleaded before the tribunal have violated the principle of *principe de la contradiction*, an important principle of fair hearing.[76] To this end, the courts in other jurisdictions have ensured that the parties are given fair treatment by the tribunals and any

70 ibid., in Blackaby, Partasides, Redfern and Hunter (n 8) 626.
71 *O Ltd (Hong Kong) v S GmbH (Austria),* (1997) XXXII YBCA 254.
72 See Blackaby, Partasides, Redfern and Hunter (n 8) 627.
73 The New York Convention, Article V (1) (b).
74 Blackaby, Partasides, Redfern and Hunter (n 8) 627.
75 *Société Overseas Mining Investments Ltd v Société Commercial Caribbean Nique,* Case No 08-23901*/*, Paris Cour de Cassation, Ch. 1ere, 25 March 2010.
76 *Société Overseas Mining Investments Ltd v Société Commercial Caribbean Nique;* Blackaby, Partasides, Redfern and Hunter (n 8) 628.

awards which was rendered by means of non-compliance to due process is struck down at the enforcement stage.

Third ground deals with the jurisdictional issues. Article V (1) (c) of the New York Convention provides the ground under which the enforcement by the domestic courts may be refused. It states that:

> [T]he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced.

Under this ground, the High Court may refuse to enforce the award if the arbitral tribunal has disposed of the matter acting in excess of its authority. This ground also incorporates the situation of a partial excess of authority and in such instance, the award covering those matters which fall within the submission of the parties should be saved and enforced by the national courts of the states.[77]

The fourth ground is provided under Article V (1) (d) of the New York Convention. It mainly deals with a situation where the composition of the arbitral tribunal or arbitral proceedings was not in accordance with the agreement of the parties or otherwise not in accordance to *lex arbitri*. In *Encyclopaedia Universalis SA (Luxembourg) v. Encyclopaedia Britannica Inc. (US),*[78] the parties in their contract had agreed that their appointed arbitrators must appoint the third one, and failing which, the English Commercial Court was empowered to appoint one. The claimant Encyclopaedia Universalis SA (Luxembourg) avoided the first requirement and prematurely requested the appointment of the third arbitrator from the English Commercial Court. The US Court of Appeals for the Second Circuit held that the appointment of the third arbitrator prematurely by the English Commercial Court has

77 Blackaby, Partasides, Redfern and Hunter (n 8) 630.

78 *Encyclopaedia Universalis SA (Luxembourg) v Encyclopaedia Britannica Inc. (US),* (2005) XXX, YBCA 1136.

irremediably spoiled the arbitral process and accordingly refused to enforce the award.[79]

The last ground as provided in Article V (1) (e) of the New York Convention is that the parties are not yet bound by the award or if the award has been set aside or suspended by the court of the seat of arbitration or under the law of which the award was made. This ground is regarded as one of the controversial grounds under the New York Convention. This is mainly due to the divergent approach taken by national courts of different states. For instance, if the award was set aside by the court of the place of arbitration, it becomes unenforceable in that country, and as such it is expected that it becomes unenforceable in another country as well.[80] But this is not the usual stand taken by the national courts of different states. The award that is being set aside by the national court of the place of arbitration may be enforced by national courts in other states, in fact, such awards are enforced.[81] The national courts of states like Austria, France, Belgium, and the USA have taken this approach to recognize and enforce the award that was set aside by the court of the seat of arbitration.[82]

This approach of national courts is due to the use of non-mandatory or discretionary language in Article V of the New York Convention. Article V of the Convention uses the term 'may' instead of 'must' or 'shall' in refusing the recognition and enforcement of the award.[83] The other reason for this approach of national courts is that the New York Convention only provides minimum standards for the recognition and enforcement of the international award. In this regard, Article VII of the New York Convention gives mandatory overriding effect to multilateral and bilateral agreements concerning recognition and enforcement of arbitral awards which may be more favourable than the New York Convention.

In *Chromalloy Aeroservices Inc. v. Arab Republic of Egypt,*[84] the US Federal District Court for the District of Columbia enforced the award which was

79 *Encyclopaedia Universalis SA (Luxembourg) v Encyclopaedia Britannica Inc. (US),* (2005) XXX, YBCA in Blackaby, Partasides, Redfern and Hunter (n 8) 633.
80 Blackaby, Partasides, Redfern and Hunter (n 8) 634.
81 ibid.
82 ibid 636.
83 See the New York Convention, Article V (1).
84 *Chromalloy Aeroservices Inc. v Arab Republic of Egypt,* 939 F.Supp 907 (DDC 1996).

set aside by the courts in Egypt. The Court reasoned that the Article V of the New York Convention gives discretion to national courts to not to refuse the recognition and enforcement, while Article VII requires the national courts to not to 'deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law of the country where the enforcement is sought'. Likewise in *Société PT Putrabali Adyamulia v. Société Rena Holding et Société Mnogutia Est Epices*[85] the French Court enforced an award which was set aside in England. The French Court held that the validity of the award must be examined based on the laws of the states where the recognition and enforcement are sought.[86] Nevertheless, the enforcement of awards which was set aside by the national courts of a place of arbitration still remains to be a controversial one.

In addition to the above grounds, the High Court may also refuse the recognition and enforcement of the awards on the grounds of non-arbitrability and public policy. Article V (2) (a) of the New York Convention clearly provides that the recognition and enforcement of the award may be refused by the national courts if the subject matter of the dispute was not capable of settlement under the law of the country where recognition and enforcement were sought. The issue of arbitrability varies from one state to another, as it is within the domain of each state to define what dispute could be settled by arbitration or not through its respective national laws.

Therefore, if the enforcement of foreign arbitral award is sought in Bhutan, the High Court is empowered to review that arbitral award on the grounds of arbitrability in accordance with the ADR Act. On this regard, Section 47 of the ADR Act deals with arbitrability which states that:

> [F]or the purpose of international commercial arbitration […] no arbitration shall be permitted on matter of insolvency and winding up, subject of taxation and other matters which are against public policy, morality or any other existing provisions of the law in force in Bhutan.

85 *Société PT Putrabali Adyamulia v Société Rena Holding et Société Mnogutia Est Epices* [2007] Rev Arb 507.

86 *Société PT Putrabali Adyamulia v Société Rena Holding et Société Mnogutia Est Epices* [2007] Rev Arb 507; Blackaby, Partasides, Redfern and Hunter (n 8) 638.

In addition, Section 46 of the ADR Act also enumerates the list of subject matters of the disputes which cannot be arbitrated in Bhutan. In other states, generally disputes falling with the ambit of penal, tax and those within the scope of public law are considered non-arbitrable. In *Aloe Vera of America, Inc. (US) v. Asianic Food (S) Pte Ltd (Singapore) and Another,*[87] the defendant argued that the arbitrator could hold him bound by the arbitration clause in the contract upon finding of an *alter ego* since under the law governing the contract, which is Arizona law, does not allow the issue of *alter ego* to be arbitrated. The Singaporean national court dismissed the contention of the defendant and held that the issue of arbitrability as a ground to refuse the enforcement of the award before Singapore national court should be determined based on Singaporean law and therefore Arizona law is irrelevant under this context.[88]

Another ground under the New York Convention is public policy. Under this ground, the High Court may review the foreign arbitral awards on its own motion and may refuse the recognition and enforcement if it is contrary to public policy of Bhutan (also called as '*ordre public*'). Public policy is a very wide term and it is most asserted grounds in resisting the recognition and enforcement of the award. Although the public policy as referred in the New York Convention means a public policy in accordance with the law of the enforcement state. However, the majority of court decisions of other jurisdictions have considered the public policy as used in the New York Convention as that of international public policy and to be construed narrowly.[89]

In *Parsons Whittemore Overseas Co. Inc. v. Société Générale de l'Industrie du Papier (RAKTA)*[90] the losing party pleaded before the US national Court that the award should be refused to recognise and enforce based on the ground that the diplomatic relation between Egypt and the USA has been severed.

87 *Aloe Vera of America, Inc. (US) v. Asianic Food (S) Pte Ltd (Singapore) and Another,* (2007) XXXII YBCA 489.

88 *Aloe Vera of America, Inc. (US) v. Asianic Food (S) Pte Ltd (Singapore) and Another;* Blackaby, Partasides, Redfern and Hunter (n 8) 641.

89 Blackaby, Partasides, Redfern and Hunter (n 8) 643; Born, *International Commercial Arbitration* (n 12) 3662.

90 *Parsons Whittemore Overseas Co. Inc. v. Société Générale de l'Industrie du Papier (RAKTA),* 508 F.2d 969 (2nd Cir. 1974).

The Court rejected the argument and held that the ground of public policy under the New York Convention should be construed narrowly and further stated that the enforcement of the award should be refused only when such enforcement would violate enforcing state's most basic notions of morality and justice.[91] Likewise, national courts in other states have taken the restrictive view on this ground of public policy.

To this end, the High Court has a very important role in the recognition and enforcement of the foreign arbitral awards. Enforcement of foreign arbitral award is governed by both the ADR Act and the New York Convention. National courts of different states are aligned towards recognising and enforcing the arbitral awards mainly by giving effect to pro-enforcement bias and the presumptive enforceability of the awards as envisaged by the New York Convention. Otherwise, the frequent review of awards by national courts under these grounds and refusal to recognise and enforce the awards would defeat the purpose of finality of the arbitral award and arbitration as a whole. The complexity of these refusal grounds on the other hand grants national courts to interfere in the enforcement of awards, fortunately this is not the case in Bhutan, at least for now.

6. **Conclusion**

The courts play various roles at different stages of the arbitration proceedings under the ADR Act. Its involvement in respect of enforcement of arbitration agreement, granting provisional measures, and rendering assistance in taking evidence are some of the pre-arbitral awards roles that courts assume in support of arbitration. Even more importantly, the courts play significant roles during post-arbitral awards by recognising and enforcing the arbitral awards and setting aside of the arbitral awards. To that end, the role of courts at various stages of arbitration proceedings is very critical to the viability of the arbitration. The Courts 'serves as a vital bridge between arbitration proceedings and parties' ultimate ability to vindicate their rights and fulfill their expectations."[92]

91 *Parsons Whittemore Overseas Co. Inc. v. Société Générale de l'Industrie du Papier (RAKTA);* Blackaby, Partasides, Redfern and Hunter (n 8) 644.

92 Charles C. Correll, Jr & Ryan J. Szczepanik (n 23) 617.

Although arbitration represents itself as the independent arbitral legal order, but arbitration is dependent on courts to fully dispatch its role in adjudicating the disputes. Involvement of courts at different level of arbitration proceedings is necessary especially when viewed from the perspective of binding and enforceability of arbitral awards as the awards need the support of the courts to materialise its rulings made in the award. Thus, the judiciary's role in arbitration is very pertinent to make arbitration an end in itself.

A Contextual Legal Application of a *Jabmi*[1]

Introduction

Generally, the wide spectrum of legal understanding and the knowledge of law is inherently confined to the bastion of law professionals. However, with the advent of democracy in Bhutan, the legal knowledge has become an indispensable tool strengthening the *rule of law*. Similarly, the need to understand the clear role of a *Jabmi* in the Bhutanese legal system has assumed very important.

