



Dedication

We dedicate this volume of the *Bhutan Law Review* to our peerless People's King - His Majesty the Druk Gyalpo, Jigme Khesar Namgyel Wangchuck, coinciding with the joyous occasion of His 38th birth anniversary. We thank Him for His profound foresight, leadership and reforms in the judiciary, the justice sector and the nation.

We are witnessing unprecedented peace, harmony and prosperity in the country due to the unwavering resolution, wisdom, divinity and the selfless leadership of His Majesty the King. Building on the strong foundation laid by His Majesty the Fourth Druk Gyalpo, His Majesty the King created several national milestones.

The Institute seizes the opportunity to reaffirm its pledge to disseminate laws and empower people to exercise their rights granted by the Constitution. We strive to inspire public trust and confidence in the justice system by promoting fairness, impartiality and justice; and enhance access to justice through continuing legal education for a peaceful, fair, just and content civil society.

We wish His Majesty good health and long life. May His Majesty's reign continue to be an era of ever-lasting peace, prosperity and happiness.

Content

1. Preface	
2. The Exposition of Constitutional Kuthangs	1
3. 'The Roles of the Judiciary in creating a Just, Civil Society: A Society based on Justice, Equality and Fairness'	4
4. Lyonpo Tshering Wangchuk, <i>The Crucial Roles of Laws in a Changing Society</i>	8
4. Lyonpo Sonam Tobgye, <i>Judges and Judging in Democratic Bhutan</i>	19
5. Lungten Dubgyur, <i>A Decade of Judicial Reforms under His Majesty the King's Glorious Reign</i>	32
6. Norbu Tshering, Tshering Namgyel and Garab Yeshi, <i>Environmental Justice in Bhutan: Establishment of Green Bench at the High Court</i>	42
7. Tharchean, <i>Ignorance of Law is no Excuse: Empowering People through Dissemination of Laws</i>	59
8. Sangay Chedup, <i>The Constitution of Kingdom of Bhutan: Appraisal of its Salient Features on its Tenth Anniversary</i>	65
9. Sonam Tshering, <i>Right to Privacy in the age of Information, Publicity and Social Media</i>	82
10. Bhutan National Legal Institute, <i>Access to Justice in Bhutan: Excerpt of the Report of the Survey</i>	93

Preface

It is with yet renewed zeal and enthusiasm that the Bhutan National Legal Institute presents the 9th volume of the *Bhutan Law Review* - country's first law journal coinciding with the 38th birth anniversary of His Majesty the King. Humbled by the generous criticisms, but being encouraged and emboldened by the frugal appreciation, the editorial board draws immense satisfaction in collating the scarce articles for the benefit of the readership and documentation of the contemporary thoughts and literature on Bhutanese laws and jurisprudence.

To remind ourselves of the high Royal expectation and the trust; and the onerous responsibility resting on our shoulders, we are publishing His Majesty the King's Address delivered to the judges during the 19th National Judicial Conference on 11 June 2010. We also bring you the words and thoughts of the former and current Chief Justices who as the conduits of the visions of the successive monarchs have crafted one of the most professional and efficient judiciaries in the region. As we celebrate its tenth anniversary, we draw your attention to the Constitution; and the selfless thoughts and deeds of the great souls who gifted it to us.

The articles and the literature herein echo the concerns and interests of our President, Her Royal Highness Ashi Sonam Dechan Wangchuck, an author, a dedicated civil servant, an astute legal scholar, avid reader, thinker and a reformer. As the representative of His Majesty the King in the Bhutan's Justice Sector, she harbors the health, safety and wellbeing of each one of us foremost in her heart; comforting us with the assurance that she will be the first to hear and be near us should a tragedy befall any one of us. Some of us would be in different circumstances today had it not been for the timely intervention and the gracious *Royal Kidu* garnered by Her Royal Highness. She shuttles between Her three Offices of Bhutan National Legal Institute, Jigme Singye Wangchuck School of Law and the Bar Council of Bhutan whilst fulfilling the needs and cares of Her own family; and the expanding family of staff and the mandates of the three Institutions. If and when we tend to falter and become complacent, we have also sensed subtle and timely nudging from Her Majesty Gyalyum, Ashi Dorji Wangmo Wangchuck, for which we are deeply grateful.

The judiciary is perpetually witnessing structural and systemic developments under the leadership of Her Royal Highness and the Chief Justice of Bhutan. Specialization of the courts have begun in Thimphu. Additional Benches are being created with the appointment of new judges and other judicial personnel. We can increasingly expect reasoned and self-speaking judgments with the continuous training of the judges and judicial personnel in judgment drafting, case management and Dzongkha proficiency. The judiciary is also receptive to the public expectation and trust with increasing emphasis on the judicial accountability and ethics; service-oriented values and attitudes; with enhanced accessibility to the courts and judicial services.

There is enabling political will from the successive governments toward enhancing rule of law in the country. A separate and independent National Key Result Area (NKRA 16) has been allocated to the country's justice sector in the 12th Five Year Plan for the first time in the history of the planned development in the country. This is primarily aimed at strengthening the justice sector services and institutions. Being the key justice sector institutions, the Judiciary of Kingdom of Bhutan and the Bhutan National Legal Institute are expected to play major roles and make meaningful contribution toward fulfillment of the NKRA 16 in the next five years; through effective resolution of disputes, enhanced access to justice, efficient delivery of judicial services and dissemination of laws.

Having been established on 25 February 2011, the Institute is seven years old this year. Even as we are overwhelmed by a huge sense of responsibility; and are racing against time in attempting to live up to the high expectations, we indulge in hope that we might be inching toward becoming the *Law Institute and Research Center* His Majesty the King dreamt of establishing in the country in 2010 to strengthen our legal system.

In order to motivate our readers to contribute articles and encourage scholarship and research, we have included a brief profile of the contributors. If you deem this journal worth your time and thought, we thank our leadership and the contributors who are shaping the legal thoughts and jurisprudence in the country. We will spare no effort to grow and improve continuously. We believe that success is rising up each time we fall, rather than never falling. We hope our Spring Volume will awaken a sense of growth and rejuvenation in you, as you set about to venture out in the service of the country in different capacities.

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 2 - The Institution of Monarchy



1.The White Parasol (Dhug Karpo)

The White Parasol symbolizes protection and royalty. Just as the Parasol guards one from the blazing heat and harmful forces, the Druk Gyalpo protects and upholds the Constitution in the best interest of all its subjects. His Majesty the King also embodies national values and is a symbol of unity.

2.The Raven Crown (Uzha Jaro Dongchen)

The Raven Crown is the symbol of His Majesty the King as the Head of State.

3.The Golden Wheel (Sergi Khorlo with 16 Spokes) :

His Majesty the King is the upholder of Choe-sid-nyi of Bhutan. The Golden Wheel symbolizes turning of the wheel of Buddha's doctrine, both in teachings and realizations enabling one to experience the joy of wholesome deeds and liberation. The sixteen spokes (Nga Chudruma) inscribed on the Sergi Khorlo signifies good governance.

4.Moon

It signifies clarity. Moon and Sun collectively represent the symbols of wisdom and compassion.

5.Geysar

It signifies nectar of the Lotus flower. Geysar represents the symbol of the paradise realms. They surround deities and blossom abundantly in the landscape.

6.Pema

The Lotus symbolizes purity, renunciation, divinity and the blossoming of wholesome deeds in blissful liberation. The full-bloomed Lotus represents the fully-awakened mind while the flower bud represents the potential to achieve enlightenment.

7.Serthri (Golden Throne)

The title to Golden Throne shall be passed onto the legitimate descendants of Druk Gyalpo Ugyen Wangchuck. The succession to the throne on the abdication or the demise of the Druk Gyalpo is regulated in an adequate and flexible manner. It encompasses the hereditary succession with preference to the direct lineal descendant of the Druk Gyalpo in order of seniority, with the Prince taking precedence over a Princess.

Conversely, His Majesty may deviate from this general rule as the Druk Gyalpo has a sacred duty to select the most capable heir to the throne.

8.The Wish-fulfilling Tree (Pasam Joenshing)

It signifies prosperity of the Nation. It depicts an auspicious configuration representing the union of male and female as method and wisdom with wealth and luck. The tree also signifies Chenrig Ze (Avaloketeshwara).

9.People connect with root of the Wish-fulfilling Tree (Pasam Joenshing)

It signifies compassion and noble aspiration of the Monarchs. The Druk Gyalpo is the guardian of the people's welfare and interests. He reigns in conformity with the Constitution.

10.Seals of 1907 Inviolable Gyenja

It was through the historic Gyenja of 1907 that our forefathers pledged to serve and repose trust and confidence in the establishment of Monarchy in Bhutan. It signifies the reverence of the institution of monarchy by the people. It is also the legal and philosophical basis of the Constitution.

11.The 15-Branch Tree

It signifies the 15 Royal family members from the Fourth Druk Gyalpo. Bhutan has accorded the status of Royal family to the Royal children of the reigning and past monarchs.

‘The Roles of the Judiciary in creating a Just, Civil Society: A Society based on Justice, Equality and Fairness’¹

“First of all, I would like to say that I am very happy to meet you all on this occasion and I hope that the conference was a successful one. If I may say a few things about the judiciary; it was in 1978 that His Majesty the Third Druk Gyalpo Jigme Dorji Wangchuck established an independent Judiciary. Thereafter, my father, the Fourth Druk Gyalpo Jigme Singye Wangchuck worked persistently toward strengthening and building a strong legal system. Several legal reforms and amendments were affected as per the needs of the time. These reforms were based on our age-old values mutual respect, interdependence and co-existence. This served as a strong foundation for our legal system and the result is that we now have a strong legal system.

Efficient judiciary and effective legal system are the primary tools for protecting the sovereignty and security of our nation. They are also the means to achieve the goals of Gross National Happiness (GNH), enhance national unity, happiness and wellbeing of our people for all times.

I congratulate the Chief Justice of Bhutan, the judges and all the judicial staff for establishing the Supreme Court and the High Court successfully. Since law is the backbone of democracy, these two important institutions must vigilantly uphold the principles and values of democracy.

The Chief Justice Lyonpo Sonam Tobgye has served three successive monarchs with full devotion and unwavering loyalty in various capacities. He has also been the Chief Justice of the High Court for many years. He also served as the Chairman of the Constitution Drafting Committee with full dedication and commitment. Similarly, I have complete faith and confidence in all the judges, since they now have many years of working

1 His Majesty the King’s Address to the Judiciary during the Concluding Ceremony of 19th National Judicial Conference on 11 June 2010.

experiences. All of them are professionally sound and intellectually competent to resolve all kinds of cases, issues and controversies.

However, you must not be complacent. You must perform your duties and serve the Tsa-Wa-Sum with full devotion and commitment. I promise to support you fully in this mission. If I were to praise you all for the past glories today, it might make you happy; but it would be of little value in accomplishing the great tasks which lay ahead. One of the great responsibilities that lie ahead is to establish a “*Law Institute and Research Center*,” that will enhance access to justice and further strengthen our legal system.

It is very important for the people to understand our legal system. All the judges are performing their duties and responsibilities very well. But it also is imperative to disseminate legal education and increase awareness of the people on laws and legal system so that they become law-abiding citizens.

People approach the court only when they are in trouble – that is when their rights are violated and claims denied. However, law serves far greater purposes than that. Law governs us from the moment we are born till we die. Be it business, marriage, employment, inheritance, acquisition or possession of properties, all our rights and privileges are conferred by the laws. There is no security of our life and no guarantee of our liberty without strong laws.

It is very essential for us to understand the notion of “*natural law*” and “*man-made law*.” Man-made laws are those enacted by the Parliament like, such as the *Marriage Act*, the *Land Act*, the *Inheritance Act*, etc... Natural law is inherent by virtue of being human beings - it's the intellectual capacity to differentiate between various acts and omissions, which are good or evil to oneself and others.

Natural law emanates from our age-old values. Loyalty between parents and children; love and affection among siblings, relatives and colleagues are natural laws and values aimed at mutual benefit and empathy. All these and other natural laws exist in our country and our man-made laws are founded upon these laws. Our man-made laws will be strong if we uphold our natural laws. We should not tolerate any act or omission, which is directly

or indirectly against our national interests. We should not encourage those acts or omissions which fuels doubt, misunderstanding and disharmony among our people. People should come forward and condemn such acts. If we could do this, people will always be united and prosperous. When the natural law remains strong, the man-made laws will naturally be strong and benefit our citizens as they are bound together by common values and goals.

In this august gathering, I would like to remind you that my father, the Fourth Druk Gyapo has once commanded that expeditious resolution of the disputes and easy access to justice services were of paramount importance for the people when they are wronged and rights denied. This will be possible only through the medium of the judiciary and people manning it. No less is the importance of medical and health services when people fall sick. Judges must bear in mind that access to justice must be easy, prompt, affordable and convenient for our citizens – especially the poorer ones.

People will be grateful and respect the legal system if we can render fair, clear and correct judgments. The judges must be aware of the changing needs and challenges of the developing society. In the past we had ample time; we could implement our plans and resolve disputes or issues on time. Today, we live in a fast-paced globalized world. Look at our own country. We are experiencing political changes, economic development and commercial activities at a large scale. We are required to carry increasing load of works and responsibilities. We are running out of time. Furthermore, we are facing new issues and challenges. It is important for judges to consider the needs of the future while fulfilling the present requirements. You must be very cautious and take appropriate and timely actions. As we say, ‘it’s useless displaying the weapon after the bear has vanished’. As far as possible, if we could start working now and complete the tasks within one or two years, we may not have to worry much about the future.

It is good that we are able to establish our Supreme Court. The king and the people of this country offer judiciary full support to help achieve its objectives. The Supreme Court must be independent and be the true guardian of the Constitution. I hope that all the powers and authorities conferred upon the judiciary will be fully utilized toward achievement of the constitutional visions.

Now I want to be very straight forward. If you work hard and achieve your goals within one or two years, we don't have to worry about anything. However, if you fail to prove yourself, we will not only get disappointed but this will jeopardize our democratic system. Therefore, the Chief Justice must ensure that all the works get completed soon.

Since all the judges are present here, I would like to say that you are fortunate to serve our people and nation. But you should always remember that once you sit on the Thrim Thri, you are performing a sacred duty transcending your personal interests, prejudices, whims and fancies. It is important for you to serve your people, king and the nation selflessly devoid of any bias or discrimination.

Public officials in general and Ministers, Drangpons, Dzongdas, Gups and others shoulder crucial responsibilities. They serve people with absolute commitment and unwavering loyalty. Judges must be the role models and set good examples for our future generation and youths.

Finally, for a king, the welfare of his people is his foremost concern; peace and prosperity are the foremost desire of the people; and law is the foundation of peace and prosperity. Thus, no other goal should be nobler than the creation of a society based on justice, equality and fairness. I always pray that our nation remains a 'just society' forever."

The Crucial Roles of Laws in a Changing Society¹

Introduction

We need intellectuals, academicians, scholars and above all enlightened Leaders and Members of Parliament, to support the people in transforming the challenges into opportunities, to realise growth, improve benefits, create a learning network and to unleash the latent talent. It is important to strengthen the people, so that people can also contribute meaningfully towards fulfilling the national goals and aspirations. His Majesty the King has commanded that *“if we have the energy, motivation and dedication to strive towards achieving our national objectives of sovereignty, security, peace and stability, Bhutan can achieve untold prosperity.”* Given the profound role and responsibilities as Members of Parliament, who are involved in public review of policies and issues, bills and other legislations and scrutiny of State functions – the conduct of this leadership program is a timely and positive step towards enhancement of skills, creation of awareness related to values and understanding important national goals and challenges. Among the many national goals, the most important is the nurturing and strengthening democracy and achieving self-reliance for the benefit of our nation and our people for all times to come. We must at all times bear in mind that *“democracy is not a gift, but rather a responsibility given to the people from the Kings to further strengthen our country”* as commanded by His Majesty the King.

Therefore, I seek your indulgence and patience – please allow me to discuss the following issues:

- (i) Role of Parliamentarians in Nation building;
- (ii) Law and the rule of law;
- (iii) Principles of check and balance;
- (iv) Judicial Review; and
- (v) Statutory Interpretation and Legislation.

¹ Lyonpo Tshering Wangchuk, the Chief Justice of Bhutan. Keynote address during the launching of the Leadership Program for Parliamentarians (LLP) at the Royal Institute for Governance and Strategic Studies (RIGGS) on 3 January 2015.

Role of Parliamentarians in Nation building

In any democracy, the representation of the people must be the basic source of authority for a body that makes the laws under which society operates. The electorate will therefore expect that their respective Member of Parliament to represent their interests. Therefore, our educated parliamentarians need to provide the nation with enlightened laws - always bearing in mind the collective dreams and common aspirations of our people, the national interests and objectives based on the concept of *ley jumdre and tha-dhamtsi*, demonstrating purity of thought and action.

Executive (Cabinet) has limited law making powers. Parliament cannot be in session all the time. Therefore, Cabinet may make laws when it is absolutely necessary when Parliament is not in session. However, the law must be either withdrawn or tabled as a bill, once Parliament reconvenes. It has its basis in the absolute non-delegation doctrine enshrined under Article 10 Section 1 vesting all legislative powers with Parliament.

Examples of ultra-vires Executive Law Making – Advisors appointed to the PM’s office, APIC, Pedestrian Day, Declaration of National Park in Bumthang (Article 3 Section 5) (DPT Government), and BOIC (PDP Government), Fiscal Incentives decided by the Cabinet.

Parliament is the conscience of the people. It is the institution through which the aspirations and interests of the people are communicated and fulfilled. The proposal of every legislator has to be in the advancement of public welfare and continued well-being. Justice and reason must constitute the general legislative intent in every piece of legislation.

Parliament is meant to be the citadel of righteousness and the embodiment of crystallised wisdom and leadership. The Members of Parliament must ensure that national interest prevails over all other interests. His Majesty the King has always reiterated that:

“good governance cannot be scarified. Through good governance, equality and justice can be established in order to achieve national goals and aspirations with the end goal being the achievement of peace, prosperity and harmony for the people.”