Jabmi literally means a person who stands on someone's behalf; and roles played by them are both judicial and quasi-judicial. Over the years, and particularly with literal interpretation, the '*Jabmi*' has entailed varying legal responsibilities.

This article attempts to explain the complex roles played by *Jabmis* in the traditional and modern legal settings in the administration of justice, and contextualise the actual legal responsibilities of a *Jabmi*.

Traditional role and statutory origin of *Jabmi*

The most revered traditional role of the *Jabmi* is during the practice of mediation *Nangkha Nangdrik or Dumdrik,* and hence, was never perceived as what the modern law refers to *Jabmis* as lawyers alone. However, the 14th century text of Tertoen Karma Lingpa's *'Bardo Thodrel'* enumerates the presence of *Lha Karpo* in the trial of the sinner or the virtuous one, who represents and submits on their behalf in the court of Lord Purgatory (*Shinge Choki Gyalpo*), the role which arguably befits a *Jabmi* or any modern day defense counsel.

Traditionally, and which continues to be relevant even today, the practice of mediation with the help of *Jabmis* has not only helped to shape our

1 Contributed by Lungten Dubgyur. The author is Justice of the High Court.

legal system but also contributed to promote peace and social harmony, which reflects the true essence of the Buddhist philosophy and our ways of life. Prior to the enactment of modern laws, the Buddhist philosophy was of pivotal essence because it teaches us to be kind and compassionate through the practice of *'Tsemed Zhi'* (the four immeasurable values). It encompasses compassion (*Jampa*); empathy/sympathy (*Ningjyed*); happiness (*Gawa*); and equanimity (*Tang nyom*). Based on these values, most of our laws and policies are framed to advance '*Bangi Desung'* or public peace, '*Chigdrel/Thuendrel or Thuenlam*' or unity of the people, neighbourliness and harmonious living, '*Lay Judrel*' or cause and effect', '*Namin'* or Karmic consequences, '*Tha Damtsi*' or being faithful and the promotion of virtue and '*Driglam*' or conduct.

One of the main aspects of the code of conduct popularly referred to as *Driglam Nam Zhag* encompasses the three most important '*Choaipas*' or requirements of a person through body (*Lue*), speech *(Ngnag*) and mind (*Yid*). Former Chief Justice Lyonpo Sonam Tobgye explains the six precepts of the code of conduct:

(1) The way one associates and behaves (*Namzhag*)
(2) The way one compromises *(Drigni or Thuendrel/driglam)*
(3) The way one eats or dines (*Zaa*); the way on conducts/manners (*Chaa*) or the way one tread or walk (*Droh)*- the three precepts (*Zaa, Chaa, Droh Sum)*
(4) The way one acts or performs (*bey zha cha zhag*)
(5) The way one communicates (*lapshey nyen sheg*)
(6) The way one listens or understands (*goshey nyen sheg*)

Bhutan's sovereignty and Buddhist values paved the way for a profound legal culture and justice system that define the traditional role of *Jabmis* in the practice of mediation as well as other roles that the *Jabmis* have assumed over the years.

Recognising the vital role of a '*Jabmi*', the *Thrimzhung Chhenmo* (Supreme Law), 1959 gave the legal or statutory impetus through Section Da 3-10 where it spelt the role of a *Jabmi* and the validity of an agreement, contract

or deed. The *Thrimzhung Chhenmo* was enacted by the newly established *Tshogdu Chhenmo* (National Assembly) in 1953 by His Late Majesty the Druk Gyalpo Jigme Dorji Wangchuck. The Thrimzhung Chennmo contains seventeen chapters recognizing the concept of equality of citizens, land and property rights, trade and commerce, contractual relationship and crimes.

To ensure easier access to justice in the modern legal system, the High Court of Bhutan trained and certified about 176 traditional *Jabmis* in 1996. With the enactment of *Jabmi* Act, 2003, the *Jabmis* were required to have legal qualification recognized by the *Jabmi Tshogdey* (Bar Council) of Bhutan. Further, the *Jabmis* should have also undergone the National Legal Course or Post Graduate Diploma in National Law and must have passed the Bar selection examinations. It is therefore only those who possess law degrees are allowed to practice as *Jabmis*. However, those *Jabmis*, who were granted license continue to provide their legal services unhindered.

Multiple Roles of Jabmi

Jabmi, at times, played the role of a witness known as '*Jab-pang*'; and also plays the role of a guarantor, a representative of the party, witnesses to testify matrimonial relationship and grant of the marriage certificate from courts, signing as surety on the loan agreements with the private individual and financial institutions. *Jabmi* also ensures personal surety in securing bail and bonds of the accused, and also stand as guarantor for bad loans and judgment debt. More recently, *Jabmi* is referred to a qualified lawyer to represent cases before courts on behalf of the litigants or the defendant in accordance with the *Jabmi* Act, 2003 and its amendment, 2016.

a) *Jabmi* as witness

The *Jabmis* play active roles in the execution of many legal documents including settlement agreements. When *Jabmis* witness the execution of such legal documents, they also sign as a witness and are often referred to as *Jab-Pang*. Whenever legal issues arise, they may be summoned by courts to testify as witnesses. Other than being a witness to the documents, such *Jabmis* do not bear any legal obligation.

b) *Jabmi* as guarantor

When a *Jabmi* enters into an agreement as a guarantor, it secures a legal obligation and responsibilities of party's performance. The guarantor gives a guarantee, which is an assurance that the debt or other obligation will be fulfilled. In the Bhutanese legal system, *Jabmi* often signs as a surety on the loan agreement when borrowed from private parties or when securing loan from financial institutions. In these instances, the *Jabmi* undertakes a legal responsibility to be bound for the performance in case of any lapses by the principal party in the payment of debts. However, these conditions must be clearly mentioned in the terms of an agreement or in a contract. Traditionally, agreements are signed, witnessed by each party's *Jabmis* and if such agreements do not have any specific clause related to the legal responsibilities of *Jabmis*, then such *Jabmis* will not be held as guarantor.

c) *Jabmi* as surety in the payment of judgment debt

Section 21(2) of the Moveable and Immovable Property Act, 1999 defines judgment debt as '…any sum, costs, charges or expenses made payable by or under any judgment, decree, rule or order of any Court whatever in any civil proceeding shall be deemed to be a judgment debt….' In a plain language, judgment debt refers to a sum of money owed to a person or legal entity after the conclusion of litigation.

When a litigant (judgment debtor) fails to pay the judgment debt as per the judgment, the other party (judgment creditor) files for the enforcement of the judgment. Accordingly, the court shall under Section 28 (e) of the Civil and Criminal Procedure Code (CCPC) issue enforcement order and may sentence in accordance with Section 102.1(b) for failing to comply with judicial order or its non-compliance of judgment results into civil or criminal sanction. When a person or a judgment debtor is served with sentences for non-compliance with the judicial order, a *Jabmi* who stands as a surety on behalf of the judgment debtor may ensure the payment

of judgment debt forthwith or for the future compliance with the court order. The courts often ask to the party to provide personal surety when a person repeatedly fails to comply with the order particularly when it involves private borrowings while the loans acquired from financial institutions are secured through mortgage and collaterals.

Further Section 100 of the CCPC provides that where any person has furnished security or given a guarantee, a decree or order may be executed in the manner herein provided for the execution of decrees if he/she has rendered himself/herself personally liable against him/her for:

a) the performance of any decree or any part thereof;
b) the restitution of any property, taken in execution of a decree; or
c) the payment of any money or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or proceeding consequent thereon.

d) *Jabmi as* surety or witness for marriage certificates

Section Kha-1-2 of the Marriage Act of 1980 provides that '... a person has the right to marry any other person, irrespective of status, caste, wealth or appearance, provided the persons contracting the marriage thereof have expressly consented to their marriage.' Section Kha -1-4 provides that any couple approaching a court for acquiring a Marriage Certificate shall have to be present in person before the court along with a *Jabmi* or surety who should be a male for the bridegroom and a female *Jabmi* for the bride. As per Section Kha-1-5, such a *Jabmi* will be thoroughly enquired as to whether or not the intending bride or bridegroom has contracted any prior marriage and whether or not any provisions laid down in the Marriage Act will be contravened by contracting such a marriage and have to submit undertaking in the prescribed judicial forms 7 & 8. If the *Jabmis* have made false declarations, they shall be held for perjury as per the

Penal Code or levied such penalties and fines as prescribed under the Marriage Act.

e) *Jabmi* as personal surety in securing bail and bonds

Section 196 of the Penal Code explicitly states that in a case where a suspect is other than a person accused of non-bailable offence, the court may decide to release him/her on bail upon execution of a bond for such sum of money or with one or more *Jabmis* standing as sureties legally referred as *Gyen Lenpa*.

In this case, the *Jabmis* have to make written submission in a prescribed judicial Form H-38 for compliance with the bail conditions. In breach of any bail conditions, the *Jabmi* shall be held liable in accordance with Penal Code. In this case, the *Jabmis* or *Gyen Lenpa* can be any other person including a friend, relatives, parents or guardian of whom the court can rely upon for securing bail conditions.

f) *Jabmi* as representative of a party

Section 31.1 (d) & (e) provides that any case can be filed before the court for which the registration can be effected by a victim or victim's next-of-kin or by an aggrieved person or his/her *Jabmi*/ next-of-kin. This provision allows *Pro se litigation* or *propria persona* or litigant in person and therefore, in our legal system a litigant can file and argue their own case and the hiring of lawyers is not compulsory like other countries particularly those that follow common law system.

When a case is represented by next-of-kin, he or she becomes a legal representative before the court with the undertaking prescribed under judicial Form H-11 & H-12 with full legal responsibilities for submission before the court and for the conclusion of trial and compliance with the judicial order or decisions rendered.

Conclusion

Under the *Jabmi* Act, the usage of the term *Jabmi* is restricted to a lawyer or legal counsel. However, the contextual understanding of the roles of a *Jabmi* (not necessarily a lawyer) and their practices is so much engrained in our legal system and cannot be ignored.

As enshrined in the preamble of the *Jabmi* Act, justice is the primary source of peace in the Kingdom and to promote this noble goal, the pursuit of seeking truth and justice invariably vests to the legal counsels as well as the continuous responsibilities played by our traditional *Jabmis* in our communities. This article primarily pointed out the differing roles and responsibilities shouldered by *Jabmis,* and the dynamism of the concept and its application. Over centuries, *Jabmis* have helped to promote and protect the rule of law in the kingdom and their legal assistance will continue to help in providing justice. In this essence, the multiple roles played in each case by the *Jabmis* are inherent in our traditional legal culture, and hence justify the unique evolution of our own legal system, legal sovereignty and our nationhood.

The Art of Judgment Writing[1]

Introduction

In law, a judgment is a decision of a court regarding the rights and liabilities of parties in a legal action or proceeding. It generally provides the court's explanation of why it has chosen to make a particular court order. *Rule of law* mandates that the basis for judicial decision-making should be clear, independent and rational. Courts across the country are involved in adjudication of the cases and render reasoned judgment based on the facts, evidence and application of sound principle of law. Judgment is the primary mode of communication with the public.

A judgment is the statement given by the Judge, on the grounds of determinative facts and issues. It is the end product of the proceedings in the Court. The writing of a judgment is one of the most important and time consuming task performed by a Judge. The making and the writing of a judgment varies from Judge to Judge and reflects the characteristic of each individual Judge. Every Judge, of every rank has his own distinct style of writing. However, judgment must be designed and structured so that readers find their way through it easily and quickly. Judgments must manifest impartiality and intellectual honesty of the writer.

Decisions, orders, decrees, and judgments must be understood if they are to be obeyed. You achieve this by using simple words that convey the meaning you desire; short sentences together with transitions; paragraphs that address one subject at a time; and only the words needed to convey each thought.

Essentials of good judgment writing

As per Chapter 12, Section 96 of the Civil and Criminal Procedure Code 2001, following the adjudication of the case, the Court shall reconvene and

1 Kinley Dorji and Kinley Namgay. Kinley Dorji is Justice of the High Court and Kinley Namgay is Chief Judge of Thimphu District Court.

in the presence of the parties to pronounce its written judgment in the language of the Court.

Plain and simple language has always been appreciated in writing judgments. Brevity, simplicity and clarity are the hallmarks of the good judgment. The greatest of these is clarity. It is better to avoid invidious examples, unnecessary quotations, and lecture. A controlled judgment without any legalese, sharp criticism, pinching comments, and sarcasm invokes respect to the court. Short sentences and para phrasing, head notes and subheading, wherever it is necessary, is a recommended style of writing a judgment. The general rule is that when you speak or write, you should be thinking all the time of others, whether the other person understood or understands your speech or writing clearly. The essence is whether you have been able to convey the message you want to convey. You should make the reader task as easy as possible.

Judges must avoid using Latin phrases or expressions, legal jargon, (Bhutanese saying) unless there is a good reason to use such language or phrases. At times, as some Bhutanese proverbs (*paytam*) can be effective in the ordinary communications of life, it has placed (although necessarily limited) in judicial communication. The judge should avoid using words or expressions showing gander-bias. Avoid arrogance or insensitivity of expression in written forms. Care should be taken to avoid the injection of personal views, by adhering to the purpose of the judgment. An inclination to humour, irony, trenchant criticism and anger are not desired in a judgment. Avoid discriminatory or derogatory language, redundancy, eliminate repetition, and exclude irrelevant findings of facts. Avoid explanation of the obvious.

A good writing must be balanced, well-reasoned and effective. Drafting must be simple, clear and precise. Words are the greatest gifts to humanity. Ideas in words move the world and right words guide and shape the future of humanity.

The Judgment must clearly specify in whose favour and against whom the judgment is rendered. You shall always want to make it easy for a Court to enforce your judgment. A basic requirement for all judgment is that it be certain. The nature of a Judgment must be sufficient and certain to

enable the prevailing party to enforce it and to permit the defeated party to comply with the Judgment's requirement.

A good judgment should clearly identify the parts arranged in a logical sequence. By breaking up the facts, issues and rules into several distinct parts and looking at them individually rather than in whole will be more easy and manageable.

All courts in general are duty bound to render reasoned judgments. A reasoned judgment must satisfy the parties and ultimately prevent them from making unnecessary appeals. Judges must avoid shirking responsibility and deliver judgments that are complete and inconsonance with the facts, issues and relevant laws applicable to the case.

Moreover, judgment must be delivered timely and not delayed simply because the judge who has conceived or written the judgment fears that the judgment delivered may be wrong or may be reversed on appeal. No judgment is right or wrong. It all depends on the reasoning.

In short, a well drafted judgment is:

a. The final and conclusive determination of the facts, issues and evidence in accordance with the law;
b. Supported by reasons for the determination;
c. Expressed in judicious language;
d. Intelligible to the average literate laymen;
e. Enforceable. Conditional judgment must be avoided; and
f. Properly dated, named and signed by the hearing judge and must bear the judicial seal.

Judgment Readers

Judgment is always for others, and it is for their benefit; and we should always have them in mind. Today we see that judgments are read by everyone including law students, academics, critics, politicians, bureaucrats etc.

Generally, the judgment should explain why the party did not win the case. The losing party is entitled to a candid explanation of the reasons for the decision. Judgment is also written for the legal counsels or advocates or representatives of the parties and for the profession generally. They are the ones to test the judgment for the accuracy and fairness of its fact-findings and form opinion of the judgment.

Methodology

In order to draft a good judgment and arrive at a reasonable conclusion, it is important to:

1. Establish a logical and coherent judgment outline;
2. Develop a good mastery of the facts and issues to be resolved;
3. Conduct a thorough analysis of the evidence presented in light of the applicable laws, rules and principles; and
4. Properly articulate the reasoning behind the final judgment.

The judgment outline should identify the issues that must be resolved before the case proceed on its merits. Depending on the facts of the case and the issues involved, a Judge may choose to apply rules and analyse them in a chronological order or a thematic approach. Using FIRAC (Facts, Issue, Rule, Application, and Conclusion) methodology would help in easy analysing the facts of the case, applying the law, and explaining the outcome of the case.

Facts of a case are central to every step in the FIRAC. It is from the facts that the issues are identified. It is the facts that lead to the identification of the most appropriate rules, and the rules which lead to the most useful way of construing the facts. The facts should explain who the parties are and how the problem between them arose, in a chronological narrative. It should give a reader a clear picture as possible of the case and the decision.

Issue section of FIRAC is important to state exactly what the question of law is. Each issue is often treated separately. Issue arises when a material proposition of facts or law is affirmed by one party and denied by the other.

Usually, the issues are framed during the preliminary hearing when the petitioner or prosecutor submits their part of the story and during the opening statement where the defendant submits his/her side of the story.

If the defendant pleads guilty to the charge, the matter is resolved. It will be followed by the application of the law. However, the Court should give reasons for the decision. In civil cases, the Court has to supplement the decision by clearly establishing how the plaintiff or appellant has demonstrated the case by "a preponderance of the evidence" in accordance with Section 96.1 of the Civil and Criminal Procedure Code and in criminal cases, the Court has to show how the prosecutor has established "a proof beyond reasonable doubt" in accordance with section 96.2 of the Civil and Criminal Procedure Code. And, if the defendant denies the charge or the accusation, analysis of the facts and the evidence followed by application of law is to be done.

Determination of issues of the case to be resolved is not only an essential for deciding the case but also an important aspects of good judgment writing. The correct and proper framing of issues is *sine quo non* for writing a clear and effective judgment. A clear framing of the issue will assist the Court in identifying the problem and provide a clear road map in resolving the case.

Advantages of framing issues:

1. Party not taken by surprise;
2. Proper conducting of a trial;
3. Adduce proper evidence during trial;
4. Right decision; and
5. Curtails unnecessary delays.

Points to be considered while framing issues:

1. Separate and distinct issues;
2. Burden of proof as per the provisions of Civil and Criminal Procedure Code. The court shall keep in mind as to which party has to prove certain facts and the issue shall be framed reflecting such burden on certain party;

3. Judgment shall be on all issues. Certain issues such as the issues of law regarding the Jurisdiction of court or the bar to the suit created by law for the time being in force may stop the framing of other issues; and
4. Amendment and striking out of issues. The court may at any time before passing decree amend the issues or frame additional issues if deems fit.

Rule follows the statement of the issue at hand. The rule helps to make a correct legal analysis of the issue at hand using the facts of the case. The rules section needs to be a legal summary of all the rules used in the analysis and is often written in a manner which paraphrases or otherwise analytically condenses information into applicable rules. Thereafter, it is important to apply the rules to the facts of the case and explain or argue why a particular rule applies or does not apply in the case presented. Judgment should demonstrate the Judge's knowledge of the applicable statutory provisions, doctrines, the relevant case law or legal precedents etc.

Conclusion part of the judgment answers all the questions and issues of the case. You must justify why you have decided in this or that way. That is a "reasoned judgment".

Generally, we can dissect and analyses the case based on:

1. Relevant facts of the petitioner or prosecutor;
2. Relevant facts of the defendant or defence; and
3. Relevant Issues.

Analysis: After studying the facts and analysing the law, the Judge must proceed to correlate them to each other in a logical and coherent manner. He/she must consider and decide all the credibility issues that arise and come to what can or cannot be believed and why. He must ask himself what would be the most reasonable conclusion to arrive at after viewing the facts of the case in accordance with the applicable laws and rules.

If there is more than one issue, identify each one of them and address each issue with its own FIRAC analysis.

Essential Elements of Judgment under the Civil and Criminal Procedure Code:

a. Name of the Court;
b. Case Registration number with date;
c. Name of the parties and their particulars in brief;
d. Name of the counsel or representatives;
e. Heading or Title of the case;
f. Introduction of the case in brief;
g. Hearing dates;
h. Court findings;
i. Listing of Issues;
j. Court Summary;
k. Decision;
l. Operative order (*Kaja*);
m. Date of delivery of judgment;
n. Seal of the Court; and
o. Name and Signature of the Judge.

Conclusion

Write to express not to impress. For most judges, preparing judgments is the most demanding, challenging and even stressful part of the judicial life. It can also be the most creative, rewarding and satisfying. A well-structured judgment enhances clarity and conciseness and helps ensure that the reasoning process is complete.

Judgment writing is a skill that should be learned, practiced, improved and refined. There is no such thing as good writing, there is only good re-writing. Therefore, good editing ensures that a judgment is lucid, thorough, coherent, concise and has transparent reasoning. Whether judges like it or not, decision should be taken, as one understands the law, satisfy one's conscience. But never decide the case as others understand. The Judge judges the cause and the judge is judged by his/her judgments.

Making and Un-Making of Treaties: Analysing the Post Constitutional Processes[1]

Introduction

Year Two Thousand and Eight will remain a milestone era in the history of the small Himalayan Kingdom. The country has embraced its written Constitution[2] on the 15th Day of 5th Month of the Male Earth Rat Year corresponding to the 18th Day of July 2008. The Constitution is the gift from the throne,[3] and it 'encapsulates the people's aspiration to preserve the sovereignty and identity of Bhutan, [….][4] promoting goodwill and cooperation with nations, respecting the international law and treaty obligations and promotes international peace and security.[5]

Ever since the adoption of the Constitution, tremendous respect has been bestowed upon, and the government and its people functions in accordance with the Constitutional principles and the rule of law. It is the sacred

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1 Contributed by Sangay Chedup. The author is Trainer and Researcher of the Bhutan National Legal Institute.

2 The Constitution of the Kingdom of Bhutan 2008 (herein referred to as the Constitution).

3 Sonam Kinga writes that "[T]hus, parliamentary democracy and its embodiment, the Constitution is regarded as gift from the throne". See Sonam Kinga, *Polity, Kingship and Democracy: A Biography of the Bhutanese State* (Ministry of Education, Royal Government of Bhutan 2009). However, the King refuted the idea that the Constitution is a gift from the Throne by saying 'The Constitution should not be considered as a gift from the King to the people: it is my duty to initiate the constitutional process so that our people can become fully involved in shaping and looking after the future destiny of our country.' See Sonam Tobgye, *The Constitution of Bhutan Principles and Philosophies* (Judiciary of Bhutan 2015). Also see Sonam Kinga, 'The Constitution – the King's Gift: Defiling and Sanctifying a Sacred Gift' (2009), Proceedings from the International Conference 'Beyond the Ballot Box': Report from the Developing and Sustaining Democracy in Asia Conference 134

4 *Tobgye,* ibid.