His Majesty has commanded that:

“Politicians and civil servants’ primary duty is to work for the prosperity of the nation and the wellbeing of every citizen. Regressive policies must be discarded and the country must be managed with clean, efficient, good and intelligent governance.”

Members of Parliament are responsible and accountable to the public. Parliament must justify the public confidence and ensure that our actions of today do not have an irreversible impact on tomorrow’s future.

Abraham Lincoln (16th President of United States) said:

“Parliament must ensure a Government of, for and by the people to safeguard the interests of the nation and fulfil the aspirations of the people by providing a national forum for public consideration of issues, by passing bills and legislations and overseeing executive actions in the national interest.”

Law and the Rule of Law

The law affects nearly every aspect of our lives every day. We have laws to deal with crimes like robbery and murder. And we have laws that govern activities like driving a car, getting a job, and getting married. Law is a rule prescribed by Parliament for the regulation of human conduct in society. It is the solemn will of the legislature. Laws give us rules of conduct that protect everyone’s rights. Laws balance individual rights with our obligations as members of society. For example, when a law gives a person a legal right to drive, it also makes it a duty for a driver to know how to drive and to follow the traffic rules. His Majesty the King has often equated the existence of rule of law to whether people follow traffic rules. His Majesty the King has profoundly stated that:

“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. Rule of law brings about discipline in people and order in society. If there is order in society, there will be peace and trust amongst the people.”

Even in a well-ordered society, people disagree, and conflicts arise. The law provides a way to resolve disputes peacefully. Laws help to ensure a safe and

peaceful society. It should not however, hinder the broader social objectives of a meritocratic and creative society. It must have the ability to foster trust and harmony in society. Laws must be enacted after thorough discussion and consultations within Parliament and with relevant stakeholders – it must basically involve meaningful and thoughtful deliberations. When new laws are enacted hastily and not understood well by the people it leads to social difficulties thereby, leading to loss of faith in the law and eventually diminishing people's confidence in democracy.

His Majesty has commanded that:

“law is like the air we breathe, its presence is unnoticed but its absence and bad laws will be lethal. We must respect law, and law must be upheld without question just as we do not question the need to breathe.”

Therefore, the law must be clear, concise, consistent, and direct, it must have a functional and utilitarian purpose. Further, while ensuring that the basis of the laws must be traditional and Bhutanese in essence, it is equally important to ascertain the political will and capacity of institutions to implement and enforce the laws. For example – the Child Care & Protection Act, 2011 – has remained a white elephant. The creation of a reliable, fair and efficient justice system is a necessary component of a just, equitable and fair society under the rule of law.

Principles of Check and Balance

In consonance with the rule of law, inherent to any system of constitutional democracy is the system of check and balance between the three arms of the State, along with independent constitutional bodies. As a doctrine, it is essentially a theory of government, the objectives of which are the protection of liberty and the facilitation of good governance. It is a system to prevent one branch from becoming supreme, but at the same time to induce the different branches to cooperate. With checks and balances, each of the three branches of government can limit the powers of the others. Even within Parliament, we have the National Council and the National Assembly and within the National Assembly a ruling party and an opposition party – each institution shouldering a sacred duty in the democratic process.

- Article 1 Section 13 of the Constitution provides that the three organs are independent and separate and no encroachment of each other's power is permissible. Parliament drafts, Executive enforces and Judiciary interprets laws.
- We appreciate the mammoth tasks of reviewing drafts, enacting and amending of laws, which are within the legislative domain and primary responsibilities of Parliament.
- Parliament while enacting laws must ensure that it is in consonance with existing laws and above all refrain from enacting laws that are in contravention of constitutional provisions and principles.
- Parliament must consider amending ambiguous provisions of the laws that is not beneficial to the national or public good.
- In considering statutes for amendment, Parliament should review the statutory text, legislative history, and purpose, and the practicality of competing policies by engaging in thorough research, study and consultation with relevant stakeholders.

Judicial Review

Judicial review is the doctrine under which legislative and executive actions are subject to review by the Judiciary. A court with the power of judicial review may invalidate laws and administrative decisions that are incompatible with the general principle of law or with the Constitution. Judicial review is one of the checks and balance inherent in the concept of separation of powers and constitutionalism, the philosophical belief in government under a written constitution.

Some praise the power of judges to review and strike down legislation as a bastion, defending the rights of the people. Others critique such judicial review as an inappropriate intrusion upon the functions of elected legislatures. A few even dismiss it as nothing more than a further entrenchment of elite-dominated politics. And yet, for all the controversy surrounding judicial review, it has spread across the world and has taken root in many newly emerging or emergent democracies. Bhutan has also recognised that preservation of liberty, prevention of tyranny in the garb

of democracy and that violation of rule of law must be checked through the concept of judicial review (Article 1 Section 11).

Judicial review is a basic essential feature of any constitution and no law passed by the legislature can abrogate it, which if done, the Constitution will cease to be what it is. A thriving democracy is based on the twin principles of majority rule and the need to protect fundamental rights. It is the duty of the Judiciary to balance and ensure that the government on the basis of its majority does not make ineffective the rights of citizens. It is harmonious with this concept that power belongs to the people and their rights need to be protected. Therefore, it is important to understand the inter-relationship between Parliament, Executive and Judiciary. For instance:

Acts of the Parliament

Passes laws

Creates and authorises agencies to act

Administrative Agencies (*Line Ministries*)

Issue rules and regulations

Resolve disputes via adjudication

Judicial Review Function

- Is law constitutional?
- Is delegation to agency constitutional?
- Is action consistent with Constitution?
- Is action consistent with delegated legislation and other laws?
- Is action consistent with case law?

After the judicial review, Parliament may codify the precedence set by the Courts, or reject the interpretation given by the courts and amend the particular provision of the statute by giving its understanding. Such a decision of Parliament would be again subject to judicial review – check and balance operates in a cyclic manner.

Statutory Interpretation and Legislation

The process of application of enacted laws has led to the formulation of certain rules of interpretations or construction. According to Salmond *“interpretation or construction is the process by which the courts seek to ascertain the*

meaning of the legislature through the medium of authoritative forms in which it is expressed”.

A statute is to be construed according “to the intent of them that make it” and “the duty of judiciary is to act upon the true intention of the legislature - the mens or sentential legis”. If a statutory provision is open to more than one interpretation the Court has to choose that interpretation which represents the true intention of the legislature, which is also referred to as the legal meaning of the statutory provision.

The problem with interpretation is a problem of meaning of words and their effectiveness as a medium of expression or to communicate a particular thought. A word is used to refer to some object or situation in the real world and this object or situation has been assigned a technical name referent. Words and phrases are symbols that stimulate mental references to referents. But words of any language are capable of referring to different referents in different contexts and times.

In ordinary conversation or correspondence, it is generally open to parties to obtain clarification if the referent is imperfectly communicated. The position is, however, different in the interpretation of statute law. A statute as enacted cannot be explained by the individual opinions of the legislators, not even by a resolution of the entire legislature. Resolutions cannot be equated as laws – it is expression of appreciation or Parliaments resolve to initiate something.

After the enactment process is over, the legislature becomes *functus officio* (a term applied to something which once has had a life and power, but which has become of no virtue whatsoever - the authority is exhausted) so far as that particular statute is concerned, so that it cannot itself interpret it.

The legislature can no doubt amend or repeal any previous statute or can declare its meaning but all this can be done only by a fresh statute after going through the normal process of law making. The courts have therefore, to look essentially to the words of the statute to discern the referent aiding their effort as much as possible by the context.

Legislation in a modern state is actuated with some policy to curb some public evil or to effectuate some public benefit. The legislation is primarily

directed to the problems before the legislature based on information derived from past and present experience. It may also be designed by use of general words to cover similar problems arising in future. But, from the very nature of things, it is impossible to anticipate fully the varied situations arising in future, in which the application of the legislation in hand may be called for, and, words chosen to communicate such indefinite referents are bound to be, in many cases lacking in clarity and precision and thus giving rise to controversial questions of construction.

The duty of the judges to expound and not to legislate is a fundamental rule, but this is now and has always been merely an aspiration. There is a marginal area in which the courts “mould or creatively interpret legislation” and the Judges are thus “finishers, refiners and polishers of legislation which comes to them in a state requiring varying degree of further processing”.

His Majesty the King has commanded that “*the judiciary cannot seek solace in the argument that defects in laws is a legislative responsibility, and remain a mere spectator*” (Tashi Chhodzong, 27 August 2002 - reported in the Kuensel dated 31/08/02). Therefore, the Judiciary does not look at the provisions of the statutes in the eyes of a foot soldier, who see only that part of the battlefield that is right in front of their eyes, but from the eyes of those who see the whole war, and its complex manoeuvres and counter strategy to effectively interpret the laws in the context of other provisions and statutes. The judiciary (especially the High Court and Supreme Court) must and has till date consistently engaged, to prevent inconsistencies in the laws which eventually affect the common man. The courts’ can do this, by interpreting the vague or conflicting statutes in a meaningful manner, adopting various principles and thumb rules regarding the interpretations of statutes, instead of merely interpreting and applying the provisions literally as an educated person.

Administrative Justice

Most government based statutory interpretations are rendered by administrative agencies and departments, and courts are second-order interpreters, examining the issues against the backdrop of what agencies have already said and in some cases have said for a long time. When faced with a problem of statutory construction, the court shows great deference

to the interpretation given to the statute by the officers or agency charged with its administration – provided the interpretation and application of the rule is not arbitrary or inconsistent.

Rapid institutional development and in a fast changing socio-economic scenario, there will be need for numerous and various statutes and as such, they are bound to collide. Since 2008, Parliament has enacted or amended over 50 laws. Hence, it is up to the higher judiciary to pick up the gauntlet and give conflicting provisions an interpretation that is consistent so that the people are certain and aware what the law means.

Purpose of Laws

His Majesty the King has consistently raised the concern that, “*over legislation tantamount to the possible loss of trust in society, inhibits meritocracy and stifles initiative and creativity.*” Over legislation invariably also leads to statutory conflicts and confusion for the very people in whose interest the laws have been enacted. Excessive legislation may be repressive and may lead to a diminution of societal vitality, thus the Parliament should limit its action to those for which concerted action is necessary.

While Parliament is responsible for providing citizens with requirements necessary for self-development, it must not interfere with growth of self-reliance ... with moral autonomy, which is a condition of the highest goodness. An improperly made law begets more laws, and spawns further regulations and red tape leading to irregularities and confusion within the system. The legislature must conscientiously only make laws without which society would fail to function properly. If, while seeking to address certain issues in society, the legislature ends up creating laws that either worsen or create new auxiliary issues instead, then the legislature must take responsibility and have the courage to take corrective measures, by codifying the precedence set by the Courts, amending or repealing such laws.

If I may propose, the Members of Parliament may form a committee to study and review the concern or outsource it to a Think-Tank. If both Houses engage in refraining from enacting laws, it would amount to the Parliament shirking its responsibility, violation of its sacred duty and a disservice to the people. Under legislation and too little responsibility is

thus equally dangerous as over legislation and too much responsibility. Further, given the concerns about meritocracy and creativity – it may also be prudent to issue relevant guidelines to the Line Ministries to be conscious of the above concerns while preparing delegated legislation necessary to ensure implementation of the laws.

Emerging Constitutional issues

- (i) Ensure sanctity of the Throne – we must all be mindful of the principle associated with “guilt by association.” Debates in Parliament must be based on the merits and relevant laws without dragging and involving the Throne.
- (ii) Understanding of “except by law”, “may by law” and “provided for Parliament by law” – Parliament must ensure that relevant laws are enacted.
- (iii) Pay Commission – it is an expert body and hence, it is not a Committee like the Constitution Drafting Body. The pay fixed by incumbent Parliament should be collected by next Parliament to avoid conflict of interest; amounts fixed by Pay Commission should never be increased by the Cabinet and Parliament but may be reduced; fixation of salary of Members of Constitutional Bodies must be reconsidered, especially members and commissioners.
- (iv) Thanks to the Advisory jurisdiction of the Supreme Court, only one constitutional case has been filed till date and the Supreme Court is engaged in dealing with routine statutory cases.

Conclusion

Bhutan has strengthened and prospered through the enduring values, pervasive traditions and culture, under the ever vigilant and benevolent guidance of our successive Monarchs. The paramount duty of every individual is to ensure that falsehood does not triumph over the truth, that injustice does not eclipse justice. We must all contribute towards building a profound and caring justice system and enhance public confidence and adherence to the rule of law. Every Bhutanese must have absolute and uncompromising respect for the Rule of law.

Law is not an end, but a means to securing peace and stability. Therefore, as envisioned by His Majesty, law is the embodiment of the hopes of the people and the Rule of Law is the protector of justice (Justice is the constant and perpetual desire to render everyone his right according to the law.) Together, it must ensure the continued well-being of the people and sustain the whole edifice of our society and the nation. His Majesty has commanded that “... *failure of justice persecutes an individual, but the lack of adherence to rule of law persecutes an entire nation.*”

Lastly, as the Chief Justice, I would like to place it on record that, the Judiciary as always is committed to work with the other branches and constitutional bodies in ensuring and upholding the rule of law. 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.

Judges and Judging in Democratic Bhutan¹

Introduction

This Article examines the crucial role of judges in the modern judicial system of Bhutan under a democratic system. In order to gain a proper understanding of the role of our present judges, I will briefly delve into the historical origins and then examine the evolution of the modern judicial system in Bhutan. I will also highlight the selection, life and nature of duties, code of conduct and judicial temperament and challenges of judges in Bhutan. It is hoped that the general public gains greater awareness and knowledge of the nature of the roles of judges and the indispensable institution of judiciary in the country through this Article.

Origin of Judges and Judging

Society is riddled with disputes which is not desirable for symbiotic and peaceful life. Therefore, justice has been the human solution. As Ronald Dworkin wrote:²

Perhaps the institution of justice started as I imagined courtesy starting in simple and straight forward rules about crime and punishment and debt. But the interpretive attitude flourished by the time the earliest political philosophy was written, and it has flourished since. The progressive reinterpretations and transformations have been much more complex than those I described for courtesy, but each has built on the rearrangement of practice and attitude achieved by the last.

As per the Jataka text, there are ten duties of a king (*dasa-rajā dhamma*) including the delivery of justice. Further, in Buddhaghosa's term, *dhammika* refers to the one who rules with justice (*nyaena*) and impartiality (*samena*). Justice is a requisite quality of a ruler. Consequently, the judges inherited the duties of *dasa-rajā dhamma* as their responsibilities; and are part of and originates from the *curia regis*, the king's court.

1 Contributed by Lyonpo Sonam Tobgye, the former Chief Justice of Bhutan.

2 Ronald Dworkin, *Law's Empire* (Harvard University Press 1988).

The origin of laws can be traced to legend of Mangpo Kurwai Gyalpo ('the Great Chosen One and revered by all', *Mahasammata rajan*)³, wherein monarch is considered as the fountain head of justice. However, with the coming of increasingly complex system of governance, the monarchs of Bhutan delegated the power of adjudication to the judges beginning in 1961⁴. This was reinforced with the appointment of judges of the High Court. "The High Court at Thimphu is functioning satisfactorily and disposing off all cases expeditiously. The present judges of the High Court are Dasho Kesang, Dasho Tsang Tsang, Dasho Nidup Namgyel, and people's representative Dasho Sedo," the *Kuensel* report in 1968.⁵

Independence of the Judiciary

To restore and keep maintain the social equilibrium and protect the society, we need strong justice system, so that the strong does not prevail over the weak and trample their rights. The justice system requires institutional building, legal framework, infrastructural development, modern technology and human resource development. The institution of justice in Bhutan started since 1961 and its institutionalization progressed steadily. The *Kuensel* (15 February 1969) reported that:

On royal command, the judiciary and the executive are being separated in the districts of Thimphu, Paro, Wangdiphodrang, Punakha, Tongsa, Byakar, Mongar, Shemgang and Tashigang. The High Court and the Royal Advisory Council hope that this re-organisation will enable all cases to be settled expeditiously in the above nine districts, and will also prevent large numbers of cases being referred to the High Court at Thimphu by the District Officers. The separation of the judiciary from the executive will, it is hoped, also ensure better administration of justice in the districts.

Since then, the Judiciary of Bhutan has metamorphosed over the years with procedural reforms and human resources development. Independence of the Judiciary, *inter alia* collective independence (*the concept of non-interference*,

3 *Agganna-suttanta, Digka Nikaya*, Vol 3, section 27, P.T.S edition or Mahavastu, Senart's edition, Vol I, pp 347-348.

4 The separation of powers started with the appointment of late Home Minister, Lyonpo Tamzhing Jagar, as the first Thrimpon on 13th Day of 7th Month of Iron Bull Year in 1961.

5 See, *Kuensel*, (30 June 1968).

jurisdictional monopoly, transfer jurisdiction, control over judicial administration), personnel and financial independence (qualification, selection and training, conditions of services, suspension, removal and disciplinary measures, security of tenure and protection from arbitrary removal from office) and institutional independence (distinctive court building, distinct Kabney and court seal) are all constitutionally guaranteed.

Era of Professional Judges

Human resource is a national asset and an institutional necessity. It must be supported by strategic planning, critical analysis and methodological implementation. Hence, the judiciary of Bhutan has built professionals⁶ within the past two decades and the system has symbiotically merged with Bhutanese traditions and modern methods. Learning Bhutanese grammar, literature and law in the Post Graduate Diploma in National Laws (PGDNL) has enhanced the capacity of the judges and mitigated public opposition. Following his visit to Bhutan Lord Philips, the President of the Supreme Court of United Kingdom, wrote on 9 May 2011:

I had certainly not expected to find in Bhutan such a sophisticated judicial system, nor a judiciary better academically qualified than many of the judges in this country (the U.K.).