5 Article 9(24) of the Constitution of Bhutan states that "[T]he State shall endeavour to promote goodwill and cooperation with nations, foster respect for international law and treaty obligations, and encourage settlement of international disputes by peaceful means in order to promote international peace and security."

document that places the power of governance and future of the nation in the hands of the people of Bhutan.[6] Lawyers and legal professionals take the Constitutional principles far-front through conversations and debates. One of the frequently asked questions, amongst the legal professionals, *inter alia,* is with regard to the Article 10(25) of the Constitution, which I referred to as the 'Treaty Clause.' The text of the Treaty Clause reads:

> Except for existing International Conventions, Covenants, Treaties, Protocols and Agreements entered into by Bhutan, which shall continue in force subject to section 10 of Article 1, 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.

This Treaty Clause is likely to pose few questions: what will happen to those international legal instruments which Bhutan is already signatory to? What would be the legality of those provisions of the treaties that are inconsistent with the provisions of the Constitution of Bhutan? What are the treaty making processes? What is the Constitutional limitation in making treaties? These are some of the possible questions that this paper is trying to digest.

Reading the plain language of the Treaty Clause gives us an impression that it is not explicit in nature. It invites necessary follow-up action, and if that is not adequately taken, future interpretations would expectedly turn awful. Anticipating thus, the Government has adopted Rules of Procedure (ROP) for Treaty Making in 2016.

This paper, therefore, is an attempt to analyse the treaty making power and its associated procedure reading together with the Constitutional provisions and the ROP. Attempt shall be made to analyse the Constitutional test

6 *Sonam (n* 2). Lyonpo Sonam Tobgye, in his book, reflects the words from His Majesty the Druk Gyalpo Jigme Khesar Namgyel Wangchuck as saying: "[H]is Majesty the Druk Gyalpo Jigme Khesar Namgyel Wangchuck mentioned that the Constitution is neither a prescriptive document, nor it shows the people what to do on a daily basis, but it is a sacred document that places the power of governance and the future of the nation in the hands of the people of Bhutan."

and limitation of the executive power to make treaties. In the latter part of this paper, argument shall be made on the implementation of treaties highlighting some of the problems within the new legislated ROP reading with the Treaty Clause. This part of the analysis will possibly take us to understand and appreciate the distinction between monist and dualist model as it exists in the domestic and international legal relations. This paper will finally elaborate the treaties unmaking procedures enshrined under the Constitution and the ROP. The process of writing this paper basically involves contemplating the literature works of other jurisdictions and international practices.

Treaty Making Power

Treaty making is not a recent phenomenon for Bhutan.[7] Bhutan's experience in making the treaty dates back to 1774 when Anglo-Bhutanese Treaty was signed with the British East India Company.[8] This part, however, does not focus on the pre-constitutional process involved in the making of treaty, rather focus shall be on the post constitutional aspects of treaty making and its power.

Bhutan's crucial signing of the multilateral treaty was on September 21, 1971 when the country became the 128th Member of the United Nations (UN).[9] The year was a turning point in which the status of Bhutan in the international areas have been greatly changed. Bhutan's historical policy of isolation that withdrew almost from international politics was put to an end,[10] confirming to the international rule of law and values and principles

7 Legal commentaries say that treaty-making power is considered as a modem concept. See Peter Haggenmacher, 'Some Hints on the European Origins of Legislative Participation in the Treaty-Making Function' (June 1991) 67 Chi.-Kent. L. Rev. 313. However later scholar disagrees by saying that treaty making has its roots in medieval and earlier practices of statecraft. See Theodor Meron, 'The Authority to Make Treaties in the Late Middle Ages' (Jan. 1995) 89:1 The American Journal of International Law 1.

8 *Sonam* (n 2).

9 However, prior to Bhutan's signing of the United Nations Charter, the country was already a member of the Colombo Plan (joined in November 1962) and Universal Postal Union (UPU) joined on 7 March 1969.

10 Bhutan has emerged out of self-imposed isolation in the early 1960s. This indicate that Bhutan's foreign relationship predates the joining of the United Nations. See Karma Galay, 'International Politics of Bhutan' (2004) 10 Journal of Bhutan Studies 90.

of the international communities. The office of the United Nations in Bhutan was established in early 1974, and since then, the country has become home to the various UN agencies. Today, Bhutan is a member to number of international organisations and signed hundreds of bilateral and multilateral treaties.

But, a pertinent question, which is most frequently asked in the public international legal discourse, is the treaty making power. Who has the capacity to enter into treaties? Mervyn Jones writes that 'the head of state, either directly or through his agents, was alone competent to make treaties,'[11] and therefore, the capacity to make treaty is an attribute of sovereignty.[12] The Constitution of the United States expressly provide that "[H]e - the President - shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur."[13] In the United Kingdom, treaty making is the prerogative power of the executive, the power that in former times was inherent in the Crown, and that however, treaties have been traditionally placed before the British Parliament as a matter of convention as per the Ponsonby rule.[14]

In the Bhutanese context, the Treaty Clause is not explicit but very implicit in conferring the treaty making power to the executive branch of the

11 J. Mervyn Jones, 'Constitutional Limitations on the Treaty-Making Power' (Jul.1941) 35:3 The American Journal of International Law 462.

12 Chandler P. Anderson, 'The Extent and Limitations of the Treaty-Making Power Under the Constitution' (July 1907) 1:3 The American Journal of International Law 636, wherein the author writes that 'the power to make treaties with other nations is an inherent attribute of the sovereign power of an independent nation.' Also, in the Wimbledon Case, the Permanent Court of International Justice stated that 'but the right of entering into international engagement is an attribute of State sovereignty.' See S.S. Wimbledon (U.K. v. Japan), 1923 P.C.I.J. (ser. A) No. 1 (Aug. 17) <http://www.worldcourts.com/pcij/eng/decisions/1923.08.17_wimbledon.htm> accessed on 4 December 2016)

13 See Article II Section 2 of the Constitution of the United States.

14 The Ponsonby rule was given its name after Mr. Arthur Ponsonby, the Under Secretary of State for Foreign Affairs in the House of Commons gave his statement indicating that a treaty which requires ratification will be laid before Parliament in the form of a White Paper and will not be proceeded upon for 21 days. See Chicago-Kent Law Review Templeman The Right Honourable The Lord, 'Treaty-Making and the British Parliament-Europe' (1991) 67:2 Chi.-Kent. L. Rev. 459. Also see Sudhanshu Roy, 'Re-considering Treaty-Making in India: An Argument for Reform Through the Prism of International Investments' (December 2014) 54 Indian Journal of International Law 283.

government. The words 'duly acceded to by the Government hereafter' as used in the Article 10(25) of the Constitution is adequate enough to conclude that the government of the day, or the executive, enjoy the full power to make treaties.[15] On a similar note, the recent ROP says that the Rules of Procedures is to streamline treaty making process 'by the Government,'[16] and therefore, the government is entrusted with the capacity to make treaties.[17] The treaties however made by the government cannot be carried into effect without the sanction of Parliament.

Treaty Making Process

Having said that the sovereign state has right to enter into treaties and that the treaty making power is bestowed upon the government under the provisions of the Constitution and the ROP, this part shall briefly focus on the procedural aspects involved in the making of treaties.

The Constitution of Bhutan is silent on the treaty making procedure. The ROP however provides specific procedures to be followed. Paragraph 3 of the ROP provides that the making of treaty involves initiation, formulation, negotiation, signing, amendment and implementation of treaties. Any concerned agency may initiate and recommend a treaty proposal to the Government,[18] however, if the Lhengye Zhungtshog[19] initiates treaty proposal, it may be directed to a relevant agency of the Government to undertake the necessary processes.[20] Before the treaty is initiated, it is mandatory to seek political advice and clearance from the Ministry of Foreign Affairs.[21]

15 Henry Wade Rogers writes that the power to make treaty is usually vested in the executive department of government, under limitations which vary in different nations. See Henry Wade Rogers, 'The Treaty-Making Power' (1893) 16 Annu. Rep. A.B.A. HeinOnline 243.

16 See Preamble of the ROP.

17 ibid.

18 ibid. Paragraph 7.

19 Lhengye Zhungtshog is the Dzongkha term that refers to the Council of Ministers. Lhengye Zhuntshog is the highest executive body in Bhutan. Under Article 20(2) of the Constitution of Bhutan, executive power is vested in the Lhengye Zhungtshog, consisting of the Ministers headed by the Prime Minister.

20 ibid, Paragraph 8.

21 ibid, Paragraph 9.

Once the agency or the Lhengye Zhungtshog formally decides to initiate the process of formulating a multilateral treaty, a wide range of processes are involved under the ROP provisions. Consultation with the stakeholders and public is mandatory unless the test of a treaty requires confidentiality.[22] This is particularly significant to assess the proposed treaty in line with the municipal laws and policies.[23]

Once the consultation stage is completed, the agency will prepare the Preliminary National Interest Analysis (PNIA), which is to be submitted to the Lhengye Zhungtshog.[24] The PNIA will reflect the subject matter of the treaty, main obligations of the treaty, time consideration, ministerial responsibility and also its advantages and disadvantages of the treaty. The PNIA should also include the cost analysis of entering into the treaty, reflecting the social, economic, cultural, environmental and political implications. Analyses on the possible effect of domestic laws are to be incorporated in the PNIA.[25]

Upon the submission of the PNIA by the concerned agency, the Lhengye Zhungtshog shall review and make decision of the proposed treaty. If the proposed treaty is against the interest of the nation and the people, it may not approve and remain closed until further instruction.[26]

The ROP provides for negotiation processes. The Lhengye Zhungtshog will, on the advice of the Ministry of Foreign Affairs, identify the relevant agency and authorise to lead the negotiation, determine the composition of negotiating delegation and direct the Ministry of Foreign Affairs to provide necessary guidance and advice during the course of negotiation. As specified under Paragraph 21, the negotiation is to be carried out within the mandates and parameters drawn by the Lhengye Zhungtshog. Therefore, the Lhengye Zhungtshog is responsible to coordinate with the Ministry

22 ibid, Paragraph 10.
23 ibid, Paragraph 12. Paragraph 13 specifically obligates the concerned agency to seek advice from the Office of the Attorney General on the treaty's impact on the domestic laws.
24 ibid, Paragraph 15. If the Lhengye Zhungtsho so demand, the concerned agency shall need to make presentation on the PNIA (See Ibid Rule 16).
25 ibid, Paragraph 14.
26 ibid, Paragraph 18

of Foreign Affairs to determine and agree on negotiating positions and parameters to be followed by the negotiating delegation.[27] However, if the other party has substantive differences with the negotiating positions or parameters approved by the Lhengye Zhungtshog, or that major changes in the subject of the proposed treaty has been made, the negotiators or the agency will seek further clarification or approval from the Lhengye Zhungtshog.[28]

In the case of multilateral treaties where the text is already negotiated and concluded, the agency shall sign the treaty without further process.[29] However, in the case of bilateral treaties, if the Lhengye Zhungtshog decides to proceed with the treaty proposal, it shall draft the text of the treaty in consultation with the relevant stakeholders and experts or direct the relevant agency to perform this task.[30] The draft text will be then prepared, upon consultation with the relevant stakeholders and experts, including the Ministry of Foreign Affairs and the Office of the Attorney General.[31] If the experts provide major objections to the proposed treaty, the agency will seek directives from the Lhengye Zhungtshog.