Bhutan sends students to different parts of the world to study law. They are enriched by the diverse legal culture, traditions and systems that the world has to offer. Sir Robert Michael Owen of London Judicial College remarked that:⁷

It is to be noted that the majority of the judiciary have been educated in countries whose legal system is based on the common law, India, Australia, the U.S.A. and the U.K... Secondly I was highly impressed by the intellectual calibre of the judiciary, its younger members now all hold both first and master's degrees in law.

Many laws and systems have been influenced by different philosophical groups and schools of thoughts. However, overemphasis on international

6 Refer Kuensel (13 July 2001), where Mr. Louis Joinet said “within six years, the Bhutanese legal system, which had been based on individuals, had developed into a strong and professional institution....”

7 Study visit to Bhutan from 2 to 14 April 2012.

perspectives is not desirable. Strong foreign influence may weaken the Bhutanese legal system. Therefore, the PGDNL was the best defense against hegemonic and blind incorporation of foreign legal principles and practices that has no relevance to the Bhutanese context. However, as an integral member of the international community Bhutan cannot afford to have a nihilistic view of the international and global system. Therefore, the curriculum of the PGDNL comprises both international and national laws and literature for global acceptance and national relevance. It builds professionalism by blending western and Bhutanese jurisprudence. The fusion of international system and the values of the Bhutanese Legal System has been a great success. The courses on international jurisprudence abroad and the study of *Rigzhung* (Buddhist literature and philosophy) at home has resulted in imparting wholesome education and creating a body of intellectual and proficient personnel in the judiciary. It has provided a cross-fertilization of international and domestic legal principles into our legal system making our legal system firm and strong.

Every human being is born with latent philosophy and they are molded over time by the family values, religious beliefs, environmental effect, academic training and individual values. If one is conscious of these entrenched influences, one can improve and change. Bhutan can be proud of the fact that our judges are from ordinary family backgrounds. They share common values with the general public. They use those shared values to be more practical, realistic and humane in the performance of their judicial work. Nevertheless, the judges must be constantly exposed to the vista of learning as Justice Powell of the United States of America said, *“The nation’s future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.”* Continuing legal education is one of the answers to prevent us from being fossilized, and from becoming obsolete or inflexible. Laws speak through judges. This is reflected well in the Bhutanese proverb, which says that judges are earthly gods during one’s life and *Chhoki Gyalpo* is the god of the purgatory. Such sentiments were also echoed by Shakespeare in the Merchant of Venice:⁸

*A Daniel come to judgment! yea, a Daniel!
O wise young judge, how I do honour thee!*

8 William Shakespeare, *Merchant of Venice*, Act IV scene I, line 223 & 224.

Selection of Judges

The right selection and appointment of judges is a matter of fundamental importance. This is directly proportionate to the efficacy of any justice system. It should gain public trust and confidence. A quiescent and timorous judiciary, unable or unwilling to act impartially or independently of the parties before it would lose public confidence and its decisions would soon lose respect and with that would go respect for laws and the rule of law. Consequently, proper selection,⁹ attitude and suitability of the persons for the judges are crucial for the institution and delivery of justice. Therefore, appointment of the judges is important particularly in the higher echelons of the judiciary.

In Bhutan, selection and appointment of judges are constitutional duties of the National Judicial Commission (NJC) and the Royal Judicial Service Council (RJSC), and it is the duty of the public to ensure eternal vigilance. The mistake of today will be the curse of tomorrow. The National Judicial Commission can facilitate better selection of judges of the appellate courts as all three branches of the government are represented.¹⁰ Selection guidelines are enumerated under section 68 of the *Judicial Service Act, 2007* according to which the Commission and the Council are allowed to nominate judicial candidates for the post of Drangpons with requisite qualification, moral courage, integrity, and with no political affiliations. The candidates should be evaluated and selected on the basis of objective criteria. The candidates should possess record of adhering to established procedures and rule of law.

Judicial Temperament

The qualities of judges are their temperament, character, judicial philosophies, and political views. Judges should hear courteously, enquire and decide impartially.¹¹ The judges are often fossilized into different

9 Frederick Winslow Taylor, *Scientific Theory of Management* (Harper & Brothers, New York 1911).

10 See, Article 21 Section 17 of the Constitution of Bhutan.

11 See, Section 107 of the Judicial Service Act of Bhutan, 2007, which is similar to Socrates' view. He said "Four things belong to a judge: to hear courteously, to answer wisely, to consider soberly, and to decide impartially."

moulds or schools of thought. They are liberals, conservatives or centrists. In the past, we have followed the golden rule that the words of a statute must *prima facie* be given their ordinary meaning. It was the safest. However, the Supreme Court in future will not have that luxury. The heavy responsibilities will impose higher accountability. The Supreme Court will have to decide not only legal issues, but will have the onerous duty to settle and resolve political conflicts and situations through judicial intervention. However, this is by no means suggesting Machiavelli's political pragmatism. The judges will have to study the past; for ancient habits and beliefs do not yield to easy conquest. The judgment of today will have an impact on the future. It has normative values.

Code of Conduct

The Code of Conduct under the Judicial Service Act of Bhutan, 2007 has both prescriptive and normative values. Judges must have an unwavering belief in democracy with non-interpretivist philosophy. *Inter-alia*, the code of conduct prescribes that a judge shall:

- (a) Not contact with litigants outside of the trial setting.
- (b) Not be swayed by partisan interests, public clamour or fear of criticism.
- (c) Exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law.
- (d) Not do or direct to be done, in abuse of his office or power, any act prejudicial to the rights of any other person knowing that such an act is unlawful or contrary to the law.
- (e) Maintain high moral standards and refrain from involving in moral turpitude.
- (f) Refrain from indulging in habits of associating with litigants and behaviour that infringe upon the performance of official duties or tarnish the image of a judge or the judiciary.
- (g) Not engage in financial and business transactions in which he may have a conflict of interest.

- (h) At all times, maintain absolute integrity and impartiality and do nothing unbecoming of the High Office held by him/her.

Judicial Accountability

In a democracy governed by the rule of law under a written Constitution, the judiciary has been assigned the role of safeguarding, upholding and administering justice fairly and independently without fear, favor, or undue delay in accordance with the rule of law to inspire trust and confidence and to enhance access to justice. Judicial office is essentially a public trust. His Majesty always said that national interest is more important than individual interest. Insulation from public opinion fosters judicial independence. Our authority comes from our integrity and professionalism. The judges must rely on their conduct to vindicate ourselves. Judges must be of high integrity, honesty and required to have moral vigor, ethical firmness and impervious to corrupt or venal influences. They must receive general public acclaim for their integrity and professionalism. Francis Bacon, in his essay on 'Judicature', emphasized that "the place of justice is a hallowed place; and therefore not only the Bench, but the foot pace and precincts and purpose thereof ought to be preserved without scandal and corruption".¹²

Judiciary of Bhutan cannot preserve unfair privileges for itself. Our authority comes from our own moral authority. Article 21 Section 15 of the Constitution states that:

*The independence of the Drangpons of the Supreme Court and the High Court shall be guaranteed, provided that a Drangpon may be censured or suspended by a command of the Druk Gyalpo on the recommendation of the National Judicial Commission for proven misbehaviour, which, in the opinion of the Commission, does not deserve impeachment.*¹³

The Judiciary cannot be outside the public gaze. A judge must be collegial, non anti - establishment, not vindictive and not have a tainted image. Here, it is relevant to highlight the qualities of a judge as articulated by Justice Krishna Iyer:

¹² Francis Bacon, *The Essays* (First Published in 1601).

¹³ Similar provision is enshrined in Section 131 of the Judicial Service Act of Bhutan, 2007.

The bedrock of the judiciary is the confidence of the people. Briefly the standards for selection are that the recommended must have good standing, must possess and have good reputation for integrity and good character, must be enjoying sound health and must have outstanding legal ability and commitment to equal justice under law. Justice has no place in darkness and secrecy. When the Judge sits on a case he himself is on trial...If there is any misconduct on his part, any bias or prejudice, there is need to keep an eye on him... Independence of the judiciary is not inconsistent with accountability for judicial conduct. Lawless judicial conduct-the administration, in disregard of the law, of a personal brand of justice in which the judge becomes a law unto himself-is as threatening to the concept of government under law; as is the loss of judicial independence. We see no conflict between judicial independence and judicial accountability.

Judicial Restraints

Independence of the judiciary is neither the right nor the privilege of the judges, but it is the right of all the consumers of justice. Although, an independent, competent and impartial Judiciary is essential to uphold the rule of law, guarantee fair trial, protect the rights and ensure access to justice, judges should conduct themselves in such a manner as to preserve the dignity of the judicial office, and the impartiality and independence of the judiciary. Using his or her power, a judge must remember the advice of the Harvard Law School to their graduates “the wise restraints that make men free”. Conversely, Shakespeare warned in *Measure for Measure*, “O! it is excellent to have a giant’s strength; but it is tyrannous to use it like a giant”.¹⁴

The other institutional restraints are the constitutional and legal values that all persons are equal before the law and are entitled to a fair trial and public hearing by an independent court. The stages of the judicial process enhance submission of facts and issues methodologically, systematically and exhaustively. The process is in pursuit of the truth and facts that strengthen due process and the rule of law.

Although a judge is vested with statutory power yet, he cannot exercise it arbitrarily as it is amenable to challenge. Judges should pronounce reasoned judgments within the parameters set by law. A great American

14 William Shakespeare, *Measure for Measure*, Act II Scene 2, line 107 & 108.

jurist, Justice Holmes's view was "that judges must show great deference to popularly elected legislature and previous court decision – and thus be slow to make drastic changes in public policy". It must be balanced with loose construction as advocated by the Chief Justice John Marshall, the Chief Justice of the United States (1801-1835), who said that "the constitution gives general guidance about basic principles but allows play in the joints" and in his judgment in *McCulloch v. Maryland* (1819) he mentioned that "we must never forget that it is a constitution we are expounding".

Impartiality

The Constitution of Bhutan advocates a liberal political ideology. Liberalism stresses on maximization of individual freedom, the limitation of governmental powers through laws enacted by representative legislatures, and equality in the application of the law. The judges are expected to be as impartial as possible. Impartiality implies that judges must hear a case with an open mind, without being biased in advance toward any of the litigants. Although imparting impartiality may be a daunting task, but the more a judge can demonstrate impartiality, the more respected and credible will be the adjudicative process.

Life of Judges

Judgeship in Bhutan was not an attractive post. Friends and families moaned when their people were appointed as judges. They were bewildered and wondered where he or she failed in his duties. Socially, life of a judge is difficult. For the public, a judge was a necessary evil. Every loser of the case blamed the judge. They are a disdainful and scornful group. Friendships are fractured. There are rash, harsh and uncharitable comments directed or made against them. Filial relationship disrupts. Authorities humiliate them in public. Further, judges are under unblinking gaze of the public and their words are examined. Their behavior and ethical standards are scrutinized. Judges are taunted in Parliament and public places. The old habits of the Bhutanese visiting judges personally are unabated. Telephone calls and people in authority unabashedly inquiring and commenting in public and private places are common. Media gaily supports the losers and the recalcitrant.

Nevertheless, judges should not be swayed away by such acts or comments. With the passage of time, the judges must survive public scrutiny. Future generations will judge the judges by the judgments they render. The role of a judge is to serve the community. Judgeship gives this opportunity and that is a privilege. It requires a judge to serve, and that is a duty. In justice, right wins and wrong loses. Right and justice always triumphs.

Judging

It is said that “a judgment of a probability is always a personal commitment. In so doing, he must try to keep in his mind, *first*, a grasp of the total situation as presented to him by the parties; *second*, the similar cases that will come up in the future; *third*, the whole effect of his findings on the community and its standards of right conduct. With each case judged, we experience the renewed wonder of this progress.”

Every judge’s judicial philosophies and temperament will have an effect on his or her decision. Judges can be classified as conservative, liberal, aggressive liberalism, pragmatist, skeptical pragmatism, insistent originalist, realist, consequentialist, deontological, etc. However, judges should not be like Dworkin’s rigid “mechanical” judge who enforces the law for its own sake with no care for the misery or injustice or inefficiency that follows. The good judge prefers justice over law. At present, we have to be constructionists, but it is our hope that Bhutan will be a crucible of wisdom so that it can become a centre for learning. In this regard, we should remember Armistead Dobie, an American judge who said:

The goals of the ...legislation are to improve judicial accountability and ethics, to promote respect for the principle that the appearance of justice is an integral element of this country’s justice system, and, at the same time, to maintain the independence and autonomy of the judicial branch of government!...

Judges do not make law. *The Thrimzhung Chhenmo* of 1959 was cautious as it provided:

The judge shall decide cases and award punishment strictly in accordance with the provisions of the law. He shall not allow himself to be swayed by any personal opinions while interpreting the provisions of law.

This section inadvertently made the Bhutanese judicial system drift towards the Continental legal system. Consequently, judges are to interpret the laws made by Parliament. Judges interpret, but do not make laws. However, the *Thrimzhung Chhenmo* has also given flexibility to the judges to do justice. The authors of the *Thrimzhung Chhenmo* knew that rigidity causes injustice. In a way, we are partially to blame as the good intentions of the founders were executed in different ways. The howling cry against the judges and inflexible law negated the true spirit of the *Thrimzhung Chhenmo*.

Law is an interpretative social practice that contains implicit moral principles and values. Decision making within the practice of law – that is to say, adjudication – requires interpreting the practice to ascertain the ‘best theory’ of those implicit principles and values. The theory of ‘law as integrity’ requires that the moral principles inherent in a legal system be treated as a coherent whole, thus ensuring that the citizens of a community are not subject to an arbitrary application of these practices.

The judges must not invent different standing under any circumstances; it must be based on statute passed by Parliament. Otherwise, it will violate the separation of powers enshrined in the Constitution. Tyranny of the judiciary is no different from a dictator. According to the declaratory and original law making theory by Bacon, Dicey and Salmond, judges only declare law; no new law is created by the judges. Main exponents of the theory are Hale, Blackstone and Carter. They said that through interpretation, judges give a new shape to the existing law. However, Austin and Bentham criticized it and they said that by interpreting laws and giving new shape, judges make laws.

Judges should play a creative role through their interpretation of laws. If the law is clear, a judge fulfills his judicial role by drawing attention to the problem. They must be conscious of the fidelity to the text and its formulation of the statutory provisions. Warren Burger said, “when the text is clear, the court has no right to refuse to apply it just because the result is silly. It is not for us to speculate much less to act on whether Congress would have altered its stance had the specific event of this case been anticipated”.

While doing so, interpretation must be as systematic as possible and give credence to meaning. Care, deliberation and concentration on the primary issues and being conscious of the consequences of the decision are *sine qua non*.

If interpretive principles are generally to grow out of democratic commitments, it follows that a judicial role in social reform will frequently be unjustified. We might even be able to generate a set of criticisms of an aggressive role for the judiciary in the name of the Constitution. These criticisms will help in the development of interpretive principles. Where the law is offensive to conscience or contrary to the constitution, the judge has the right and the duty to step-in. However, modesty is the judicial garment to defend all the people and to make sure that there is equal justice under the law.

Conclusion

Political, administrative, legislative and judicial reforms should be a continuous process. As Lord Denning said, “a judge must not alter the material of which it is woven but he can and should iron out the creases”. In spite of the limitations of a judge, according to him, it was possible to do justice to the cause by interpreting law as required. Errors will be committed and injustices may be perpetrated, but the Constitution will be the soul and its voice of the laws. Justice is the sanctuary for all; and knowledge guides the practitioners. As the instrument of justice delivery system, the future will be challenging and its mettle will be put to the test. We should hope for the best and prepare for the worst; for Bhutan needs the best of judges to deliver justice.

The Judiciary must never surrender the sovereignty of the nation, nor silence the freedom or trample on the rights gifted to us by our monarchs. Sovereignty, security, liberty, justice, freedom, rights and tranquility of Bhutan are not gifts of the past; but it is our responsibility to bequeath them to succeeding generations. The judiciary must be a humble oracle

and not a tyrant, and we must remember the enduring and pervasive words and wisdom of His Majesty Jigme Singye Wangchuck commanded on 30 November 2009:

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

A Decade of Judicial Reforms under His Majesty the King's Glorious Reign.¹

Introduction

“We must acknowledge that in preparation for democracy we have entrusted immense responsibilities on our civil servants and the judiciary; as well as on constitutional bodies such as the Royal Audit Authority, the Anti-corruption Commission and the Election Commission of Bhutan, which they have fulfilled in the service of the nation. For a vibrant and successful democracy, we must continue to support and strengthen these institutions.”²

In Buddhist mythology, the evolution of the institution of monarchy is based on the alleviation of sufferings, securing peace, harmony, unity and justice. The first worldly king is known as *Mangpo Kurwai Gyalpo* or the ‘greatly revered’ or *Maha Sammatta* ‘acclaimed by many’. Also known as ‘the great elect’, he is credited to have established the first just legal order, the power to govern and duty to serve the people with a noble and righteous objective; akin to the historic *Gyenja* (social contract) of 1907 establishing hereditary monarchy in Bhutan.

The judge-king is one who commands high social respect, unified and unconditional reverence by all.³ After ascending the Golden Throne on 1 December 2006, His Majesty the King Jigme Khesar Namgay Wangchuck initiated a series of reforms in the Kingdom. His Majesty commands the respect of the people both within and outside the country as ‘the People’s King’.

Even before ascending the Golden Throne⁴ and subsequently signing the Constitution of the Kingdom of Bhutan on 18 July 2008 at the *Kuenray*⁵ of Tashi Chhodzong. His Majesty began conducting the public consultation

1 Contributed by Justice Lungten Dubgyur, the Royal Court of Justice, High Court.

2 See Kuensel on 31 July, 2009, Royal Address at the Concluding Ceremony of the 3rd Session of Parliament.

3 Lungten Dubgyur, *The Wheel of Laws* (Lungten Dubgyur 2015) pp. 1-15.

4 See Sonam Tobgye, ‘Making of the Constitution of Bhutan’ (5 November 2015). The Dzongkhags included Trashi Yangtse, Pemagatshel, Dagana, Tsirang, Sarpang, Chukha, Samtse, Samdrup Jongkhar, Zhemgang, Gasa, Bumthang and Trongsa.