After the completion of the negotiation process, and upon agreement with the parties, the text of the treaty shall be finalised. The agency further need to submit the text to the Office of the Attorney General for legal opinion and the Ministry of Foreign Affairs for political advices and clearance,[32] after which the final text will be submitted to the Lengye Zhungtshog for final approval.[33] After submission of the final text, the agency will have to prepare the Final National Interest Analysis (FNIA) providing mainly the ministerial responsibility, obligations and proposed text of reservations, financial cost of entering into the treaty, action plan to fulfil the treaty obligations, social, economic, cultural, environmental and political implications.[34] The FNIA will then be submitted to the Lhengye

27 ibid, Paragraph 17(2).
28 ibid, Paragraph 21.
29 ibid, Paragraph 22.
30 ibid, Paragraph 17.
31 ibid, Paragraph 19.
32 ibid, Paragraph 23.
33 ibid, Paragraph 25
34 ibid, Paragraph 26.

Zhungtshog who shall review and make decision whether to accede the treaty, or the need for domestic legislation of its enactment, or allocation or adequate resources for treaty implementation.[35] If the Lhengye Zhungtshog makes decision to enter into the treaty, the Ministry of Foreign Affairs will issue the instrument of full powers to sign the treaty.[36]

Under the provisions of the Constitution and the ROP, signature of a treaty typically does not make the nation a party to the treaty.[37] While Article 10(25) of the Constitution maintains "[…] International Conventions […], shall be deemed to be the law of the Kingdom only upon ratification by Parliament […]," Paragraph 36 of the ROP specifically obligate the Lhengye Zhuntshog to submit the signed treaty to the Parliament for ratification.

Article 10(25) of the Constitution and the ROP Paragraph 31 is very clear, but the subsequent Paragraph 32 is bit confusing. Paragraphs 31 & 32 bifurcates instrument subject to ratification and instrument not subject to ratification. While Paragraph 31 mandates to table all International Conventions, Covenants, Treaties, Protocols and Agreement for ratification before Parliament, Paragraph 32 incorporate exemption clause which provides that "[a]ny other legal instruments which are not covered by paragraph 31 of this Rules of Procedure may be entered into by the Government or other agencies without Parliamentary ratification, and without application of the procedures enshrined in this Rules of Procedure […]." The ROP however does not provide which instruments do not fall under paragraph 31 but instead provide unguided discretionary power under paragraph 33 to seek political advice and clearance of the Ministry of Foreign Affairs and approval of the Lhengye Zhungtshog

35 ibid, Paragraph 27-29.

36 ibid, Paragraph 30.

37 The ROP states that treaty comes into force 'soon as consent to be bound by the treaty has been completed through ratification by Parliament,' and this is in consistent with the Article 2(1)(b) of VLCT. Also see Curtis A. Bradley, 'Unratified Treaties, Domestic Politics, and the U.S. Constitution' (2007) 48:2 Harvard International Law Journal 307. The author in this article has written on length arguing how the signing of treaties does not necessarily make the nation a party to the treaty. Rather, nations become parties to treaties by an act of ratification or accession, either by depositing an instrument of ratification or accession with a depositary (for multilateral treaties) or exchanging instruments of ratification (for bilateral treaties). Also see UN Office of Legal Affairs, *Treaty Handbooks* (Sales No. E.12.V.1 2012)

before initiating any legal instruments not subject to ratification by Parliament. This provision is seemingly contravening to Article 10(25) of the Constitution. The Treaty Clause is unambiguous requiring all treaties to table before the Parliament for ratification.[38] Thus, while Paragraph 31 of the ROP remains consistent to the provision of the Constitution, Paragraph 32 remains unclear. However, if any treaty is to be qualified as 'not subject to ratification by Parliament' under Paragraph 32, it is more likely to contravene the provision of the Constitution.

Once the treaty is ratified by Parliament, it is then submitted to His Majesty the King for Royal Assent.[39] The Ministry of Foreign Affairs is responsible to do final depository works and direct all relevant agencies to undertake necessary implementation as per the FNIA.[40]

Constitutional Test and Limitation

The question growing out of the above discussions is whether the treaty making is bound by the Constitutional limitations. The power of the government to make treaties is limited by the procedures required by the Treaty Clause. By the words "[…] International Conventions […] shall be deemed to be the law of the Kingdom only upon ratification by Parliament unless it is consistent with this Constitution" places an obvious limitation on the government's power to make treaties. Any treaties tabled before the session of Parliament for ratification need to undergo scanning of the Constitutional provisions which I referred to as Constitutional Test.

Another limitation is provided under Article 13 of the Constitution. Article 13(4) of the Constitution provides that "[…] a Bill shall be passed by a simple majority of the total number of members of the respective Houses or by not less than two-thirds of the total number of members of both Houses present and voting, in the case of a joint sitting." If simple majority is not obtained or if less than two-thirds of the members of both the Houses concur for the treaty making, then Bhutan cannot make the treaty. The government therefore cannot unilaterally enter into a treaty.

38 See, *Sonam (n* 2). Lyonpo Sonam Tobgye writes that 'according to this provision, international agreements shall, upon ratification by Parliament, be deemed to be the law of the Kingdom'.
39 See Paragraph 46 of ROP.
40 ibid, Chapter V.

This is exactly what has happened in the present Bangladesh, Bhutan, India, Nepal (BBIN) Motor Vehicle Agreement. After the signing of the agreement on 15 June 2015, it was tabled for ratification in the 8th Session of the Second Parliament which was held on 10 November 2016 and concluded on 9 December 2016. While the Lower House (the National Assembly) passed the agreement despite stiff resistance from the Opposition, the House of Review (the National Council) voted against the move. The NC have argued that the BBIN could affect the country's culture, religion and economy and even pose a security risk[41] which the Constitution guarantees for the state to protect for all times to come. Further, the Constitutional mandate of environmental protection and preservation is likely to prolong the BBIN discussion. Thus, the government's power to make a treaty is limited within the scope of the Constitution.

Then, what would be the ideal solution? Taking the BBIN experience into consideration, it is submitted that the ideal way to get through is to table the treaties for Parliament at least before the signature. This is particularly important because Parliament represents the voice of the people and people's voice are heard by the members of Parliament. So to say, the NC members expressed their support for the BBIN Agreement if certain provisions of the text are changed.[42] However, since the Agreement has been already signed, it becomes a mere impossibility on the part of the government to negotiate in changing the provisions of the BBIN.[43]

Another ideal solution would be seeking the Constitutional Court (either the High Court or the Supreme Court) to decide the question of 'compatibility of international agreements with the Constitution prior to ratification.' The Treaty Clause is not clear whether the Bhutan Constitutional Courts have special jurisdiction to have oversight of the constitutionality of treaties before ratification. However, the Constitutional Court has jurisdiction to proclaim treaties 'unconstitutional' under Article 1(10)[44] of the Constitution read with Treaty Clause. In view of this, one can argue that the Constitution

41 MB Subba, 'NC rejects BBIN agreement' (November 16, 2016) Kuensel <http://www.kuenselonline.com/nc-rejects-bbin-agreement/> accessed on 7 December 2016
42 ibid.
43 ibid.
44 See Infra Note 60.

of Bhutan provides the Constitutional Courts *a posteriori* jurisdiction to annul the treaties by declaring unconstitutional. This step, however, would contravene the Article 46 of the Vienna Convention on the Law of Treaties (VCLT), 1969[45] and it would also mean arbitrary judicial intervention and misuse of power by the courts.[46] In view of this, it may be argued that such action would only invalidate the treaty obligation domestically though it would not discharge the international liability of the state for the application of that treaty. Thus, the ideal way of making the treaty is by seeking the Court's intervention during the treaty making processes. This is a safe-play approach for the country so that treaty's obligations are implemented and kept in *good faith* after its signature and ratification.

Implementation of Treaties

The VCLT specifically provides the parties to perform the treaty in *good faith*[47] and that it becomes the responsibility of the contracting state to ensure that treaties are implemented in their domestic region. However, in most of the third world countries, implementation of treaties become more difficult than expected. It appears that the country lacks either the necessary capacity or political will for effective domestication and implementation of the requirements.[48] This part of the paper, however, does not intend to provide answer for the problems but try to study the legal framework and mechanisms as to how the treaties are implemented in Bhutan.

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45 Article 48(1) of VCLT states 'A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.' See United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.

46 See Visar Morina, Fisnik Korenica and Dren Doli, 'The relationship between international law and national law in the case of Kosovo: A constitutional perspective' (2011) 9:1 Oxford University Press and New York University School of Law 274. Authors in this article claims that 'though the Kosovo Constitutional Court may strike down the law that has ratified a treaty …. in such case under the international duty to implement a binding treaty in good faith and the principle of *pacta sunt servanda*, the international liability for implementing the treaty concerned would not be dissolved.'

47 See Article 26 of VCLT.

48 Aliyu Ahmed-Hameed, 'The Challenges of Implementing International Treaties in Third World Countries: The Case of Maritime and Environmental Treaties Implementation in Nigeria' (2016) 50 Journal of Law, Policy and Globalization 22

The relationship between international law and national law may be best understood by describing the monism and dualism theories. Monism theory considers that the rule of international law is in the same sphere with that of national law. This theory typically takes treaties into direct effect in domestic law without separate implementing legislation.[49] In countries where monist theory is followed, the country's Parliament adopt what is called a 'ratification law,' and implement as the domestic law.[50] However, the theory of dualism says that international law and domestic legal order are equally but completely independent and separate. Thus, in dualist states, it is more evident to enact domestic legislation to give effect to the international legal instruments.[51]

The Treaty Clause as it stands in the text of the Constitution provides "[…] shall be deemed to be the law of the Kingdom only upon ratification by Parliament […]." Would this sentence take us to believe that Bhutan is a monist state? Or is this provision too vague that invite further analysis and interpretation?

The ROP takes a stance of mixed approach.[52] Paragraph 52 of ROP states that "[W]here national implementation cannot be carried out without domestic legislation, the concerned agency shall propose a national implementing legislation or propose for amendment of relevant domestic legislation". The proposal to enact domestic legislation can be done before or during the time of ratification process.[53] However, I believe that this provision is quite misleading. Perhaps, the drafter of the ROP might have failed to understand the legislative intent of the Treaty Clause of the Constitution.