5 *Kuenrey* is the main prayer hall of the Monk Body or *Shangha* in the presence of magnificent Buddha statue.

on the draft Constitution for the 13 districts beginning with Lhuentse on 24 December 2005. The historic exercise ended at Trongsa on 24 May 2006.

The key national goals that His Majesty envisions are important to our very nationhood. On many occasions, His Majesty highlighted the need to maintain our national identity through sound policies in the areas of security, finance, foreign policy and challenges from emerging technologies. In a short span of time, His Majesty's farsighted vision saw many institutional, structural and other reforms. This culminated in far-reaching policies that not only strengthened national security, sovereignty and our nationhood; but also created new entities to secure and promote economic growth and prosperity.

Amongst the key institutional establishment, the creation of Natural Resources Development Corporation Ltd (NRDCL) to manage natural resources in 2007; the establishment of Druk Holding and Investment (DHI) in 2007 as a corporate arm of the government; and the State Mining Corporation Ltd.(SMCL) in 2014 to manage and the develop mines and mineral resources are significant for both the short term and long term goals of economic development of the Kingdom.⁶ To promote nation-building and to ensure peace and harmony, His Majesty established *De-Suung* or the Guardian of Peace training program in 2011 based on voluntarism; which has immensely benefited the people. Further, on 10 October 2013 His Majesty also established, the Royal Institute for Governance and Strategic Studies (RIGSS) in Phuntsholing to provide a forum to impart leadership trainings to the public, corporate as well as the third sectors. The Institute caters high-quality education and discourses on governance and public policy. It also promotes excellence in strategic studies.⁷ In the judiciary sector, His Majesty the King established Bhutan National Legal Institute (BNLI) on 25 July 2011 as the research and training arm of judiciary to disseminate legal information and promote judicial education in the country.

In addition to several structural reforms, His Majesty constantly scours every nook and corner of the country in His quest for the poor and the un-

6 See Natural Resource Development Corporation, < <http://www.dhi.bt/nrdc>>

7 See Royal Institute for Governance and Strategic Studies, < www.rigss.bt>

privileged citizens to enable them to have a stake in development. Other Royal interventions are constantly launched from the Office of Gyalpoi Zimpon and His Majesty's Secretariat where the posts of *Zimpon Wongmas* and *Kidu Officers* are created with branches in all the twenty districts.

I. The Royal Expectations and Vision for the Judges

Granting Royal audience to the judges on 19 September 2013 at the Royal Court of Justice, High Court, His Majesty the King reminded that, of the three branches of government, the judiciary was the most important. His Majesty emphatically commanded that judges must be aware of the existing problems and the future challenges, which must be dealt with intelligently and efficiently:

It is our duty as citizens to protect our country and sovereignty. We cannot afford to be complacent. We must work hard, reason out, exercise and give good judgment while being relevant, grounded to reality, pragmatic, practical and serve with humility. We should not have our head in the clouds - for you will not see the ground below.

His Majesty emphasized that our duty to the country and people should be the foremost; and one cannot be complacent. His Majesty reminded that history was very important to understand the past and plan the future; in order to secure and strengthen our sovereignty and security as a landlocked nation.

His Majesty said that as the Drangpons are in direct and in constant touch with the people in the Dzongkhags; and given that conflicts in society are inevitable - there will invariably be cases registered with the courts which need to be resolved effectively. His Majesty applauded that the judiciary as an organization is doing well and gaining the trust of the people in the institution. His Majesty also reminded that since Drangpons are all well-educated and trained professionals with LL.Bs. and LL.Ms. degrees with perfect blend of senior lay judges and trained professionals who are grounded in modernity and traditions of our country, the judiciary was suitably and appropriately equipped to serve or capable of serving the nation and its people with unfailing dedication and commitment.

II. Judicial Independence and Responsibilities

It is important to ensure trust and confidence of the people; and not respect out of fear in the judicial system. People must have confidence in judicial independence, fairness, and impartiality and in the ethical standards of our judges. The judges must be seen as the guardians and protectors of the constitution and democracy for the people to recognize and accept the legitimacy of judicial decisions. It will be the biggest achievement...⁸

On many occasions, His Majesty said that one must have the idea and sense of justice. The rule of law is a must for peace, unity and harmony to prevail. His Majesty said that the judges who administer justice must be impartial; and naturally the public will applaud such judges. They cannot afford to falter.⁹

During some of the Royal audiences and speeches, we were always reminded that professionalism, hard work, unfailing service, values of character and standard of leadership cannot be compromised:

Values are the root of our character- if we do not tend the roots, the character that springs from them, no matter how much wealth, power and fame; it will bring little benefits to oneself, others and to the wellbeing of the planet.As we become better human beings, we build better families, stronger communities, successful nations and a peaceful stable world for ourselves and our future generations. It all starts with the Leadership of the Self.....What we need is not a leader to lead the masses - we need leadership of the self.¹⁰

His Majesty desired that the courts and judges should give the best legal guidance and leadership in solving cases in a just and fair manner. It was necessary where applicable that the judges counsel parties to the case without necessarily influencing or linking such guidance to the outcome of the case. His Majesty further commanded that while the normal appeal cases should generally be dealt by the High Court, the Supreme Court should deal with

8 Royal Audience to the judges on 19 September 2013 at the Royal Court of Justice, High Court, Thimphu.

9 The author particularly noted it from the excerpts from BSS highlights on the eve of His Majesty's 34th Birth Anniversary, 2014. His Majesty further reiterated the importance of the Rule of Law in the National Address during 110th National Day Celebration in Haa on 17 December 2017.

10 From the convocation Address of His Majesty, Calcutta University, 5 October 2010.

cases that concern issues related to national peace, security, sovereignty and integrity of the county and matters of high national importance.¹¹

*Where justice have been denied because of interference from different quarters and where entire procedures have not been followed resulting in violation of individual rights; it was important he be informed.*¹²

Reminding that the Bhutanese citizens have always considered litigations and judicial proceedings as the last resort, His Majesty said that,

*...as much as possible, the scope of mediation and settlement through negotiation and other alternative dispute resolutions need to be encouraged and promoted at the grassroots including Gewog Tshogdes, Dzongkhag Tshogdus and Civil Society Organizations.*¹³

His Majesty reiterated that there is a need to strengthen the established culture of mediation of disputes (*Nangkab Nangdri*), which was His wish and personal priority. His Majesty further said:

*There is a need to create awareness on the laws and rules among the general public. This was necessary because the innocent litigants, at times are instigated and misled by the litigious individuals. There has been lack of proper counseling and guidance to the litigants; and the Courts should play an important role in educating and disseminating information on the aspects of rule of law and other rules pertaining to their disputes.*¹⁴

III. Structural and Institutional Strengthening

(a) Court Constructions

The Institutional strengthening and structural independence continues to be an important part of the judicial reforms for improved access to justice. The successful construction of the Supreme Court, its inauguration and now being fully functional under the reign of His Majesty the King has become the hallmark of our nation's sovereignty and independence. It serves as the model of traditional architecture, repository of legal and judicial history and culture for the future generations.

During the short reign of His Majesty the King, all fifteen *Dungkhag* (Sub-ordinate) Courts have now independent court structures and

11 While granting Royal Audience to the members of the Royal Advisory Panel to His Majesty's Secretariat, Tashi Chhodzong, Thimphu, 2 September 2010.

12 *ibid.*

13 *ibid.*

14 *ibid.*, Royal Audience 2 September 2010 and 1 August 2011.

separate residences for the judges. This has strengthened the structural and institutional independence of the judiciary at the grass-roots. The Dungkhag courts help provide easier access to justice and efficient delivery of judicial services.

The court architecture, the painting and motifs in our courtrooms symbolize proud national heritage and sources of our laws. Whenever His Majesty visits the courts he was pleased to command that the tradition of display of motifs of the Lord Purgatory (*Shingye Choki Gyalpo*), the *Dre-Nagchu* (Prosecutor) and *Lha-Karpo* (Defence Counsel) be maintained in its original context. It goes to affirm His Majesty's satisfaction and approval that our criminal justice system which is based on the adversarial judicial principles incorporated in the 14th Century text of Terton Karma Lingpa's *Bardo Thodrel*. Every Bhutanese people are aware of the *Raksha Mangchham*, which is performed during our annual religious festival. The performance of mask dances engages the due process involved in the criminal trial of the sinner and that of the virtuous one.¹⁵ These procedures ensure that no guilty or the sinner escape while no innocence or the virtuous one is punished.

(b) Establishment of Bhutan National Legal Institute

The Bhutan National Legal Institute (BNLI) was established on 25 February 2011 under the command of His Majesty the King with Her Royal Highness Ashi Sonam Dechan Wangchuck as the Hon'ble President. The Institute develops targeted programs that strengthen the capacity building of the judicial personnel and legal professionals. It further provides legal and educational services that aide the judiciary and court users. With fully developed and professionalized Institution, it is mandated to provide professional training, publication and other resource materials that are relevant to assist courts in arriving at carefully considered and researched interpretations, arguments, decisions making, and publication of documents including case reports.

Under the dynamic leadership of Her Royal Highness, the Institute fulfills its mandates of imparting continuing judicial education to the judicial

15 For comparative analysis with western criminal trial and the influence of Buddhism in Bhutanese Criminal Justice System, see, Lungten Dubgyur, *The Parasol of Silken Knot*, (Royal Court of Justice, High Court, Research Division, 2005) pp. 1-12.

personnel, and conducting trainings, research, publications and creating legal awareness to the public through radio, television talk show and conducting legal awareness programs to the people at grass-roots level. It immensely benefits our people in knowing their rights and duties in a democracy.¹⁶

Of the several milestones achieved by the institute within short duration of its establishment, the credit of reviving, strengthening and institutionalization of the age-old informal and amicable resolution of disputes in the communities fully goes to the Her Royal Highness, Ashi Sonam Dechan Wangchuck, the Hon'ble President of the Institute. Soon after its inception in 2011 the Institute began training of the local government officials of on the Alternative Dispute Resolution (ADR) in general and Mediation in particular. The Institute also serves the Faculty for the pedagogical inputs in conducting the Post-Graduate Diploma in National Laws (PGDNL) at the royal Institute of Management, Simtokha. Amongst the several research and publications of the reports and documents on a regular basis, the Institute brings out country's first law journal – the *Bhutan Law Review* on a bi-annual basis.

(c) The Royal Law College

It was a historic occasion when upon the grant of a Royal Charter by His Majesty the King on 21 February 2015 the first law college in the country was established. The school of law like other key educational institutions is a national pride. The first law college now named after His Majesty the Fourth King as 'Jigme Singye Wangchuck School of Law' started its first five-year LL.B. course with twenty five students in 2017. The vision of the Law School is:

To maintain and improve strong legal institution that contributes to a vibrant democracy by creating an effective legal fraternity of educated, well-trained and socially responsible professionals.

The establishment of the Law School will result in home-grown legal professionals with an international outlook in the diverse areas of laws; and help the judicial system grow from strength to strength.

IV. Laws and Institutional Reforms

¹⁶ The author assisted the Institute in framing a Strategy Paper.

Today we have more than 160 legislations most of which were initiated by the implementing agencies. With the adoption of the Constitution and with the creation of new institutions, Parliament enacted many laws during the last twelve years of inception of democracy. In this regard, His Majesty said:

While our laws and policies that are in place are sound in principles and provisions, when it comes to actual implementation, enforcement and monitoring, we are lagging behind. The laws and policies should be beneficial to the people and not burden them. Instead, the laws and rules should make the life of citizens comfortable or better.

For His Majesty, the positive and the substantive laws are paramount to promote peoples' welfare and justice. It was also important that the tenets of natural laws were given its due deference. Natural law is pure. It embodies innate desire to promote virtues and common duties. His Majesty said that:

Natural law is the intellectual capacity to differentiate between virtuous actions that benefit others and evil actions that would be detrimental. Hereafter, the principles of natural law will naturally become strong, if we uphold these profound values.¹⁷

The process of law making involves and highlights as to how the society needs to be governed or regulated and invariably correlates with that of emerging political, economic and social change. In the past, the lack of mechanism to check the overlapping provisions gave rise to incoherent and contradictory laws.¹⁸ The overzealous legislation and severe penal provisions make judges prescribe minimum sentencing; as extreme punishment neither reforms the defendant nor help achieve the purpose of de-criminalization in the society. In the modern criminology, any punishment must serve its purpose to reform the defendant and restore dignity of those involved in the criminal justice system.

On the eve of the Royal Coronation in Punakha His Majesty pardoned 132 prisoners of different ages. It was His Majesty's act of compassion that they should be given a second chance to be a good human being and value freedom and liberty. In order to institutionalize the practice, His Majesty

17 See Sonam Tobgye, 'Law, Justice, Rule of Law, Democracy and Constitution' (18 January 2018) Lecture at the SELP-9, RIGSS.

18 Lungten (n 14) at 26-36.

not only reformed our prison system such as the establishment of open-air prisons but also established legal division in the Office of Gyalpoi Zimpon along with Royal Advisory Panel to His Majesty's Secretariat to review legal issues and the establishment of Amnesty Panel; which recommends prisoners for pardon, amnesty and release on the regular basis.¹⁹ His Majesty always believes in making impartial and informed decisions.

V. Strengthening Democracy and the Rule of Law

His Majesty always aspires that our social and 'political system' must evolve along a path that secures and protects a social order that is founded on justice, equality, peace, harmony and unity of people, which conforms with the principal tenets of Gross National Happiness propounded by His Majesty the Fourth Druk Gyalpo. His Majesty believes that our democracy must be exemplary and unique with inherent mechanism and tool to solve problems if and when they arise. Any issue must be resolved through a dialogue, consultation and understanding among the institutions while it was also necessary to uphold the provisions of the laws of the country and function in accordance with the rule of law. The Success of democracy must culminate with good governance and 'overall well-being and social happiness' of the people, which has been constantly nurtured by the visionary leaders. His Majesty the King while addressing the first Democratic Parliament, said:

*"The highest achievement of one hundred years of Monarchy has been the constant nurturing of democracy. This has culminated today with the first sitting of Parliament and the start of democracy, whereby my father the Fourth Druk Gyalpo and I, hereby return to our People the powers that had been vested in our kings by our forefathers one hundred years ago. We do so with absolute faith and confidence, offer our complete support and our prayers for the success of democracy."*²⁰

Under the glorious reign of His Majesty the King, Bhutan continue to progress on all fronts and the transition to democracy has been carefully

19 Article 2, Section 16 of the Constitution enshrines, His Majesty in the exercise of Royal Prerogatives may grant Royal kidus, amnesty, pardon and reduction of sentences.

20 See < <http://2008.bhutan-360.com/his-majestys-address-at-the-first-session-of-democratic-parliament-of-bhutan/> >

nurtured with every branches of the government and constitutional bodies playing its assigned role in accordance with the Constitution.

*“As His Majesty places this Constitution and, with it, the future of the nation in your hands, you must remember that the worth of a good idea, the efficiency of a good machine, the strength of any law, all depend on the will and commitment of the people in whose hands they have been placed.”*²¹

*“This is the tenth year since I became King, and it has been eight-and-a-half years since we transitioned to parliamentary democracy. Our experience so far has been one of success. But more importantly, when I look ahead, I find that there are many reasons to be happy and confident about our future.”*²²

VI. Conclusion

We have witnessed a transformative reforms and developments during the first decade of the reign of His Majesty the king in the whole country – judiciary being no exception. It is our good fortune that Bhutan is blessed with the selfless monarchs endowed with the qualities of *Tong Khorolo Gyunr Wai Gyalpo* or *Chakravartin* or universal monarch whose embodiments are manifested with timeless wisdom, love, compassion, fearless and protection:

*“The birth of a Chakravartin heralds the onset of seven wealth or abundances which arise in the realm: a wealth of faith, morality, honesty, modesty, learning, renunciation, and wisdom.”*²³

His Majesty the King places law and justice as the foundation of society when He said that:

*“The foremost concern of the king is the welfare of the people; the foremost need of the people is peace; and the law is the foundation of peaceful society”*²⁴

While His Majesty continues to toil for us, His subjects; and as more and more roads, bridges and schools are being inaugurated under His Majesty the King’s reign; let’s pray for His Majesty’s eternal long life and good health. May the ‘wisdom’ manifestation of Her Majesty the Queen Jetsun Pema Wangchuck nurture the cradle of the child of destiny, Prince Jigme Namgyel Wangchuck; and may the Bhutanese civilization scale even higher heights of development and prosperity.

21 See Kuensel, dated 27 May, 2006.

22 See Concluding address of the 7th Session of Parliament by His Majesty the King, <<http://www.bbs.bt/news/?p=60351>>

23 Robert Beer, *The Encyclopedia of Tibetan Symbols & Motifs* (Shambhala, Boston 1999)

24 See Kuensel issue of 14 October, 2016. His Majesty the King while conferring Dhar to the elected Gups on 13 October, 2016.

Environmental Justice in Bhutan: Establishment of Green Bench at the High Court¹

Introduction

The special environment courts and tribunals with special expertise are well-known in dealing with environment litigations and promoting ecologically sustainable development.² Almost all the countries in the world have initiated the Special Courts viewing at their vital roles and benefits in enforcing environmental legislations. Australia have the 'Land and Environment Court of New South Wales' established in 1980³; whose success has led to setting up similar courts in other countries. Although, the United Kingdom resisted such reforms for over a period of twenty years, it has recently established the environment tribunals in England and Wales⁴ (2012). Several Asian countries have also set up environment courts and tribunals based on their needs and research studies undertaken.⁵ Under lead role of the Asian Development Bank (ADB), the judiciaries of the SAARC countries have come together to work on several environmental issues. Out of the several recommendations proposed during the 2nd South Asian Judicial Roundtable Conference, one was to establish 'Green Benches' within the judiciaries.⁶ While India has already established Green Benches at the High Courts of Kolkata and Chennai⁷, Pakistan has also set up several environment courts and Green Benches across the country after the 'Bhurban Declaration' in 2012⁸.

- 1 Contributed by Justice Norbu Tshering, Royal Court of Justice, the Supreme Court; Justice Tshering Namgyel, Royal Court of Justice, High Court; and Garab Yeshi, Registrar, Royal Court of Justice, Supreme Court.
- 2 Brian J. Preston, 'Operating an Environment Court: The Experience of Land and Environment Court of New South Wales' (2008) 25 Environmental and Planning Law Journal 385.
- 3 UNSW, 'Land and Environment Court Clinic', <<http://www.law.unsw.edu.au/current-students/lawinaction/clinics/land-andenvironment-court-clinic>>
- 4 Recharad Macrory, 'Environment Courts and Tribunals in England and Wales – A Tentative New Dawn', Journal of Court Innovation, University of London.
- 5 Tun Lin, Canfa Wang, Yu Chen, Trisa Camacho, and Fen Lin, 'Green Benches: What can the People's Republic of China learn from the Environment Courts of Other Countries?' (2009) Asian Development Bank.
- 6 The 2nd South Asian Judicial Roundtable, Thimphu, 30-31 August 2013.
- 7 'Green Benches' reported in India Environmental Portal, 14/05/1995.
- 8 Azam Khan, 'Environmental Justice: Green Benches constituted all over Pakistan' (13 May 2012) The Express Tribune, AJK.

Bhutan's situation is unique as there was no exigency for establishing an environment court before its transition to democracy. This was mainly owing to the strong commitment towards environmental conservation by His Majesty the Fourth King of Bhutan. Several plans, programs, policies and legislations have been initiated under the visionary leadership of His Majesty which won the '*Champions of the Earth Award 2004-05*' and '*J. Paul Getty Conservation Leadership Award, 2006*'. Bhutan has spearheaded the global leadership on environmentally sustainable development⁹. However, with Bhutan transitioning to democracy, it was felt that Bhutan may lose its sense of environmental ownership to multi-partisan interests driven by political agendas and party interests. As litigations concerning mining, road development works and ownership of water sources increases, it reminds the judiciary to learn from environmental mistakes of others. Therefore, establishment of special environmental Courts in Bhutan was also paramount.

1. Importance of Environmental Justice in Bhutan

Bhutan possesses rich pristine environment and biodiversity. Our Buddhist values and ethos has fostered environmental protection in Bhutan. This is furthered by strong environmental policies and legal frameworks. However, Bhutan is not immune from the threats of global warming.

a. *Bio-diversity*

Bhutan is proud to possess forest cover of 72% of total land area.¹⁰ Bhutan is composed of three environmental zones with rich flora and fauna. It is a home to several species of mammals, birds, reptiles and insects with huge varieties of plant species.¹¹ This has created Bhutan a one of the environmental hotspots in the world.

⁹ UPDN, 'Bhutan in Pursuit of Sustainable Development', (12 Sept 2012) <<http://www.undp.org/content/undp/en/home/presscenter/articles/2012/09/12/bhutan-s-gross-national-happiness.html>>.

¹⁰ Department of Forest and Park Services, MoAF, <www.dofps.gov.bt>.

¹¹ As per Bio-diversity Action Plan 2009, Bhutan has 5603 species of vascular plants, 200 species of mammals, 678 species of birds, 15 species of reptiles and more than 800 species of butterflies, <www.nbc.gov.bt>.

b. *Economic Benefits*

Our environment has ensured continuous flow of fresh water in Bhutan. The rich biodiversity at the alpine zones has nurtured the growth of medicinal *fungus* commonly known as the *Chinese caterpillar*.¹² Bhutanese rivers have been the source of continuous power supply in the country-generating income for the economic development of the country. Beautiful mountains coupled with fresh and clean environment with unique cultural traditions are the attractions for the booming tourism industry. Although, about 69% of the population is dependent on subsistence farming¹³, export of agricultural products like apples, oranges, cardamoms, and potatoes to neighboring countries has been the earner of foreign currency for the country.

c. *Environmental Risks*

Studies have shown that Bhutan's glaciers are receding at the rate of 8 to 19% a year and Bhutan had witnessed five instances of Glacial Lake Outburst Floods (GOLF) since 1957.¹⁴ The effect of global warming has impacted the human life, agriculture production, animal species and their habitats. The changes in weather patterns have exposed the fragile mountain ecosystem to erratic heavy rainfalls, landslides and windstorms. In order to mitigate the threats of GOLF, the government agencies are entrusted to carry out mitigation and adaptation programs. The Government is also in the process of formulating and implementing green, low-emission and climate-resilient development strategies with the help of United Nations Development Programme (UNDP)¹⁵ which best suits to the development policy of Gross National Happiness.¹⁶

12 The best quality of the fungus would fetch around \$ 26500 p.kg in Shanghai in 2008, Daniel Winkler, 'Caterpillar Fungus (*Ophiocordyceps sinensis*) Production and Sustainability on the Tibetan Plateau and in the Himalayas' (2009) Vol.5:2 Asian Medicine.

13 Ministry of Agriculture and Forestry, <<http://www.moaf.gov.bt/agencies/departments-of-agriculture/about-us/>>.

14 Report of Geological Survey of Bhutan, 2010.

15 See, Low Emission Capacity Building (LECB) Program, International Partnership on Mitigation and MRV, <<http://www.mitigationpartnership.net/low-emission-capacity-building-lecb-programme>>

16 Azam Kha (n 8).

2. His Majesty's Vision

Bhutan's commitment to environmental conservation dates back to late 1970s. Under the wise leadership of His Majesty the Fourth Druk Gyalpo, conservation of the environment has occupied an important role in the nation's quest to economic development. His Majesty stated that:

"Throughout the centuries, the Bhutanese have treasured their natural environment and have looked upon it as the source of all life. This traditional reverence for nature has delivered us into the twentieth century with our environment still richly intact. We wish to continue living in harmony with nature and to pass on this rich heritage to our future generations."

His Majesty's visions are visible today. Today, Bhutan has about ten protected areas declared as Wildlife Sanctuaries, Parks and Reserve Forest lands besides the biological corridors. Bhutan has rectified international conventions on conservation by developing its own domestic legislations.

3. The Constitutional Mandates

The Constitution of Bhutan has reflected conservation of environment as one of the prime objectives of the government. This is the testimony to the commitment by the Royal Government of Bhutan in conservation and safeguarding the environment.

Article 5 of the Constitution outlines the responsibilities of the people and the government to conserve and protect the pristine environment and safeguard Bhutan's wild life. Environmental conservation is safeguarded by the nation's policies as no generation has the right to destroy the inherited rich environment. Article 5 of the Constitution of Bhutan, inter alia includes:

A. Sustainable Development

Article 5 of the Constitution enshrines sustainable development wherein the Government is particularly entrusted to *"secure ecologically balanced sustainable development while promoting justifiable economic and social development."*¹⁷ To ensure balanced sustainable development in the country, the government must always remember the constitutional principles and responsibilities to balance between development and environment.

17 See Article 5 Section 2(d) of the Constitution.

B. Public Trust

The doctrine of *public trust* is based on the idea that certain common resources such as air, water and forest were held in trust by the state for the benefit of general public¹⁸. The Constitution of Bhutan also incorporates the principle of public trust by making every Bhutanese the trustee of Country's natural resources.

C. Inter-generational Equity

The concept of *intergenerational equity* being one of the fundamental principle of the *sustainable development*, basically talks about saving of environment for future generations. In other words, the present generation should not jeopardise the future generations. Instead, it requires ensuring the future generations about their need of environment during their time. This principle is clearly reflected in Article 5, Section 1 and 4 of the Constitution.¹⁹

D. Precautionary Principle

The *precautionary principle* under the Constitution protects from causing of irreversible damage to the environment by taking precautionary measures with the anticipation of uncertainty of scientific inventions which would eventually degrade the environment permanently. So to avoid this, the precaution being taken as earliest as possible before happening or causing such irreversible damage to the environment is what the principle in essence talks about. This principle is adopted and applied in the different fields of environmental protection.

The framers of the Constitution have rightly incorporated this principle entrusting the Government to safeguard and improve the environment²⁰ and prevent ecological pollution and degradation.²¹

18 World Commission on Environment and Development (Australian edn), 'Our Common Future', (1990) Oxford University Press, Melbourne <<http://www.uow.edu.au/~sharonb/STS300/sustain/meaning/defarticle1.html>>

19 The principle is also reflected in the Stockholm Declaration under Principle 1 and 2, and Principle 3 of the Rio Declaration, 1992.

20 Article 5 Section 2 (a) of the Constitution.

21 Article 5 Section 2 (b) of the Constitution.

E. Fundamental Right

The fundamental rights of citizens have direct co-relation with environment protection. Through the enforcement of the fundamental rights, many other jurisdictions across the world have played a pivotal role in protecting environment. Specially, the fundamental right to life has been given the widest interpretation in other jurisdictions to give true meaning of life upholding the protection of the environment. The Constitution of Bhutan guarantees the fundamental right to life.²² The right to life encompasses protection of the environment from any kind of pollution, without which life cannot be enjoyed.²³ Similarly, the constitution entrusts the government to ensure the safe and healthy environment.²⁴

4. International Obligations

The first ever conference on environment took place in Stockholm, Sweden under the auspices of UN from 5 to 6 June, 1972 known as UN Conference on Human Environment. This is also called '*Magna Carta* on Human Environment' which resulted to Stockholm Declaration containing 26 Principles. Thereon, the series of international movements took place assembly the world leaders to share concerns and resolve the problems of environment. This has obliged the States not only to pursue with plans and programs for conservation of the environment, but also to commence development activities that are eco-friendly.

To this end, Bhutan has not only become a signatory to several international conventions and protocols, but has also ratified some of the important conventions as under:

1. Charter of the United Nations;
2. Convention on Biological Diversity – Ratified on 25 August 1995;
3. The United Nations Framework Convention on Climate Change – Ratified on 25 August 1995;

²² Article 7 Section 1 of the Constitution.

²³ Stockholm Declaration and Rio Declaration (n 19).

²⁴ Article 5 Section 2 (c) of the Constitution.

4. Agreement establishing the International Fund for Agriculture Development – Accession on 13 December 1979;
5. International Plant Protection Convention - Sort adherence as of 20 June 1994;
6. 10 Kyoto Protocol to the UNFCCC – Accession on 26 August 2002;
7. Cartagena Protocol on Bio-safety to the Convention on Biological Diversity - Accession on 26 August 2002;
8. Basel Convention on the Control of Trans-Boundary Movement of Hazardous Wastes and their Disposal – Accession on 26 August 2002;
9. Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) – Accession on 15 August 2002;
10. United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (UNCCD) – Accession on 20 August 2003;
11. FAO International Treaty on Plant Genetic Resources for food and Agriculture – Ratified on 2 September 2003;
12. Vienna Convention for the Protection of the Ozone Layer - Accession on 23 August 2002;
13. Montreal Protocol on Substances that Deplete the Ozone Layer and all other Amendments to the Protocols – Accession on 23 August 2004;
14. Convention of the World Meteorological Organization - Accession on 11 February 2003;
15. Statute of the Codex Alimentarius – signed on March 1999;
16. International Agreement for the Creation of an Office International Des Epizooties in Paris – Sort Adherence on 15 December 1990; and
17. Agreement on the Establishment of the International Vaccine Institute – signed on 28 October 1996.

5. Environment Justice in the SAARC Region

As climate change and environment issues are frequently discussed, Environmental Justice and law have also become the main issues of global discussion. To foster collaboration and cooperation in the sphere of environment conservation and protection, the Asian Development Bank (ADB) spearheaded workshops and symposiums among the Judges, civil society organizations, environment lawyers and practitioners of South Asian Nations. Besides sharing knowledge and expertise through networking, the Judiciaries of the region resolved to cooperate on several aspects of environmental law where setting up ‘Green Benches’ in courts for dispensation of environmental justice and upholding the Rule of Law is one of them.

6. The Initiatives of the Royal Government of Bhutan

Under the leadership of the benevolent Kings, Bhutan has seen unprecedented growth without causing any harm to the ecological settings of the country. This is because of the fact that sustainable development has long been an integral part of the development philosophy of Gross National Happiness (GNH) enunciated by His Majesty the fourth King of Bhutan since the 1970s.²⁵ The importance of conservation has led the government to set up various institutions and legislative frameworks that are pertinent for conservation and promotion of the environment. The institutional framework comprises of the National Environment Commission (NEC), Gross National Happiness Commission (GNHC), Department of Forest and Park Services (DoFPS), National Biodiversity Centre (NBC) and the Royal Society for Protection of Nature (RSPN).

A. Institutional Frameworks

I. *National Environment Commission (NEC)*

The NEC is a high level multi-sectoral body mandated to make decisions and coordinate with the relevant sectors in the matters relating to the protection, conservation and improvement of the environment. The NEC formulates national environment strategy to institutionalise environment

25 Azam Kha (n 8).

impact assessment for development activities. The NEC functions as a body to look into the environmental policies, plans and programs, laws, advocacy of the awareness programs, institutionalization of the Environmental Assessment (EA), set environmental standards, promote quality of water, air and land use among others.

II. *Gross National Happiness Commission (GNHC)*

Initially the Government's plans were framed by central body known as the Planning Commission. The body changed to GNHC with the mandate to budget the development activities in light of the sustainable development directed towards the end result of happiness. In order to achieve the objectives, a separate support office of Sustainable Development Secretariat (SDS) has been established to "... *promote and coordinate the implementation of the Sustainable Development Agreement within framework of the Rio Declaration on Environment and Development as well as Agenda 21 and the international agreements on planetary environmental problems*".²⁶

III. *Department of Forest and Park Services (DoFPS)*

The DoFPS was set up in 1952. With the revision of the National Forest Policy 1974 and Forest and Nature Conservation Act of 1995, the functions of the department bifurcated into several divisions with different roles and responsibilities.²⁷ The primary duty of DoFPS is to ensure the maintenance of a minimum of 60% of the forest cover for all times to come as mandated by the Constitution.

IV. *Royal Society for Protection of Nature (RSPN)*

The RSPN is a Non-Governmental Organization set up in 1985 to advocate for creating awareness about nature and also to monitor the migration of the rare species like Black-necked Cranes in the country.²⁸

²⁶ See, <http://www.sds.org.bt/sds_aboutus.htm>.

²⁷ *ibid.*

²⁸ National Environment Commission, 'Conservation in Bhutan' (1994) NEC, <<http://www.nec.gov.bt/nec1/wp-content/uploads/2012/10/Conservation-in-Bht-1994.pdf>> -

V. *National Bio-Diversity Centre (NBC)*

The National Assembly has passed the Biodiversity Act in 2003 as a legislative measure to conserve biodiversity. It is primarily to coordinate biodiversity conservation and sustainable use programs in the country. It is also entrusted to develop policies and legal frameworks for conservation and sustainable utilization of biological resources.

VI. *Bhutan Trust Fund (BTF)*

Bhutan has established a trust fund in 1991 in collaboration with UNDP and World Wildlife Fund (WWF) to finance the conservation programmes in the country. It provides long term conservation grants and supports environmental programmes of the government and the Non-Governmental Organization (NGO) like the RSPN. It also supports to set up institutional, necessary legal and technical framework to enhance implementation capacity.²⁹

B. **Legislative Frameworks**

The symposium on ‘Environment and Sustainable Development’ at Paro in May 1990 provided a further impetus to the Royal Government of Bhutan to preserve and safeguard the environment. It was realized that “... *no amount of technology and monetary assets can make for a razed forest, depleted soils, polluted waters or ravaged climate.*”³⁰ The government then proceeded with several strategic projects and policies in the different sectors of development. The first Conservation Act known as ‘the Forest and Nature Conservation Act’ was passed in 1993.³¹ Besides an array of rules and regulations, the following legislative frameworks are in place today:

1. National Environmental Protection Act, 2007;
2. Livestock Act of Bhutan, 2001;
3. Biodiversity Act of Bhutan, 2003;

²⁹ Jessica Brown and Neil Bird, ‘Bhutan’s Success in Conservation: Valuing the contribution of the environment to Gross National Happiness’ (December 2011) Research Reports and Studie, <http://www.developmentprogress.org/sites/developmentprogress.org/files/bhutan_report_-_master.pdf>

³⁰ Stockholm Declaration and Rio Declaration (n 19).

³¹ *ibid.*

4. Environmental Assessment Act of Bhutan, 2000;
5. Dzongkhag Yargay Tshogdu and Geog Yargay Tshogchhung Act, 2002;
6. National Environment Protection Act of Bhutan, 2007;
7. Plant Quarantine Act of Bhutan, 1993;
8. Water Act of Bhutan, 2011; and
9. Forest and Nature Conservation Act of Bhutan, 1995.

7. The Green Bench

Underpinning the aforesaid importance of environmental justice, the Judiciary of Bhutan embarked to create a separate Bench within the established strength of the High Court under Section 30 of the Civil and Criminal Procedure Code (CCPC), 2001 and Section 231 of the Judicial Service Act, 2007.

A. Composition, Jurisdiction and Powers

The Green Bench was established at the High Court primarily to provide an effective access and develop professionalism in adjudication and enforcement of the environment litigation. It is seen that there are hardly any cases of environment litigations in some districts. Therefore, a separate environment court in each district could entail costs which are not commensurable with the actual workload as maintaining a separate set of technical experts would mean extra burden.

The ‘Green Bench’ at the High Court is being presided over by the Chief Justice with four other sitting Justices of the High Court. In order to have a congenial team in the Bench, the Justices of the Bench should be nominated by the Chief Justice from among the Justices of the High Court. The Bench will be reconstituted as and when the Chief Justices completes the term at the High Court.