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49 ICRC, *The Domestic Implementation of International Humanitarian Law: A Manual* (September 2015). Also see Fisnik Korenica and Dren Doli, 'The Relationship Between International Treaties and Domestic Law: A View from Albanian Constitutional Law and Practice' (2012) 24:1 Pace Int' L. Rev. 92

50 ICRC, ibid.

51 ibid.

52 It is commonly said that common-law States are primarily dualist, and civil-law States are usually monist. Since Bhutan follow the mixed system (of civil and common law), perhaps ROP might have intended to follow both dualist and monist approach in treating implementation.

53 Similarly, the Paragraph 53 of ROP provides: 'The Government shall propose for enactment of a domestic legislation before or during ratification of the treaty if national implementation cannot be carried out without domestic legislation.'

The former Chief Justice of Bhutan, Lyonpo Sonam Tobgye, who was also the Chairperson for the Drafting Committee of the Constitution maintains in his book that the 'treaties under this section are not self-executing.'[54] As legally understood, non-self-executing treaties are treaties which becomes judicially enforceable through the implementation of domestic legislation.[55] Lyonpo also writes that 'under the dualist system, the classic position is that the domestic law is supreme,'[56] and that could be the sole reason why the international law is not supreme in Bhutan but the Constitutional law is. International law has legal effects in domestic region only if some steps are taken by the domestic legal system to adopt or bring international law into domestic law.[57]

Earlier practices in Bhutan also account that Bhutan follow a dualist approach. Bhutan signed and ratified the Convention on the Rights of the Child (CRC) in 1990 without a single reservation. After 21 years of its ratification, Bhutan adopted the Child Care and Protection Act in 2011 solely with its intent to implement the provisions of the CRC. Similarly, Bhutan ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1981. The Parliament has enacted Domestic Violence Prevention Act of Bhutan in 2013 to give effects to the provisions of the CEDAW. Therefore, it can be construed that, both from the historical experiences and from the intention of the legislature Bhutan is a dualist state[58] and need legislature's intervention by way of enactment to give implementing effects to the international instruments.

However, paragraph 52 of ROP cannot be negated in toto. Not all treaties would invite domestic legislation. For instance, bilateral free trade

54 *Sonam (n* 2).

55 A non-self-executing treaty requires a legislative act in order to operate as domestic law. See William W. Park and Alexander A. Yanos, 'Treaty Obligations and National Law: Emerging Conflicts in International Arbitration' (December 2006) 58:251 Hastings Law Journal.

56 Sonam (n 2).

57 ibid.

58 M. Z. Ashrafu also maintains that 'all the SAARC countries have followed the dualistic mode in case of the ratification or adoption of treaty as like other common law tradition countries.' See M. Z. Ashraful, 'Status of Treaty under the Constitution of SAARC Countries: An Approach towards Bangladesh and India Perspective' (Jan., 2014) 5:2 Mediterranean Journal of Social Sciences 129.

agreements and investment treaties signed between two contracting parties need not necessarily have to enact domestic legislation. In fact, it can be arguably submitted that domestic legislation is significant for multilateral treaties and not for bilateral treaties. This stand however requires further substantive analysis and research.

VI. Unmaking of Treaties

Not much has been said on the unmaking of treaties.[59] By 'unmaking', I mean to withdraw or denounce[60] the particular treaty thereby ceasing from its membership. This part of the paper will discuss the legislative framework of withdrawal or denouncing of the treaties.

The Treaty Clause which provides 'Except for existing International Conventions, […] entered into by Bhutan, which shall continue in force subject to Section 10 of Article 1 […]' need further scrutiny. This particular provision provides that the existing international conventions or multilateral treaties are enforceable if, and only if, it is compatible with the Constitution of the Kingdom of Bhutan. On a negative note, the existing treaties need to undergo a procedural scanning under Article 1(10) of the Constitution.

For the purpose of this analysis, it is significant to draw attention to Article 1(10) of the Constitution which reads:

> All laws in force in the territory of Bhutan at the time of adopting this Constitution shall continue until altered, repealed or amended by Parliament. However, the provisions of any law, whether made before or after the coming into force of this Constitution, which are inconsistent with this Constitution, shall be null and void.[61]

59 When I say 'not much have been said,' I only mean it in the context of Bhutan. No Bhutanese literature has been written on this subject. However, much has been written in other jurisdiction.

60 UN Office of Legal Affairs says that 'the words denunciation and withdrawal express the same legal concept.' See UN Office of Legal Affairs, *Final Clauses of Multilateral Treaties Handbook* (UN Sales No E04V3 2003) ('Final Clauses Handbook') 109.

61 Lyonpo Sonam Tobgye writes that 'This section enshrines the supremacy of the Constitution. The Constitution is the highest law of the land and anything that is inconsistent with it, past, present or future is void.' See *Sonam (n* 2).

Article 1(10) when read with Treaty Clause not only asserts the supremacy of the Constitution but also makes a way for judicial review. The Chairperson for the Drafting Committee of the Constitution maintains that "[…] if the international law is inconsistent with the Constitution, the Constitution takes priority over international law. Therefore, the primacy is conferred to the Constitution over both international law and national law."[62] This provision therefore negates the principle of the supremacy of Parliament creating a scope for reviewing the pre-constitutional and the existing laws. This provision provide check and balance to preclude Parliament from either rushing a statute or stifle liberty, freedom and right under the tyranny of the majority in Parliament.[63] It stipulates that any provision of the law which are made before or after the Constitution which are inconsistent with the spirit of the Constitution is null and void. This provision can be read to interpret, in a same line, that any provision of the treaties which were ratified before the adoption of the Constitution, and which remains inconsistent with the Constitution, shall be null and void. The question therefore is, what option, if any, does a State possess under international law if it is simply unwilling to accept a legal obligations created by the treaties that were already ratified before the adoption of the Constitution?[64]

The international legal system is grounded on a fundamental principle of *pacta sunt servanda,*[65] and the Contracting States are responsible to maintain, in good faith, the rights and obligations created by the treaty. Thus, according to the rules of international law, neither the Constitutional mandate nor the enactment of a statute provides an excuse for a treaty violation.[66] However, when shifts in political landscape or change in domestic preferences undermine the object and purpose of the treaties accidentally,

62 ibid.

63 ibid. at 65.

64 In the case of *Chahal v United Kingdom* [(1997) 23 EHRR 413], the United Kingdom's Government have shown displeasure with the legal precedent set by the European Court of Human Rights. See Ed Bates, 'Avoiding Legal Obligations Created by Human Rights Treaties' (Oct. 2008) 57:4 The International and Comparative Law Quarterly 751

65 See Article 26 of VCLT which provides that 'every treaty in force is binding upon the parties to it and must be performed by them in good faith.' Also see Laurence R. Helfer, 'Exiting Treaties' (Nov. 2005) 19:7 Virginia Law Review 1579.

66 See Article 27 of VCLT which provides that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46".

the international law and practice requires states to perform certain actions either collaboratively or unilaterally to modify or abrogate the agreement with or without the adoption of a fresh set of treaty commitments.[67]

In the context of Bhutan, Paragraph 45 of ROP empowers the Parliament to terminate, withdraw or suspend the treaty. The withdrawal of treaties will be in accordance with the procedures provided in the treaty. This provision is similar to the treaty withdrawal or denouncing provisions provided under VCLT.[68] Although Bhutan is not signatory to the VCLT, the provisions can be inferred under the principles of customary international law.

One notable ground for treaty withdrawal as envisages under paragraph 45(3) of ROP is 'a fundamental change in circumstance which affect the implementation of the treaty.' However, as a general rule, a fundamental change of circumstances, even if not foreseen by the parties may not be invoked as a ground for terminating or withdrawing from the treaty under international law.[69] Commentators have argued that the application of the rule *rebus sic stantibus* to treaties is obviously essentials in a world of continual change. A fundamental change of circumstance, unless subject to strict regulations, arbitrary invocation and interpretation of the rule might seriously prejudice the basic rule, *pacta sunt servanda.*[70] While the meaning of this principle is uncontested, its application is controversial. Some affirms that 'law of treaties must be obeyed and always be binding,' some are of the view that 'valid treaties are binding.'[71] However, it can be construed to mean that unless State successfully invokes the exemptions provided under Article 61 of VLCT, treaty cannot be denounced under the fundamental change of circumstance.

Parliament can also withdraw or terminate the treaties if 'the treaty is ruled as inconsistent with the provisions of the Constitution of the Kingdom

67 Laurence (n 50).

68 See Article 54 of VCLT.

69 See Article 61 of VCLT.

70 UN, *United Nations Conference on the Law of Treaties* (26 March-24 May1968), A/CONF.39/11.

71 Josef L. Kunz, 'The Meaning and the Range of the Norm Pacta Sunt Servanda' (Apr., 1945) 39:2 The American Journal of International Law 180.

of Bhutan by the competent court."[72] As argued above, the Constitutional Courts are vested with *a posteriori* jurisdiction to rule of laws and other normative acts that contradict any international treaty binding in Bhutan. Unlike the United States where the treaty law is considered supreme, the Bhutanese Constitution provides for supremacy of the Constitution. Thus, if the international law is inconsistent with the Constitution, the Constitution takes priority over international law.[73]

It is important that Bhutan act vigilant and invoke the treaty unmaking power intelligently, if any. With the change in political landscape and structural change in the domestic preferences, there might emerge a need to denounce or withdraw those treaties that contradicts with the national laws and policies. Treaties are drawn up in a broad and sophisticated language, deals with events that may unfold in unpredictable ways in future and are not so easy to amend or rewrite. Termination or withdrawal is written in the text of treaties easily but its implementation may not be possible or even feasible given the importance or significance of the treaty.[74] The consequences of withdrawal are diverse, which include isolation (as in the case of North Korea); distinct consequences for a state's reputation for compliance with international law, and loss of membership and voice.

Conclusion

The Treaty Clause and ROP provide implicit provisions to conclude that the executive branch of the government and its agencies are entrusted with the power to enter into treaties, although it becomes a subject to constitutional limitations and legislature's scanning.

While the Treaty Clause does not elaborate the treaty making processes, the subsequent act of the government by adopting ROP has streamlined the process of making treaty and ratification by Parliament. However, few provisions of the ROP are confusing: bifurcating 'instrument subject to

72 Paragraph 45(7) of the ROP.

73 *Sonam (n* 2).

74 See Michael Duffy, 'Practical Problems of Giving Effect to Treaty Obligation - The Cost of Consent' (1989) AUYrBkIntLaw 2; (1988-1989) 12 Australian Year Book of International Law 16.

ratification' and 'instrument subject to not ratification,' for instance. The government might have borrowed this idea from the English practices of treaty making, however this is rather in contravention to the Treaty Clause enshrined in the Constitution of the Kingdom of Bhutan. It is important that the ROP provide concise definition of 'instrument subject to ratification' and 'instrument subject to not ratification' so that it avoids further complication and confusion. By 'instrument subject to not ratification', the drafter of the ROP might have meant, perhaps those bilateral trade and investment treaties entered between the two states which would suffice to implement by parliament ratification without domestic legislation.