The Bench have both the original and appellate jurisdictions in accordance with Section 22 and 23 of the CCPC respectively. It will not only serve as an appellate court but also as the court with original jurisdiction. Litigations

could be filed at the Districts or at the High Court depending upon the convenience of the petitioners. However, the High Court should have the power to take cases *suo moto* from the subordinate courts based on merits - in order to mitigate the shortcomings of the lower court and to prevent irreversible losses. Further, the High Court as an appellate body can review the decisions of the lower courts and rectify the errors.

The Green Bench will have the same powers like the High Court. The Green Bench in the process of adjudication of the environmental cases will have such powers amongst other to issue injunction,³² preliminary injunction,³³ temporary restraining order,³⁴ and interlocutory order.³⁵ In addition to it, the Green Bench as per Article 21, Section 10 of the Constitution will be empowered to issue declarations, orders and writs. For effective enforcement of its judgment, orders and directions, it will be the prerogative of the Green Bench to appoint the Monitoring Committee which shall submit periodical reports to the Green Bench within such interval until it is enforced.

As a part of the procedural reform, the Bench hear or conduct the proceedings in accordance with the Green Bench Book. In order to provide better access, speedy adjudication and effective enforcement, the Bench should have certain special powers.

B. Public Interest Litigation (PIL)

Another innovation of the Judiciary of Bhutan to enhance the access to environmental justice to the next level was entertainment of PIL. Judiciaries across the world have played a crucial role by employing PIL for the cause of environmental protection and dispensing environmental justice. The development of environmental jurisprudence in other jurisdictions owe to public participation for their effort to protect environment.

Any Bhutanese citizen are allowed to file the petition before the Green Bench of the High Court in the interest of the public. In other words, any public spirited person can file the petition before the Green Bench for a

32 Section 67 of the Code,

33 Section 64, *ibid.*

34 Section 65, *ibid.*

35 Section 66, *ibid.*

common cause or against any activity or conduct which undermines the interest of the public at large, though he/she may not be an aggrieved person in the petition which he/she has initiated.

Accepting the PIL petition would mean the relaxation of strict rule of *locus standi* in order to render procedural justice to activate the substantive laws concerning environment. By giving a break to the rule of *locus standi*, the judiciary around the world has done a plausible job to protect the environment, enforcing the rights of the citizens and directing the state to execute its responsibility. The judiciary of Bhutan has taken a bold step to resort to this innovation by accepting the genuine PIL petition for the cause of environment protection and in furtherance of environmental justice.

C. Expert Opinion

The court should also be in a position to seek the opinion of the relevant agencies till an independent body attached to the Bench has been set up. In case if such an agency is a party to a case, the Bench should arrange an alternative to seek technical assistance from a consultant or independent agent. However, the expense of such consultation shall be borne by the party/parties depending upon who is at fault. The Bench should be allowed to accept *amicus curiae* as the friend of the court who would provide such opinion.

The Bench should come to an understanding with the agencies and to that extent draw a Memorandum of Understanding (MOU) with the consulting agency for fostering professional ethics and integrity.

D. Benefits

Green Bench is a special Bench to conduct proceedings on the matters pertaining to environmental litigations at the High Court only. Such a Court would be beneficial to the stakeholders – government & private, and the general public depending on the nature of case.

Following are some of the benefits of institutionalizing a separate environment Bench:

I. Enhance Access to Justice

Complaints can file directly to the Green Bench through PIL or by the affected parties. Litigants have the option either to file the case at the

High Court or in their residential districts. This option would provide convenience to the litigants and improve access to justice.

II. Prevent Marginalization and Delay

Since the Bench is particularly designed to hear the environmental cases, the Judges cannot opt to keep the case in pending in favour of the others. There would be hardly any or few cases which have to be heard by Bench on time.

III. Quality Judgment

Firstly, dealing in same subject of law with different dimensions would enhance the knowledge of the Judges. Secondly, Judges will have support of the technical experts to advice on technical matters. Thirdly, deeper understanding of the subject would entail positive interpretation of the laws.

IV. Increased Efficiency

With the specialized Bench fully dedicated to adjudicate the environmental cases, it will be able to prioritize the environmental case amongst other cases. The court will be in a better position to deal with complex environmental cases with ease and expediently. This will prevent delay and backlogging of the cases.³⁶

V. Uniformity

Having such specialized Bench, it will put in place the uniform application of environmental laws in the country. This will enable the higher judiciary like the Appellate Courts to be able to set precedents with diligence which the lower courts would be bound by it. The Green Bench being specialized for only environmental cases would be able to keep track of their earlier decisions, thereby maintaining uniformity and consistency in the interpretation and application of the environmental laws³⁷.

³⁶ Brian J. Preston, 'Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study', (2012) 29 Pace Evntl. L. Rev. 396 <[http:// digitalcommons.pace.edu/pelr/vol29/iss2/2](http://digitalcommons.pace.edu/pelr/vol29/iss2/2)>.

³⁷ *ibid*.

VI. *Cost Effectiveness*

Filing a petition directly to the Green Bench will be more cost effective to the litigant and to the State. The litigant filing the petition at the first instance before Green Bench will save the cost otherwise incurred during litigating in lower courts. Likewise, it will also save the State resources.

VII. *Public Confidence in the Justice System*

With the specialized Judges having experiences in adjudication of environmental cases, it enables the judges to see the environmental problems through the lenses of social justice enabling them to focus more on the problems and dispose the case with greater impact to the public. In the long run, it will gain the confidence of the public, making the courts as final recourse.

VIII. *Importance of Environment*

The importance of the environment will be highlighted through the decisions of the Green Bench. Public consciousness on the environment will take new dimensions. People will be aware about the new environmental problems and the legal regime developing in the international arena in addressing the pressing environmental problems.

IX. *Development of Environmental Jurisprudence*

The Green Bench will play very active role in developing the environmental jurisprudence. It is pointed out that having specialized Bench has prompted to develop environmental jurisprudence including substantive, procedural (like relaxing the rule of *locus standi*, issuing injunctions etc.), restorative (like innovating polluter pays principle), therapeutic (adopting the user-friendly procedure to improve access to justice),³⁸ and the distributive justice (principle like inter and intra-generational principles, polluters pays principle).³⁹

38 *ibid.*

39 *ibid.*

X. *Promotion of Innovative Ideas*

A century ago, the problem of climate change/global warming and loss of biodiversity were never a problem that court would have to deal with. But over the period of time, environmental problems of different dimensions have emerged and the courts have become more active. This has led the courts to interpret the laws more vibrantly and positively creating judicial precedents. Likewise, having the specialized Bench will help to update on the new problems and approaches with timely innovative judicial solutions.

E. **Objectives of the Green Bench**

The Special Green Bench at the High Court was established in accordance with Article 21, Section 2 of the constitution to fulfil the following objectives:

1. To enhance environmental conservation and protection in accordance with the Government's policy of GNH;
2. To settle environmental disputes expeditiously and effectively so as to reduce cost for the parties;
3. To accept the use of innovative practices of PIL, class action of the groups and broaden access to justice;
4. To promote environmental compliance by the industries and the entire stakeholders through effective enforcement of the judgments/decisions;
5. To build uniformity and fairness in the matter of environmental disputes of same nature;
6. To relieve the ordinary courts from the environment disputes of complex nature having adverse environmental impact on the general public, wildlife habitat or the groups of people;
7. To develop experts who would in turn share and exchange knowledge on current issues of environment with the judges, prosecutors and lawyers; and
8. To provide apprenticeship to environment practitioners, lawyers and social workers by providing attachment courses with the Bench.

8. Conclusion

The establishment of the Green Bench in the High Court was more of arrangement within the institution to prepare and acquaint the courts to deal with complex environment litigations. It was a response towards appreciation of the priority set by the government in the conservation and fulfilment of the sacred duty of the Supreme Court as the guardian of the Constitution. However, the Bench would face several challenges that are evident on the outset. Specialization means not only being proficient with the relevant laws, but the court needs to be supported by experts who are technically qualified and experienced to provide scientific opinion pertaining to the subject matter. Lack of such assistance would invariably lead to faulty judgments that would generate a sense of uncertainty for the public. Although, the Bench could avail the service of the relevant agencies, it would definitely take a longer time as the agencies themselves are not in the position to deliver their primary functions due to shortage of skilled service. Therefore, the Court should be in the position to set up the Technical Unit within the Judiciary at the earliest.

Ignorance of Law is no Excuse: Empowering People through Dissemination of Laws¹

Introduction

The government of any society is composed of three branches, namely, the executive, the legislature and the judiciary; and the nature and functions of these agencies are different from each other.² While the primary function of the executive branch is to implement and administer the laws enacted by the legislature; the judiciary interprets the law and gives life to the dead words of the statutory enactments.³

When the legislature makes a law, it does with a specific purpose - to meet the emerging needs of the changing society, and help resolve the complex issues that the society is confronted with. Since the law exists to serve the needs of the changing society, it has to change or adapt as per the needs of the society it is to respond to the changing needs and circumstances of the society.⁴ If the law cannot adapt to the new reality, it becomes redundant and obsolete. Hence, this situation calls for the intervention of the legislature to amend the legislation that does not keep pace with the changing life conditions.⁵

Laws are made in the grand hall of the parliament, but it serves little purpose if it remains there without dissemination. As the primary objective of the law is to regulate the conduct of the subjects or a group of targeted individuals, it is essential to make them known or bring to their notice of the public and concerned individual and agencies so that they do not violate the laws and risk punishments.

This Article is an attempt to highlight the significance of legal dissemination

1 Contributed by Drangpon Tharchean, Royal Court of Justice, Pemagatshel.

2 See, Article 1 Section 13 of the Constitution of the Kingdom of Bhutan; see also Tharchean, 'The Three Branches of the Government and their Central Functions' (2017) Vol. vii Bhutan Law Review 8.

3 Articles 10, 20 & 21 of the Constitution.

4 Aharon Barak, *The Judge in a Democracy* (Princeton: Princeton University Press 2006), pp. 3-4.

5 *ibid* at 5-8.

program as a powerful means to empower the people. Legal dissemination help people understand the laws; and their rights and duties.

1. Ignorance of Law is no Excuse

Unless the laws are disseminated to the public; or unless the public are aware of the laws and understands and appreciates the consequences of violation or non-compliance the state cannot expect total adherence and compliance of such laws. However, in reality in accordance with the well-known Latin maxim '*ignorantia juris non excusat*',⁶ 'ignorance of law is no excuse.'⁷ It is a legal fiction created by the imperative necessity and practical expediency in the administration of justice. This doctrine is also supported by the law of presumption which states that "every man is presumed to know the law."

As suggested by Professor Austin,⁷ if a court accepts a defence of ignorance of law as pleaded or tendered by a charged person, it would be a challenging task for the court to determine that the person actually did not know the law, as it has no facility to do so. Hence, it would therefore, be scarcely possible to resolve the matter and render the judicial adjudication almost impracticable. He also cautioned that if the court takes the cognisance of the mistake of the law as an exemption of culpability, the court would be flooded with such pleadings and it would be an extraneous task for the court to decide whether the party was actually ignorant of the law.

Now, we know that, in all societies, generally, a person pleading or justifying his erroneous action on the ground of his ignorance of the law is not a legally acceptable defence and people get convicted for breach of law. This is because since every person residing within the political boundary of a nation is under the protection of the law, it is necessary that every person knows the law that concerns him or her and obey it faithfully; since the same laws protect their rights and privileges. It may be absurd to claim the protection of the law and the assertion of his or her rights under the law, when the same person is oblivious of his duties and obligations under the law. It is not enough that one knows the existence of the laws but one must

⁶ The popular maxim enforced in other jurisdictions as well.

⁷ Prakash Mokal, *Criminal Jurisprudence* [Unpublished, Government Law College, Mumbai, India] pp. 43-44.

comply with it.

Like other jurisdictions, the Bhutanese legal system also recognised the application and operation of this legal maxim, '*ignorantia juris non excusat*' in the administration of justice. There people are required to uphold or abide by the laws in return for the protection, rights and privileges offered by the laws of the State⁸. When we talk about being 'law abiding', we can become one, only when we know the laws. To know the laws, we have to be vigilant, seek and learn the laws; for we cannot plead ignorance of laws if we are caught breaking or violating them. This means that we will be punished irrespective of whether we break the law knowingly or unknowingly. Therefore, we have the utmost duty to know the laws so that we do not break them unknowingly. Imagine, what will happen if ignorance of the law is excused. Every time people commit crimes or offences, they will simply say sorry, or argue that they are unaware of the laws. Therefore, to prevent this mischief, the State requires people to know the laws, i.e., the courts are not allowed to let people free even if they plead ignorance of the law.

Thus, the corollary of this maxim requires the state to facilitate people to know the laws. We cannot expect people to know laws if they are not made aware of the passage, enactment or existence of laws. More so in a country like ours, where the literacy in general and legal literacy in particular is not very high, we have a duty of creating awareness on laws to the public – at least the most basic ones – the ones which they come in conflict with on a daily basis, such as the laws relating to marriage, inheritance, land, loan, property, etc. The laws must be widely published and made freely available to the public. Agencies must be engaged in advocacy and dissemination of laws so that people are not entangled in the legal traps and waste public and private resources in protracted and frivolous litigations. More importantly, disputes and litigations are not desired in a small and interdependent society like ours since it has the adversarial and divisive effect which would disrupt the social harmony.⁹

2. Rights and Duties are Correlative

8 Concept Paper on Legal Dissemination (2013) of Bhutan National Legal Institute.

9 *ibid.*

Essentially, it points out to us apart from legal rights, we also need to be equally concerned about our legal duties. The Constitution has recognized both rights and duties with equal force, and are categorised as the fundamental rights¹⁰ and fundamental duties¹¹.

A legal right may be explained as an interest of a person which is recognised and enforceable by the rule of law,¹² while a duty on the other hand is an act which one ought to do, and its performance is secured or enforced by the law.¹³

Rights and interests are not identical, however.¹⁴ The violation of a person's interest would be legally wrong and respect for it is a legal duty.¹⁵ It means that there can be no right without a corresponding duty or duty without a corresponding right. Hence, the rights and duties are necessarily correlative, and the relationship between them is in a similar manner like there cannot be a husband without a wife, or a father without a child.¹⁶ Thus, it simply means that a person's right has become a duty of another person and vice versa in the administration of justice.

People can certainly appreciate and sincerely enforce the rights and duties created by the statutory laws provided that they actually know them, for which the best and effective method to take the law to the people would be through education, awareness and advocacy programs – dissemination of laws.

3. Statutory Requirements of Advocacy and Awareness Programs

While everyone talks of the significance of legal dissemination and its efficacy, but no encouraging efforts or developments are seen on the ground. This offends the post-democracy (2008) statutory enactments¹⁷ since they contain provisions which require the competent authorities established under the respective laws to undertake advocacy and awareness

10 Article 7 of the Constitution of Bhutan.

11 Article 8 of the Constitution of Bhutan.

12 P.J. Fitzgerald, *Salmond on Jurisprudence*, (London: Sweet & Maxwell 1966) pp. 216-217

13 *ibid.*

14 *ibid.*, at 217

15 *ibid.*

16 *ibid.* at 220.

17 E.g., The Judicial Service Act, 2007; The Water Act, 2011; The Child Care and Protection Act, 2011; Domestic Violence Prevention Act, 2013.

programs to the people. The concerted effort on the part of these agencies to disseminate or educate people on new laws is necessary as the deliberations of the laws in the temple of democracy¹⁸ do not afford them the full opportunity to grasp the essence of the laws.

The process of law making is a rigorous one. It entails substantial costs to the state. Hence, the laws should benefit the country and people; and achieve the objectives enshrined in the preamble of the respective laws. For the people to reap the benefits of the law and to secure compliance thereof, it is obligatory for the people to know their rights and duties under the laws. Therefore, there has to be some mechanisms by which the law is taken to the people.

In our context, the best method to do so is by way of public-friendly advocacy and awareness programs. If not, the people would not be aware of their rights and benefits that the law confers on the; and the purpose of the law would not be materialized. In case of duties or obligations, if they have transgressed the law whether intentionally or unintentionally, they shall be held liable for the consequences. It is more so essential in view of the fact that our Parliament adopts numerous Acts in every session. Most often many people have no knowledge of the existence of the laws until they are summoned for legal proceedings for their violations.

Legal Disseminations Programs

In His Address to the judges,¹⁹ His Majesty the Druk Gyalpo highlighted the importance of law and the need to obey and respect it:

*“Law is like the air that every person breathes at every moment. Its presence is unnoticed but its absence will be lethal; we must respect law and law must be upheld without question, just as we do not question the need to breathe.”*²⁰

His Majesty also urged the judiciary to strengthen the people’s awareness on laws, the judicial system and its functions.²¹

Drawing inspirations from the wisdom of the His Majesty the Druk

18 By Temple of Democracy, I refer to the National Council and National Assembly.

19 His Majesty’s Address at the Judicial Conference, High Court, Thimphu (11 June 2010).

20 *ibid.* See also Kinzang Chedup, ‘Evolution of Criminal Justice System in Bhutan’ (2017) VIII Bhutan Law Review 85.

21 *ibid.*

Gyalpo, the Bhutan National Legal Institute (BNLI) under the guidance of the Honourable President, Her Royal Highness Ashi Sonam Dechan Wangchuck, initiated the Legal Dissemination Programs with the special emphasis to the people in the rural communities. The program was also taken to the schools where legal education and literacy is spread through the School Law Clubs across the country since 2012. Today, there are more than 36 Law Clubs in the various parts of the country and the number is increasing. The students are kept abreast of the emerging laws and legal issues through various programs organized by the respective Law Clubs.

Besides, the BNLI has trained hundreds of local leaders of all the 205 Gewogs mediation techniques and skills. So that the community disputes are mediated in consonance with the prevailing statutory laws, the participants are familiarised with the basic principles and rules of the common laws such as *Marriage Act*, *Land Act*, *Inheritance Act*, etc. Laws are also periodically disseminated through various media – such as the Television, Radio and newspaper.²² Interviews and talk shows on laws are also periodically organised through live TV and radio programs. We have received positive feedback on the programs which shows the effectiveness of the programs in informing people of the laws – and the rights and duties connected therewith.

Conclusion

Like anywhere, ignorance of law is no excuse in Bhutan; though along with good motive, it can be a plea in mitigation of the penalties and damages. Therefore, people are obliged to be aware of the laws and the consequences of violations of the laws before they confront harsh realities. Similarly, the state has the obligation to publish, broadcast or disseminate laws to enable the people to understand their rights, duties and obligations in different laws. Only through such means, the incidences of people coming in conflict with laws may be reduced or prevented. It is only through such efforts we might be able to achieve His Majesty the Druk Gyalpo's vision of “...creation of a society based on justice, equality and fairness.”

22 Bhutan Broadcasting Service TV and Radio, Kuzoo FM Radio, and Newspapers.

The Constitution of Kingdom of Bhutan: Appraisal of its Salient Features on its Tenth Anniversary¹

Introduction

Constitution is the first and the basic law of a country. It is the highest law and therefore, any law which is contrary to it is *null and void*. It defines the basic pattern of authority among and between the branches of the government. It is the sacred document that places the power of governance and the future of the nation in the hands of the people.² The Constitution of the Kingdom of Bhutan was adopted on 18 July 2008. Therefore, we celebrate its tenth anniversary this year.³ Upon conferment of the Royal Assent, deep respect has been bestowed upon it, and the government and the people functioned in accordance with the principles and values enshrined therein.⁴ On the historic day of the signing of the Constitution, His Majesty the King said, *“On this day of destiny, in the blessed land of Palden Drukpa, we, the fortunate People and King, hereby resolve to bring into effect the root and foundation, the very source of all law in our nation.”*⁵ Despite initial misgivings and resistance, the Constitution was well received by the people; and the processes of transition and implementations were smooth with no constitutional crises. This Article intends to pay tribute to His Majesty Fourth Druk Gyalpo Jigme Singye Wangchuck, the father of the Constitution; and to the People’s King Jigme Khesar Namgyel Wangchuck under whose leadership and rule the Constitution has been nurtured well during the last ten years. The Article highlights the essence of the constitutional laws and principles; and ten salient features of the Constitution of Bhutan.

1 Contributed by Sangay Chedup, Legal Officer, Bhutan National Legal Institute.

2 His Majesty the King said that the Constitution is a sacred document that places the power of governance and the future of the nation in the hands of the people of Bhutan.

3 The Constitution of Bhutan was adopted on the 15th Day of 5th Month of the Male Earth Rat Year corresponding to the 18 July 2008.

4 Sangay Chedup, ‘Making and Un-Making of Treaties: Analysing the Post Constitutional Processes’ (Nov. 2017) Vol. VIII, *Bhutan Law Review*.

5 Royal Office of Media, *Royal Addresses of His Majesty the King Jigme Khesar Namgyel Wangchuck 2006 – 2009* (2010), RoM, His Majesty’s Secretariat.

Fundamentals of Constitution

The Chairman of the Constitution Drafting Committee Lyonpo Sonam Tobgye have published numerous articles on the procedural aspects of the making of the Constitution of Bhutan.⁶ This Article focuses on the substantive aspects. The Greek philosopher Plato had argued that government should maximise public good and individuals needed to give up certain things for the good of all citizens.⁷ Similarly, Aristotle maintained that ideal governments should be concerned with the common good or interests.⁸ Same was the view of Thomas Hobbes when he compared absolute governments to mythological whale-like sea monsters ‘*Leviathan*’.⁹

What is constitution? How do we define it? Thomas Paine defines the constitution in *Rights of Man* as:

[...] a Thing antecedent to Government; and a Government is only the Creature of a Constitution. The Constitution of a Country is not the act of its Government, but of the People constituting a Government. It is the Body of Elements to which you can refer and quote article by article; and which contains the principles upon which the Government shall be established, the manner in which it shall be organised, the powers it shall have, the Mode of Elections, the Duration of Parliaments, or by what other name such Bodies may be called; the powers which the executive part of the Government shall have; and, in fine, everything that relates to the complete organization of a civil government, and the principles upon which it shall act, and by which it shall be bound. A Constitution, therefore, is to a Government what the laws made afterwards by that Government are to a Court of Judicature. The Court of Judicature does not make the laws, neither can it alter them; it only acts in

6 See e.g., 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

7 Plato, *The Republic* (New York: Books, Inc. 1943).

8 Aristotle, *Politics* (Middlesex: Penguin Books 1976).

9 John Charles Addison Gaskin (ed.), *Thomas Hobbes Leviathan* (Oxford University Press 1996). Also See Marian Gallenkamp, ‘Democracy in Bhutan: An Analysis of Constitutional Change in a Buddhist Monarchy’ (24 March 2010) Institute of Peace and Conflict Studies, New Delhi, India.

*conformity to the laws made: and the Government is in like manner governed by the Constitution.*¹⁰

Paine's definition of Constitution is quite exhaustive. Written as a defence of the French Revolution, his definition of Constitution is relevant even today. The Constitution is the body of rules which establish the government and provides the powers thereto. It specifies the mode of elections, formation of parliament, power of the executive, judiciary and the legislature; and the rights and duties of the citizens. It is the fundamental law of the state which contains the basic principles to which the society must conform. The constitution also provides limitations on the authority of the government and other agencies; and prescribes the extent and the manner of the exercise of authority bestowed.

In her book *The Raven Tells a Story*, Her Royal Highness Ashi Sonam Dechan Wangchuck defines constitution as “a sacred document of values that we agree to live by...”.¹¹ Her Royal Highness explains that:

*[T]he Constitution creates our unique system of democracy by specifying, structuring and balancing the powers and duties among various people such as Kings, Ministers, Members of Parliament, Judges and so on. As a written document it can also serve as a reminder of our values, rights, duties, and national goals. The Constitution shows us the path.*¹²

Our Constitution is an exceptional and sacred document created and presented to the people by our monarchs. It is the grand synopsis and collection of all laws, policies and priorities of the Palden Drukpa.¹³ It is the receptacle of values and sentiments of the people which creates a system and safeguard us in times of crises. The constitution is the fundamental law of the land. It is the mother of all laws - the very basis and the very source of the authority of the government.¹⁴

10 Thomas Paine, *Rights of Man* (Nashville: Knowledge Products 1986). Also see, Phillip S. Foner (ed.), *The Complete Writings of Thomas Paine* (The Citadel Press, New York 1945).

11 Sonam Dechan Wangchuck, *The Ravens Tells a Story* (Sonam Dechan Wangchuck 2011).

12 *ibid* at 19.

13 *ibid*.

14 See Sonam Tobgye above n.6.

The Salient features of the Constitution

Constitution of Bhutan is a unique document with several salient features.

¹⁵ In *The Raven Tells a Story* Her Royal Highness writes “the Constitution of Bhutan is unique as it represents the legacy of a great monarch, and it exists to fulfil the deepest hopes and dreams of the Bhutanese people”.

(i) Introduction of Democracy

Prime Minister Tshering Tobgay said that the Constitution of Bhutan was a ‘tool to introduce democracy. People of Bhutan did not demand or fight for democracy as they were happy under the leadership of our great monarchs.’¹⁶ The Constitution enshrines the most fundamental principles of democracy and thus, our Kings have gifted democracy to the people of Bhutan through the Constitution.¹⁷

Plato believed that democracy takes birth when rich made the poor loathe them and love of revolution begin to spring amongst poor.¹⁸ The conditions described by Plato did not exist in Bhutan. People were happy with the rapid all-round growth and development under the successive kings. On 21 March 2005 at a special session of the *Lhengye Zhungtshog* (Cabinet Meeting), His Majesty the Fourth King told the members that the Constitution had been drafted with a single-minded focus of creating a democratic political system best suited to Bhutan.¹⁹ The Chairperson of the Constitution Drafting Committee said that “many members of the Committee and the people, during the public consultations, pleaded that the monarchy should be continued”.²⁰

However, on hindsight, democracy was not an alien subject the people of Bhutan; at least as far as monarchs were concerned. They sowed the seeds of democracy long ago. It evolved gradually especially during the

¹⁵ Talk delivered by H.E. Prime Minister Tshering Tobgay at Lee Kuan Yew School of Public Policy, Singapore. For more see Lee Kuan Yew School of Public Policy, [Public Lecture] Democracy by Bhutan Prime Minister Tshering Tobgay; Published on Nov. 30, 2016 <<https://www.youtube.com/watch?v=ghXOYpF-jyQ>> accessed on 2 February 2018). He elucidates nine features, and the tenth was added by the author.

¹⁶ *ibid.*

¹⁷ *ibid.*

¹⁸ See Plato above n.7.

¹⁹ See <<https://www.un.int/bhutan/bhutan/constitution>> (retrieved on 04 February 2018).

²⁰ See Sonam Tobgye above n.6.

reign of His Majesty the Fourth King, beginning with the decentralisation and devolution of power to the grassroots in the 1980s.²¹ Wide public consultations were held before framing and implementation of successive Five-Years. Decentralisation programs urged the people to participate actively in decision-making processes.²²

(ii) A Precise Document

The Constitution of Bhutan is a short and precise document. It has only 34 Articles, and barely 1500 words. However, although it is one of the shortest Constitutions in the world, it has references to both the national and international legal, political, social, cultural and spiritual philosophies and principles.²³ It is comprehensive, and ‘combines tradition with modernity to usher the nation into the 21st century as the harbinger of peace and advocate of scientific temper and a spirit of humanism’.²⁴ Several Constitutions have been referred during its making;²⁵ and comparative analysis was made with the Constitutions of twenty-two countries.²⁶ Despite its brevity, as His Majesty the King said on the day of the signing of the Constitution “... each word has earned its sacred place with the blessings of every citizen in our nation”.

(iii) Roles of the King

Another exceptional feature of the Constitution of Bhutan is that it defines the specific roles of the king.²⁷ Article 2(7) of the Constitution provides for the institution of Council of Regency. It states that a Council of Regency

21 Former Chief Justice of Bhutan Lyonpo Sonam Tobgye writes “democracy in Bhutan has been evolutionary and not revolutionary”. See Sonam Tobgye (n.5).

22 See Sonam Dechan Wangchuck above n. 11, p. 13.

23 See *A Perspective on the Philosophical Basis of the Bhutanese Constitution*, a Speech delivered by His Lordship Lyonpo Tshering Wangchuk, the Chief Justice of Bhutan on 21 March, at the RIGGS. <[http://www.judiciary.gov.bt/education/\[RIGGS\]CJB.pdf](http://www.judiciary.gov.bt/education/[RIGGS]CJB.pdf)> accessed on 04 February 2018.

24 See Sonam Tobgye, *Making of the Constitution and Democracy in Bhutan*, September 03, 2012, <[http://www.judiciary.gov.bt/education/C&D%20\(4th%20Sept%202012\).pdf](http://www.judiciary.gov.bt/education/C&D%20(4th%20Sept%202012).pdf)> accessed on February 6, 2018.

25 His Majesty the Fourth Druk Gyalpo told the first public consultation meeting in Thimphu that he “had studied more than 100 different Constitutions; not to copy their contents, but to draw inspiration and make the contents of the Bhutanese Constitution more meaningful.”

26 *ibid.*

27 See Article 2 of the Constitution.

will be established when the Druk Gyalpo has temporarily relinquished, by proclamation, the exercise of the Royal Prerogatives; or when it has been resolved by at least $\frac{3}{4}$ of the total number of members of Parliament in a joint sitting that the King is unable to exercise the Royal Prerogatives by reason of temporary physical or mental infirmity; or the king abdicates or dies and the successor to the throne has not attained the age of twenty-one years. These provisions are effective until the royal heir presumptive reaches the age of 21 and become Regent by right.²⁸

Another unique provision is regarding the abdication of Throne.²⁹ Incorporated by His Majesty the King Jigme Singye Wangchuck, this provision is extremely unique demonstrating His Majesty's vision, selflessness and altruism.³⁰ This has become one of the exemplary provisions in the world. People were taken by surprise when the Constitution imposed age limit to the tenure of the kings. Their Majesties convinced the people that this provision is for the greater interests of the nation and the people. As if that was not enough, Article 2 Section 20 of the Constitution requires the Druk Gyalpo to abdicate the Throne for wilful violations of the Constitution or for being subject to permanent mental disability. This provision is indirect form of impeachment which is truly unique and self-incriminating upon the monarchs.

(iv) Separation of Powers

The Constitution provides for separation of powers. Article 1 Section 13 of the Constitution states that "There shall be separation of the Executive, the Legislature and the Judiciary and no encroachment of each other's powers is permissible except to the extent provided for by this Constitution". It refers to the division of government responsibilities into distinct branches to limit them from encroaching upon others. This allows the three branches of government to function independently without interference, fear, and prejudice. The objective is to prevent the concentration of power and provide for checks and balances.

28 See Article 2, Section 9 of the Constitution.

29 Article 2(6) of the Constitution states that upon reaching the age of sixty-five years, the Druk Gyalpo shall step down and hand over the Throne to the Crown Prince or Crown Princess, provided the Royal Heir has come of age.

30 See Sonam Tobgye above n.6.

(v) **Spiritual Heritage**

The Constitution of Bhutan has dedicated an entire Article to the spiritual heritage of the country. Article 3 Section 1 stipulates that Buddhism is the spiritual heritage of Bhutan which promotes the principles and values of peace, non-violence, compassion and tolerance. This provision is particularly important because Bhutan is the last surviving *Vajrayana* Buddhist nation in the world. More significantly, Bhutan is a nation shaped by the Buddhist values and principles. It is vital for a small landlocked country for its identity and sovereignty. The misconception that Bhutan is a non-secular country and that Buddhism is a State religion is totally unfounded. The Constitution clearly states that Buddhism is a Spiritual Heritage of Bhutan; not a State religion. The Constitution protects the right to religion and celebrates religious diversity.³¹ Moreover, since Bhutan was shaped culturally by Buddhist values of ways of life, this provision deserves extra sanctity. Furthermore, His Majesty the King is the protector of all religions. It is the responsibility of religious institutions and personalities to promote the spiritual heritage of the country while also ensuring that religion remains separate from the politics, and that religious institutions and personality remains above the politics.³²

(vi) **Culture**

Our culture is unique. Bhutan is one of the happiest countries in the world because of its rich culture and tradition. We have always believed that preservation and promotion of culture is crucial in protecting the security and sovereignty of the nation. Being landlocked between the world's two biggest nations, the preservation and promotion of our distinct cultural identity are important means for our survival as an independent and sovereign country. Our developmental philosophy of 'Gross National Happiness' integrates preservation of culture as one of its four pillars. Therefore, there has been continuous emphasis on the preservation and promotion of Bhutanese culture.³³ Article 4(1) of the Constitution mandates the State to preserve, protect and promote the cultural heritage of the country. Although the Constitution does not define the term 'culture',

31 See Article 7, Section 4 of the Constitution.

32 See Article 3, Section 3 of the Constitution.

33 See Article 4 of the Constitution.

it includes monuments, places and objects of artistic or historic interest. The Dzongs, Lhakhangs, Goendeys, Ten-sum, Nyes, language, literature, music, visual arts and religion are all aspects of the culture.

Her Royal Highness Ashi Sonam Dechan Wangchuck writes that “because of developments in the region, Bhutan knew it must keep its very special traditional culture and develop a strong sense of national identity. Bhutan’s survival as a nation depended on its ability to understand its weaknesses and to work towards strengthening its strengths”.³⁴

(vii) Environment

There is a separate Article for the preservation of environment in the Constitution.³⁵ This provision has reaffirmed Bhutan’s strong commitment to preserve and protect its pristine natural flora and fauna. The Constitution provides that every Bhutanese is a trustee of the Kingdom’s natural resources and environment. The word ‘trustee’, gives every individual person or member of the community a control or guardianship of Bhutan’s natural resources. This protects the needs of the present generation; as well the rights of the future generations. It is the fundamental duty of every citizen to contribute to the protection of the natural environment, conservation of the rich biodiversity and prevention of all forms of ecological degradation including noise, visual and physical pollution through the adoption and support of environment-friendly practices and policies.³⁶ The government is obliged to protect, conserve and improve the pristine environment and safeguard the biodiversity of the country.

One of the striking features regarding the environmental protection is the constitutional mandate to maintain a minimum of 60% cent of Bhutan’s total land area under forest cover for all time to come.³⁷ This is to ensure conservation of country’s natural resources and to prevent degradation of the ecosystem. Today, 71% per cent of Bhutan is under forest cover; and it will be un-constitutional to reduce it below 60%.

³⁴ Sonam Dechan (n.11).

³⁵ See Article 5 of the Constitution.

³⁶ See Article 5(1) of the Constitution.

³⁷ See Article 5(3) of the Constitution.

(viii) Candidates for Elective Offices

The Constitution of Bhutan provides for the qualification for an elective office.³⁸ In addition to being a citizen of a country and a registered voter, the Constitution requires a candidate to an elective office to be a minimum of twenty-five years and maximum of sixty-five years of age at the time of filing the nomination.³⁹

The most distinct feature is with regard to the educational qualification of the candidate of an elective office. Article 23(30)(e) of the Constitution states that a candidate for an elective office shall ‘fulfil the necessary educational and other qualifications prescribed in the electoral laws’. This provision requires the members of the parliament to have a competent degree of knowledge of all subjects, on which he/she is called to legislate. Thus, the Constitution provides for the necessity of educational qualification and intellectual capacity of the candidate. Therefore, the political parties must ensure that the candidates are knowledgeable, and they are persons of vision and character.⁴⁰

(ix) Stable Government

The Constitution of Bhutan has ensured a stable government which serves for the complete term of five years. This is because the Lower House (the National Assembly) has only two political parties which allow the ruling government to complete five year terms. Article 15 Section 5 of the Constitution stipulates that the election of National Assembly shall be by only two political parties established through a primary round of the election in which all registered political parties may participate. This forbids the formation of coalition with other political parties; which prevents the ruling government from becoming weak to complete the tenure. Moreover, the Upper House (the National Council) comprises of members who do not belong to the political parties.⁴¹ Similarly, the Local Government is independent. A candidate to or a member of the Local Governments cannot belong to any political party.⁴² All these features of

38 See Article 23 (3) of the Constitution.

39 See Article 23 (3)(c) of the Constitution.

40 See Sonam Tobgye above n.6.

41 See Article 11 Section 3 of the Constitution.

42 See Article 12, Section 17 of the Constitution.

the Constitution allow the government to complete its full five-year tenure and, prevent constitutional crises.