The constitutional test and limitation are quite interesting. I have argued from the BBIN experience and significantly proposed the executive to table the treaties in Parliament before it is signed. This would be part of the stakeholder's consultation which is one of the important processes mentioned under ROP. Further, the Constitutional Courts knows better the contradicting provisions, and it would be sensible decision of the government to seek necessary advices from the Constitutional Courts before the treaties are signed.

The unmaking of treaties is very tricky and it may not be as easy as it sounds to be. There might be a situation where Bhutan needs to renounce the treaty obligation if it contravenes the provisions of the Constitution. But what we ought to remember is that Bhutan's Constitution maintains the State to promote goodwill and cooperation with nations, foster respect for international law and treaty obligations and promote international peace and security.[75] The Constitution recognises that State's sovereignty is strengthened when international cooperation is reinforced. If every nation maintains good relations with its neighbours, international peace and security will be achieved. Thus, it is significant that Bhutan act vigilantly to invoke treaty unmaking power intelligently knowing the negative consequences of treaties' withdrawal. Ultimately, the pursuit of Gross National Happiness (GNH), the noble socio-economic development philosophy, is to be achieved ever higher.

75 See Article 9(24) of the Constitution.

Evolution of Criminal Justice System in Bhutan[1]

Introduction

A strong justice system is an indispensable part of modern democracy. His Majesty the King commanded that, *Law is like the air we breathe, its presence is unnoticed but its absence and bad laws will be lethal. Adherence to laws brings about discipline, and order in the society. Failure of justice persecutes an individual, and the lack of respect for the rule of law persecutes the whole nation.*[2] The creation of efficient justice system is a necessary component of equitable and just society. The Judiciary of Kingdom of Bhutan, under the benevolent guidance of successive Druk Gyalpos, continue to reflect and uphold the *rule of law*.

Since its inception, the judiciary has played a seminal role in safeguarding people's rights through efficient administration of justice. The institution has pursued the principle of trust, fairness and expeditious delivery of justice by considering justice as a necessary element of service to the people. It has strengthened the foundations of justice by making the judiciary an edifice for fairness and strong *rule of law*. These ingrained values of justice have transpired to form the foundations for peace, security and prosperity in the country. In this article, I attempt to analyse the evolution and administration of criminal justice in Bhutan.

Basis of Bhutanese Laws and Jurisprudence

Bhutanese laws and legal order is built on the concepts of human nature and formation of a just society. Our concepts of laws originate from Buddhist philosophies that rest on values of mutual respect, equality and karma. Such profound principles reflect the value for life, equality of human lives, and rule by a just law. These values have calibrated the lives of Bhutanese

1 Contributed by Kinzang Chedup. The author is Trainer and Researcher of the Bhutan National Legal Institute.

2 The Judiciary of Kingdom of the Bhutan [website], http://www.judiciary.gov.bt/, (accessed October 2016).

people in many ways. This has also embedded the principles of equality in such a way that it considers all human beings as equal entities where they are "equal and not unequal". The philosophy of equity and justice has become the mainstream of dispensation of justice.

In the past, Bhutan was ruled by many rulers. Every region had a ruler. Rich social values such as harmony, maintenance of peace and unity have been central to the upkeep of rule of law. These values have helped the people of Bhutan to carve out their own national identity, etiquette and social conduct. Social values and norms in the community have also moulded Bhutanese formal legislations encapsulating the wisdom and social morality that existed in Bhutan. Prominent moral and ethical values such as *Thadamtse*, *Lejumdre* and *Driglam Namzha* has superimposed a code of behaviour, ways of dealing reflecting social and moral ethics in a community. This also reflects the Bhutanese values of humility, grace, civility and courteous conduct of the body, speech and mind. These intrinsic cultural values represent a unique Bhutanese cultural heritage. These invaluable expressions of propriety, decorum are the ultimate reflection of human conscience in the Bhutanese society enriching the foundation of Bhutanese laws through compassion and heavenly flowing of justice.

The Buddhist ideals of *karma* also formed firm grounds of Bhutanese legal system. However, Zhabdrung Ngawang Namgyal consolidated and amalgamated the various Bhutanese legal practices into a Code.

Evolution of Criminal Justice System in Bhutan

Our present justice system owes to the arduous tasks of our forefathers to strengthen the system of justice in the country. They have helped to plant the principle of rule of law, equity and justice in the criminal justice. While, it reflected the changing nature of criminal justice system across the globe, it has however never failed to incorporate basic criminal law principles integral to Bhutan. The conceptual guidance of life after death based on Buddhist ethos has enriched Bhutanese criminal justice system with values native to Bhutan.[3]

3 The Bhutanese Trial System has its origin in the precepts of Bardo Thoedrol by Terton Karma Lingpa.

The Dual System of Law and Governance

Based on the dual system of governance, our laws were classified into spiritual laws and temporal laws. While the spiritual laws were said to resemble a *Silken Knot (Dargye Duephue)* that tightens with negative deeds, the temporal laws were compared to a *Golden Yoke (Sergyi Nyashing)* that grew heavier with the seriousness of the crime.[4]

Crime and Punishment

Bhutanese laws were based on Zhabdrung's Code called as the Tsayig.[5] The two fold system of laws and governance helped to maintain peace, happiness and prosperity in the country. The governance system in Bhutan replicated that of the great Saint King of Tibet, Songtsen Gampo.[6] During those times, crimes were punishable by blood money. In cases of attempted homicide, the victim realised damages and compensation from the offender. While cases of robberies bore a penalty of hundred fold, persons who stole properties of the king bore an eighty fold penalty. In the similar pattern, eight fold penalties were imposed for thefts among the subjects. Falsehood was punished by putting the offender to oath in the monasteries and temples where deities were invoked.[7] However, adulteries carried fines.

It is stated in histories that, owing to general corruption, laxity, degenerated attitudes of people, the influence of strict law and justice had declined.[8] The cardinal principles of laws were also applied to the priests. They were disrobed if they broke their vows. Use and consumption of tobacco were prohibited. It was believed that tobacco and smoking induced ill health and filth to the society. The consumers were heavily fined to discourage its use.

As criminal law progressed steadily, criminal offences carried heavy penalties. Robber or thief killed during the commission of the offence did not receive any compensation; offenders in such crimes were not awarded

4 John Claude White, *Sikkim & Bhutan: Twenty –One Years on the North East Frontier 1887-1908,* (London Edward Arnold 1909), p.301.
5 Bikrama Jit Hasrat, *History of Bhutan,* (Education Department Bhutan1980), p. 199.
6 White (n 3).
7 ibid., p. 301.
8 ibid.

any punishments. Their family did not have any legal recourse against the offender. Brandishing a sword was liable for a fine. A serious form of punishment meted out included binding the offender with the body of the deceased. Even if he would have luckily escaped after the offence, he was liable to be killed whenever he was caught.[9] Persons who forged trade documents and letters were considered to commit a very serious crime. Those found guilty were punished with deprivation of their sights and in serious cases, they were executed through decapitation.[10]

Though such penalties were severe, oppressive and brutal, it was necessary to cultivate order and law. Tougher laws were one of the methods to deter people from committing similar crimes. Capital punishments were employed in rare and very serious crimes like sedition, treason, or attempt on the lives of prominent people in the country. Jails were housed in ancient Dzongs.[11] The foundations of the existing criminal laws borrowed its principles of Zhabdrung; which became the genesis of modern legal system in the country. The first comprehensive law was the Thrimzhung Chhenmo that was codified in 1959. It comprehensively covered all the civil and criminal matters including inheritance, weights and measures. All subsequent legislations originated from it.[12]

Modern Criminal Jurisprudence

Enactment of good laws is a hallmark of good governance and prevalence of *rule of law*. In recent criminal jurisprudence, the enactment of the Penal Code of Bhutan in the year 2004 has enabled access to criminal justice and enumerated modern criminal jurisprudence in the country. The Code is expected to perpetuate good and chaste actions; correct those who have gone wrong so that the guilty do not escape and the innocent do not suffer. It aspires to secure justice to the present generation and the posterity to establish justice devoid of bias and partiality. In the same way,

9 ibid
10 ibid.
11 Dzongs were architectural splendour in Bhutan. They served as the seats of important persons in the country.
12 E. Karim and C.T Dorjee, *Research Guide to the Legal System of Kingdom of Bhutan,* 2011 [website], http://www.nyulawglobal.org/globalex/Bhutan.html (accessed on 30 October 2017).

to ensure an unimpaired flow of justice, the Civil and Criminal Procedure Code was drafted in 2001. The principles of modern Bhutanese criminal jurisprudence include open trial, legal aid, innocent until proven guilty among other principles, which reflects modern criminal jurisprudence developed and adopted across the world.

Open Trial

Open trial is one of the essential attributes of a fair and independent judiciary. The Judiciary of Bhutan to prevent the derailment of justice does not allow any cases to be tried by adhoc tribunals. This also upholds credibility and judicious decision making processes of the courts. However, in the interest of public order, national security, the privacy of the parties, protecting the privacy of a child, and in any other situations, the court may exclude public and media from the trials.

The Concept of Habeas Corpus

Any person who has been convicted or is in detention can, on the formal request to the High Court or the Supreme Court be released to produce in person before the Court of law. This allows the person to represent himself before the court of law, and personally defend the case.

Legal Aid

Legal aid is nascent in Bhutan. Rule of law is the foundation of democracy to fuel the growth of vibrant democratic principles, through a strong rule of law. In such case, legal representation as a tool for legal defence is essential to uphold the principles of fair hearing.

Without legal aid, many poor people, from low income groups may face difficulties to represent and access justice. This may, in turn lead to ineffective defences, contentions and arguments. Accessible legal aid in Bhutan will foster access to information, services and ultimately improve access to justice for the citizenry. Legal aid promotes the rights of the accused; and protects the poor and the disadvantaged, who need it the most.

Innocent till Proven Guilty

The principle of criminal jurisprudence in Bhutan is "*presumed innocent until proven guilty*". The accused is considered as innocent until the prosecution proves that the accused had committed a crime beyond reasonable doubt. This is the basic principle for the protection of human rights. It can be argued that human rights are implicitly incorporated in Bhutanese criminal justice system. This guarantees that the accused has the benefit of doubt; that he may remain silent.

Inhuman Treatment

The Constitution of Bhutan is the supreme law of the land. Judiciary is entrusted with an immense responsibility. They guarantee that criminal law in Bhutan render justice. The right against torture, cruel, inhuman and degrading treatment is a fundamental right in the Constitution that bears the testimony to uphold and respect basic human rights of people. These rights protect citizens from treatments which debilitate a human person. This sacrosanct right has enabled citizens to enjoy rights, free from fear of oppression and inhumanity. The annals of Bhutanese criminal justice echo the existence of a free society.

Capital Punishment

Absence of capital punishment is one of the hall marks of modern criminal justice system in Bhutan. Although capital punishment existed in Bhutan in the past, it was abolished. Bhutan learnt that capital punishment was an abhorrent and ancient way of punishment violating basic human right without any attributes of reform. Bhutan also abided by basic tenets of international legal principles that do not uphold capital punishment. Moreover, Bhutan is a Buddhist country that considers taking life as a sin violating the precepts of Buddhist ideals. Therefore, under the benevolent leadership of our Kings, Bhutan formally removed capital punishment from its penal laws.

Arbitrary Arrest and Detention

In many countries, arbitrary arrest and detention are considered as a serious violation of human rights. Learning that arbitrary arrest and

detention directly attacks on the right of person and restrain other rights as a human person; with no access to remedy, Bhutan made arbitrary arrest and detention as an unlawful legal process. Any person arrested or detained is produced before the court of law within twenty-four hours. Any further detention needs the Remand Order of the courts.

Role of Courts

Royal Courts of Justices are a symbol of rule of law and justice in Bhutan. Courts uphold the sacrosanct duty to administer justice, enforce the rule of law and uphold the rights of the people. They are symbol of guardians of our laws. Today the Judiciary of Kingdom of Bhutan continue to work persistently to uphold the core constitutional duty to protect the citizens from the vices of law, enforce equal and effective protection of the laws. They also ensure easy access to justice. It is believed that rule of law involves administration of justice and non-arbitrary exercise of power. Reminding from the noble quotes that failure of justice persecutes an individual and lack of adherence to rule of law persecutes an entire nation, the courts strive to create a fair and equitable justice system to usher in a fair society based on the rule of law.

Role of Judges

Judges are critical component of human resource in any judicial system. The role of a judge to promote and secure the rights of the people is both huge and enormous. The person of a judge stands to represent the sanctity of the laws; and stands as guardian of laws in the country. Every judge manifests the sanctity of a judicial institution. Our judges are moulded by best judicial philosophies and judicial ethics to prevent them from succumbing to external influences and pressure. Our judicial system is based on Buddhist philosophies of compassion and best legal ethos. Laws in Bhutan speak through our judges - they reflect confidence, fairness, and impartiality. In Bhutan, unlike in other countries, judges do not make laws. They act as umpires to the case. The qualities, temperament and judicial philosophies of our judges are based on the principles of fair hearing invigorating confidence of the people. When the judge sits on a case, it is believed that the judge is also on trial of accountability, transparency and competency to administer and dispense justice.The role of a judge to

ensure and secure the rights of persons, especially in criminal cases is huge. Any mistake by a judge can affect the life of the defendant tremendously, curtailing his liberty and freedom as a person.

Role of Police

The Royal Bhutan Police is the security arm of the government. They are responsible to protect and safeguard the society. They are also mandated to maintain law and order, and prevent crime in the society. They form a trained and uniform force under the Ministry of Home and Cultural Affairs.[13] The duties of the Royal Bhutan Police in a criminal case are extensive. They are responsible to detect crime, arrest the offenders; charge sheet and prosecute them before the court of law. They also mandated to render impartial enforcement of the laws and ensure that rights of people are respected.

In many jurisdictions, abuse of the power to arrest is a prominent rights based issue. The Constitution of Bhutan has specified that arbitrary arrests and detention is a violation of the fundamental rights. In this line, the police cannot arrest persons arbitrarily; and if so, the police personnel can face criminal prosecution.

The use of force by the police is regulated by the provisions of the law. Force is used only as a last resort to quell a disturbance of peace and public tranquillity. Handcuffs are used as means to restrain the person from flight or to secure the person from physical threat. The role of police to assist the judge in a criminal case is also extensive. Although they cannot decide any cases on their own, they are responsible to prosecute the cases after thorough investigation, and direct the judge to reach a right decision. A malicious prosecution is a source of persecution, and abuse of justice and an intentional abuse of personal rights. The police, as a prosecution agency in few cases can drag an innocent person to the court of law without any probable legal ground. Therefore, unfair and legally ungrounded prosecution is a source of injustice and personal persecution. In order to render timely and appropriate justice to the people, the Royal Bhutan Police stand as the guardian of people's rights in the country. They

13 *Royal Bhutan Police Act 2009,* s 4.

shall ensure just criminal process, and uphold human dignity and safeguard the rights of the people.

Conclusion

People's rights are never a contested issue. As every law in the country are congruent with international legal principles and by far, the Constitution of Bhutan upholds and guarantees every right, which include civil, political, social and economic rights. Bhutanese criminal justice system reflect the sanctity of Bhutanese culture, it treats every person coming in conflict with the law fairly, equally and accord respect and dignity as a human person.

Crime prevention is considered as an important alternative to criminal justice system. Persons coming in conflict with the laws are considered as human who erred the laws - who deserve reintegration, correction and social support to continue their normal life. However, Bhutan cannot be complacent. We need to adapt and make progressive changes to incorporate modern principles of law and legal ethics. Bhutan still need to change, improve to better the lives of our citizens. Our criminal justice system should make progressive changes - and it shall, in best way possible, inform, educate and disseminate information about the laws, to enable educated and sound society that upholds the rule of law.

Protection of Children: Right to Privacy[1]

Introduction

The criminal law or the criminal justice are the most fascinating aspect of any legal system. The state always faces challenges in defining and solving social problems in the changing society. Traditional criminal law, many a times, is inadequate to address changing criminal patterns. Special legislations enacted to address these new issues are not adequately debated and deliberated. Therefore, it is imperative that we as citizens and legal professionals must contribute toward nation building and creation of awareness by debating, deliberating, educating, and publishing current and emerging legal issues in the country. Above all, Child Rights is an emerging legal issue in Bhutan, with new dimensions of rights and responsibilities. Protection of Child Privacy is an emerging issue.

With the evolving nature of rights across the globe, Rights of the Child and their protections has become inalienable human right. Amongst an array of rights created by international law, children's rights include their right to association with their parents, right to basic physical protection, food, education, health care, and other rights which protect and fulfil the best interest of the child. We need to protect other secondary rights of children including freedom from discrimination and freedom to form their own views and opinions.

This article attempt to analyse protection of the child rights with specific focus to the right to privacy of children.

Who is a Child?

According to the United Nations Convention on the Rights of the Child (UNCRC) 1989, a child is any human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier.[2]

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2 Refer Article 1 of the United Nations Convention of the Rights of the Child (CRC).

According to the Black's Law Dictionary, in the law of negligence, and in laws for the protection of children, child is understood as opposite of "adult" and generally includes persons under the age of puberty.[3]

What are Child Rights?

Child rights are the human rights of children with particular reference to the rights for special protection and care.[4]

Why do we need Child Rights?

Human Rights are universal rights and children possess the same general human rights as adults do. Children's Rights to form their opinions and decisions help them to make informed views and decisions on matters that affect their lives. However, some children by virtue of their age are neither able to make decisions nor are able to appreciate what is good and bad. In many countries, children form a vulnerable group in society with many of their rights ignored and disregarded. Therefore, in 1989, world leaders agreed and decided that children needed a special legal protection both at the national as well as international level. They felt that people under the age of 18 years often need special care and protection that adults do not.

Children's Right to Privacy

Children's right to privacy is a fundamental precondition for the enjoyment of other rights. In this light, the media should refrain from disclosing the name, addresses or place of study of children in conflict with the law. The same protection should be given to children in need of care and protection. However, the right to privacy is a conditional right; it is underscored by the *best Interest of the Child*. Children should have the right to privacy. By law, disclosure of the names and addresses of a child in the mass media is an offence under *The Child Care and Protection Act of Bhutan* 2011.[5]

3 *Miller v. Finegan,* 26 Fla.29, 7 South. 140, 6 L.R.A. 813.S

4 The definition is retrieved from http://www.humanium.org (accessed on 1 November 2017)

5 S.5 *The Child Care and Protection Act of Bhutan 2011*

In most social media platforms, either the name of the place or school of the child victim and child in conflict with the laws are revealed which infringes the right to privacy of a child. Sadly, most of the journalists or news reporters are unaware of such rights. The list can also add to include parents and teachers. When the names and other identifying information appear in the media, it exacerbates trauma, complicates recovery, discourage future disclosures and inhibit cooperation with the relevant authorities. Media publicity about child abuse and child victimisation runs the risk of adding to the substantial burden that victims already carry. Research has shown that such publicity about their ordeal may increase victims' feelings of shame and stigmatisation. To minimise negative effects of publicity, it entails identifying information that appears in the media. Research from a number of related sources leads to the conclusion that the impact of identification is primarily a negative.

In this regard, the state must sensitise children as well as the parents and society on such rights of the child. Such education and awareness programs should not be limited to urban areas but need to cover the rural inhabitants. The current trend gives a feeling that laws are kept in the hands of the law makers themselves and not with those for whom the laws are made. However, basic strategy must be developed for the government, relevant organisations and agencies to sensitise the media on how to balance between the right to privacy and the right to information since both are guaranteed under Article 7(19) of *The Constitution of Bhutan.*[6]

International Conventions

Internationally, the right to privacy has been protected in number of international conventions. *The Universal Declaration of Human Rights (UDHR)* of 1948 provides for the right not to interfere arbitrarily in the private matters.[7] Similarly, Article 16 of the CRC provides for the protection to

6 According to the Black's Law Dictionary; Fundamental rights and privileges means are the rights given to people of life, liberty, property, freedom of speech, assembly, press, and religion.

7 Article 12 provides that: "no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, or to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks."

a minor from any unlawful interference to his/her privacy and imposes a positive obligation on States which have ratified the Convention to enact a law protecting the same. Likewise, Article 40 of the Convention states that the privacy of a child accused of infringing penal law should be protected at all stages of the legal proceedings. Further, article 8 of the *European Convention on Human Rights (ECHR)* stipulates that "everyone has the right to respect for his/her private and family life, his home and his correspondence".

Despite these rich international instruments to protect the right to privacy of the child, almost all media, both print and broadcast, fails to observe these standards. Although, human right activists have periodically demanded that the State take adequate measures to protect *human rights of the vulnerable group* in the society, the right to privacy has received little attention.

Another burning issue is the disclosure of the criminal cases by media while the case is *sub judice*. Though the names or addresses may not be disclosed but ironically the accused is introduced in the media in such a way that he/she has been already proven guilty. This violates Article 7(16) of the *Constitution* which provides that: "a person charged with penal offence has right to be presumed innocent until proven guilty in accordance with the provisions of the law." This emphasises that any person charged with a penal offence can only be convicted if found guilty as per the provisions of the law. Therefore, it is not commendable for any media to either declare the accused to be criminal or disclose any information of the child.

Conclusion

There is a need for more discussions and discourses among journalists, child welfare specialists, child victims, advocates, criminal justice authorities and relevant organisations or agencies to streamline the issues concerning the privacy of the child in conflict with law or child victims. It might be useful for the communities to have an independent media ethics panel represented by such authorities to discuss and offer opinions on these issues. There must be an examination of the arguments for or against the more restrictive policies regarding identifying information, and suggest some guidelines that would provide additional protections for child victims.

Great strides have been made recently in identifying the needs of child victims and in trying to provide appropriate services and remedies for them. These includes improved child interviewing methods, more sensitive medical examinations, changes in courtroom procedures, advocacy on the child rights and counselling. However, not enough discussion is initiated in Bhutan when it comes to media publicity. There is a need for media community and legal experts to exchange views and explore ways to protect child and their privacy.