(x) **Gross National Happiness (GNH)**

Bhutan's development plans and activities are guided by the philosophy of 'Gross National Happiness' (GNH). "The Gross National Happiness is more important than the Gross Domestic Product"⁴³. This is a national policy that guides Bhutan's socio-economic policies and development, and measures the collective happiness and wellbeing of the population. It is a holistic and sustainable approach to development, which balances materials and non-material values culminating in a happy society. It not only considers the material wellbeing but also takes into account the spiritual, emotional, and cultural needs of an individual and society.⁴⁴ Article 9 Section 2 of the Constitution requires the State to promote those conditions that will enable the pursuit of Gross National Happiness. It requires the State to consider the principles of GNH while formulating and implementing development plans and policies. Therefore, any reform initiated by the government must be in conformity with the principles of GNH. This provision obligates the State to ensure that its reforms and developments must bring social harmony and happiness.

Ten Years of Constitution - Changes and Developments

After the adoption of the Constitution, the plans and development have been consistently aligned with the Constitution. All the legislative Acts are in keeping with the constitutional principles and values; and the judiciary upheld and promoted the rule of law in accordance with the principles established under the Constitution. Some of the developments that took place under the established principles of Constitution during the last ten years are as follows:

⁴³ Propounded by His Majesty the Fourth Druk Gyalpo in 1972.

⁴⁴ See Sangay Chedup, *International Trade and Foreign Direct Investment: Analysing Problems and Prospects from the Himalayan Kingdom of Bhutan* (2017), the Master Thesis submitted to the Vienna School of Law, University of Vienna.

1. The Elections

The Constitution provides for the formation of the government,⁴⁵ political parties,⁴⁶ and conduct of Elections.⁴⁷ Article 23 (1) of the Constitution states that the general will of the people shall be the basis of the government and it shall be expressed through periodic elections. Bhutan has successfully conducted a series of elections culminating in the formation of governments, the opposition, the National Council, and the local government, beginning in 2008. The elections were peaceful, free and fair. There was no incidence of social unrest and instability. Under the farsighted guidance of Their Majesties, Bhutan is now readying for the third round of Parliamentary elections this year.

2. The Constitutional Offices

The Constitution provides for the institution of five Constitutional Offices. The Election Commission of Bhutan, the Anti-Corruption Commission of Bhutan, the Royal Civil Service Commission, the Royal Audit Authority, and the High Court and the Supreme Court of Bhutan are the five Constitutional Offices. In accordance with the provisions of the Constitution, His Majesty the King has appointed experienced, qualified, and competent people with no political affiliations to the Constitutional offices. The Constitutional Offices are independent of the political authorities in order to enable them to function independently to achieve the objectives of the Constitution.

3. The Judiciary

Bhutan boasts an independent, professional and a strong judiciary. It has been further strengthened with the adoption of the Constitution. The Constitution of Bhutan provides for strict separation of powers. The Supreme Court of Bhutan⁴⁸ was established on 21 February 2010 pursuant to Article 21 Section 2 of the Constitution. It has been designated as the highest court of appeal⁴⁹ and court of record.⁵⁰ Similarly, the High

45 See Article 17 of the Constitution.

46 See Article 15 of the Constitution.

47 See Article 23 of the Constitution.

48 See Article 21 Section 2 of the Constitution.

49 See Article 21, Section 7 of the Constitution.

50 See Article 21, Section of the Constitution 3.

Court of Bhutan has been granted the status of a Constitutional Court. The Constitution places enormous trust and confidence in the judiciary in upholding the rule of law. It obligates the judiciary to function without fear and favour and earn the trust and confidence of the general public. The legitimacy of the power of the judiciary is based on the amount of public trust and confidence that it earns.

The successive Chief Justices of Bhutan initiated a series of judicial reforms. Specialised courts for commercial, civil, criminal and family and child cases have been established at the Thimphu District Court for the deeper analysis and expeditious disposal of the cases.⁵¹ A Green Bench has been established at the High Court of Bhutan to enhance preservation and protection of Kingdom's natural resources and environment for the benefit of the present as well as future generations. Based on the popularity in other countries, Public Interest Litigation (PIL) is planned to be allowed whereby any person can file a complaint in the interest of the general public pertaining to environmental cases.

4. Alternative Dispute Resolution (ADR) Centre

Article 21 Section 16 of the Constitution requires the government to establish an impartial and independent Administrative Tribunals as well as Alternative Dispute Resolution Centres. Accordingly, the Parliament enacted *Alternative Dispute Resolution Act* in 2013. In compliance with Article 21(16) of the Constitution, ADR Centre has been established in 2017. The Centre will serve as a neutral, efficient and reliable dispute resolution centre and will facilitate the dispute resolution proceeding by providing required facilities for the conduct of such a proceeding at the request of the parties.⁵² This is expected to wean off commercial cases from the protracted and adversarial court litigations and promote commercial activities. It is also expected to promote Bhutan's foreign investment climate by creating conducive place to do business and earn income for the country.

51 See Tshering Wangchuk, 'Judicial Reforms: The Establishment of Specialised Courts' (Nov.2017) Vol. VIII *Bhutan Law Review*.

52 See Section 15 of the ADR Act.

5. Bhutan National Legal Institute

Bhutan National Legal Institute (BNLI) was established on 25 February 2011⁵³ by Her Royal Highness Ashi Sonam Dechan Wangchuck. This is in compliance with His Majesty's vision to establish a "Law Institute and Research Centre" that will enhance access to justice and further strengthen our legal system.⁵⁴ The establishment of the Bhutan National Legal Institute has enhanced the capacity of the judiciary and justice sector agencies to uphold the rule of law and enhance access to justice. However, 'access to justice' also means access to any other dispute resolution mechanisms in addition to the courts. Therefore, the BNLI has been taking several steps to take justice closer to the community. Amongst others, It has revitalised, strengthened and institutionalise the age-old practice of informal or amicable resolution of disputes in the communities (*Nangkeha Nangdrig*) in Bhutan through a series of trainings. Since 2012, BNLI has trained 1,825 mediators as of January 2018.⁵⁵ The disputes are resolved in the communities without resorting to courts. Some 15,316 civil cases have been mediated in the communities in 2015.⁵⁶ This is a considerable number of cases which otherwise would have gone to the courts of law and strained scarce judicial resources.

Another mandate of the BNLI is to carry out legal dissemination and awareness programs to increase legal literacy and awareness of laws. During the concluding ceremony of 19th National Judicial Conference on 11 June 2010, His Majesty the King said:

It is very important for the people to understand our legal system. All the judges are performing their duties and responsibilities very well. But it is also imperative to disseminate legal education and increase awareness of the people on laws and legal system so that they become law-abiding citizens.

53 BNLI is a statutory body established as Section 86 of the *Judicial Service Act of Bhutan 2007*.

54 During the Concluding Ceremony of 19th National Judicial Conference on 11 June 2010, His Majesty the King said that "One of the greatest responsibilities that lie ahead is to establish a *Law Institute and Research Center*, that will enhance access to justice and further strengthened our legal system"

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

56 *ibid*.

In keeping with this Royal vision, the BNLI travelled to the nooks and corners of the country with legal dissemination programs. Moreover, laws are also disseminated through radios, televisions, and print media. The BNLI also provide continuing judicial education to the Judges, Registrars and Bench Clerks through workshops, seminars and conferences. It also conducts studies and research on emerging issues and publishes legal literature. It is also involved in teaching of the Post-Graduate Diploma in national Laws (PGDNL) at the Royal Institute of Management (RIM), Simtokha.

The Constitutional Cases

Not many cases and disputes erupted during the last ten years requiring serious interpretation of the Constitution and its provisions, except two:

a) **The Government of Bhutan V. The Opposition Party**⁵⁷

Referred as the first Constitutional Case, the Opposition Party (*People's Democratic Party* – PDP) sued the Government of the day (*Druk Phuensum Tshogpa* – DPT) on the issue of revision of sales and excise duties. On 25 June 2010 during the 5th Session of Parliament, the Finance Minister while presenting the budget for the Fiscal Year 2010-2011 informed the National Assembly that the government had approved revision of rates for certain items under indirect taxes to strengthen the government's revenue base as well as to meet other socio-economic objectives. The National Assembly was also informed that the bill proposing alternations in direct taxes was already presented to Parliament. The Opposition Leader objected that the measures taken by the Government were not in keeping with the provisions of the Constitution and the *Public Finance Act 2007*. The controversy of the case was that *Sales Tax, Customs and Excise Act of 2000* empowers the government to revise tax rates;⁵⁸ whereas the Constitution states that taxes, fees and other levies cannot be imposed or altered except by law⁵⁹ – meaning that, constitutionally, Parliament must ratify all changes in sales tax and customs duty. Despite the objections of the Opposition members, the government decided to implement the revised tax measure without amending the sales tax legislation.

57 *The Government of Bhutan v. Opposition Party*, Judgment No. SC(Hung 11-1). <<http://www.judiciary.gov.bt/judg/2016/Supreme%20Court/english.pdf>> accessed on 10 February 2018).

58 See Section 4.2, Chapter 3, Part I of the *Sales Tax, Customs and Excise Act, 2000*.

59 See Article 14, Section 1 of the Constitution.

The Royal Court of Justice, the High Court held that *Sales Tax, Customs and Excise Act of 2000* and the *Income Tax Act* are the laws within the meaning of “except by law” under Article 14(1) of the Constitution; and that the government shall “approve” the fixation and revision of rates of sales tax, customs duty and excise duty on any range of commodities as per the *Sales Tax Act*, and further introduce to the National Assembly for authorisation as per the *Public Finance Act*, and Article 13 of the Constitution in the form of a Bill. The Court held that the raising of revenue and introducing taxation measures along with the budget report violates the constitutional mandate of introducing it as a Bill.

The Supreme Court of Bhutan upheld the High Court judgment and stated that:

In view of upholding of the High Court decision in the matter, the raising of taxes by merely incorporating it in the budget report being presented to and deemed adopted by the National Assembly alone without completing the normal legislative process is inconsistent with constitutional requirements and the democratic system of governance.

*The power of taxation is indispensably necessary to constitute an efficient government. Therefore, it is the prerogative of the National Assembly to impose taxes and the duty of the citizens to pay taxes.*⁶⁰

The Supreme Court pointed out that “tax authority has been vested in Parliament to ensure adequate checks and balances, avoid arbitrariness, limit discretion, and to ensure compliance with due process in a democratic system of governance”.⁶¹

b) Druk Nyamrup Tshogpa (DNT) V. The Ruling Government/ People’s Democratic Party (PDP)⁶²

On 18 August 2017, *Druk Nyamrup Tshogpa* (DNT) filed a writ petition at the High Court of Bhutan with a request to declare the action of the government *ultra vires* the Constitution. In this case, the government had

⁶⁰ *The Government of Bhutan v. Opposition Party* (above n.57).

⁶¹ *ibid.*

⁶² *Druk Nyamrup Tshogpa (DNT) v Ruling Government: People’s Democratic Party (PDP)*, Order No. (Misc. 17-749)2017/ 419, <<http://www.judiciary.gov.bt/judg/2017/HC/DNTGovtEn.pdf>> accessed on 10 February 2018).

approved the *Fiscal Incentive Policy of 2016* and submitted to the Parliament merely as a report. The Government did not introduce it as a *Money Bill* or *Financial Bill* for granting incentives.

The petitioner argued that Article 14 Section 1 of the Constitution provides that “Taxes, fees and other forms of levies shall not be imposed or altered except by law”. The term ‘*except by law*’ restricts the governmental authority and therefore, it cannot arbitrarily impose or alter the tax except in accordance with law. Similarly, it was contended that the *Fiscal Incentive Policy 2016* violates Section 46A of the *Public Finance (Amendment) Act, 2012* which clearly provides that, “if any matter pertaining to the imposition or increase of any tax or abolition, reduction or remission of any existing tax, it should be construed as *Money Bill* or *Financial Bill*”.⁶³

The Royal Court of Justice, the High Court of Bhutan ruled that the petitioner lacked *locus standi* to file the writ petition and accordingly dismissed the petition. The Court reasoned that:

*The Petitioner’s invocation of ‘legal standing’ based on Article 21, Section 18 and Article 7, Section 23 of the Constitution is not tenable. The Supreme Court in Re Government vs. Opposition ruled that “...Filing of petition against the Government by the Opposition Party and individuals who have locus standi and a concrete case or controversy must be allowed.” To uphold the binding precedent, the petition must be directly filed by those individuals who are directly affected and not by the political parties who are outside the purview of the Parliament.*⁶⁴

The Honourable High Court further rules that:

The Parliamentary remedial measures have already been taken to consider any fiscal incentives to be introduced as Money Bill and other related measures to rectify the concern and the controversy related to fiscal incentives granted thus far by way of the amendment of Sales Tax, Customs and Excise Act, 2000, Income Tax Act, 2001 and other relevant Acts. In this regards, the Court cautions that any Money Bill particularly granting fiscal incentives that stretches over longer period extending beyond the term of the Government, may

63 *ibid.*

64 *ibid.*

*be cautiously vetted based on the intended mandate of a particular government elected through periodic election for a fixed term of Five Years.*⁶⁵

This ruling is significant, in that it states that any matter that falls under the ambit of tax should be introduced in the Parliament by way of *Money Bill* or *Financial Bill*. The High Court followed the precedence set by the first constitutional case, whereby any matter that falls within the purview of tax should exhaust the constitutional procedures and introduce it as a Bill in the National Assembly.

Conclusion

More than a hundred years ago in 1907, our ancestors came together and signed a historic social contract enthrone Gongsu Ugyen Wangchuck as the first hereditary monarch of Bhutan. Bhutan became a single entity and rallied behind a single leader. Since then, Bhutan has witnessed unprecedented development and change under the successive leadership of our monarchs. Bhutan's sovereignty and security have been strengthened; and the people of Bhutan enjoyed enduring peace and prosperity.

Exactly after 100 years, people of Bhutan signed yet another historic document – the Constitution of the Kingdom of Bhutan. This document handed over the power of governance of the country to the people by our monarchs. Although reluctant in the beginning, our monarchs convinced the people that they were no stranger to the democratic processes having been prepared since 1980s through the decentralisation programs. Ten years have passed after we adopted the Constitution. Anchored around it, we were firmly guided in our thoughts, decisions and actions without crises. The Constitution having guided us thus far; and with the eternal vigilance and leadership from the Throne, and with our increasing alertness and experiences, we have every reason to hope that the Constitution will endure for years and the rule of law and democracy will deepen and flourish as the years go by.

65 *ibid.*

Right to Privacy in the age of Information, Publicity and Social Media¹

Introduction

Right to privacy is absolute. However, state must protect right to privacy of a person and his family's right to privacy. Free speech is a fundamental tool and teeth of any democracy and Bhutanese democracy is no exception. On the other hand, every person should have right to be secure in their private lives, their documents, their homes and family. It is even more important for a small nation like ours, where everyone knows everyone. Both free speech and right to be let alone contribute to attainment of happiness, the ultimate goal of Gross National Happiness. This Article highlights the state of awareness and enforcement of the privacy laws in Bhutan; *vis a vis* the right to information and the associated challenges of information and data secrecy in the age of publicity and invasive information and communication technologies.

Information Explosion

In this age of technology, data has enormous importance for both the government agencies and non-government entities and private organizations. The government agencies such a Department of Census and Registration under Ministry of Home and Cultural Affairs, Road Safety and Transport Authority under Ministry of Information and Communications, Department of Trade under Ministry of Economic Affairs, Department of Revenue and Customs under Ministry of Finance, Ministry of Education, Ministry of Health, Royal University of Bhutan and Royal Civil Service Commission, Anti-corruption Commission, Election Commission of Bhutan and many other government agencies store a huge amount of data containing every detail of person in the country including their finger prints, photos, bank account numbers, driving license numbers, family tree, entire life history in many cases. Similarly, most corporations such as Insurance Companies, Banks, Telecommunications, employers also collect

1 Contributed by Sonam Tshering, Lecturer, Jigme Singye Wangchuck School of Law.

and store our personal information and data. There is much emphasis on information and communication technology (ICT) as means of storing and processing our data to improve service and efficiency of the service providers. However, no technology is perfect and therefore, our entire data is vulnerable and risks of landing in wrong hands either intentionally or unintentionally. What do we do to prevent such leaks?

Over half the population of Bhutan is on the internet; and the number is only increasing, and we continue to provide our personal details, share some of our most intimate moments in life whether photos, videos or stories of us on social media without a second thought. What happens to those data that we constantly feed there? Are they private as we think? Who uses those data? Are the *Facebook*, *Instagram*, *Snapchat*, *WeChat*, *WhatsApp*, and *Twitter* that we Bhutanese people are so fond of and spend hours on them are safe enough to protect our data? Do we ever realize that the moment we post any information on these platforms, it is never going to be deleted, rather would remain forever in the public domain in one form or other? What happens to data on these social media platforms? Do we realize, for every social media account or shopping website, we sign up, we consent to provide them with so much of our personal information including personal mobile numbers which are often sold to third parties? Social media companies earn billions of dollars every year either by selling our personal information to third parties or targeting us to click or get attracted to millions of advertisements feed to our social network based on how we use internet and how we behave as netizens.

On the other hand, “information is a livelihood of today’s society. Increasingly, our everyday activities involve the transfer and recording of information. The government collects vast quantities of personal information records pertaining to an individual’s birth, marriage, divorce, property, court proceedings, motor vehicles”² etc. And these new technologies coupled with the increasing use of personal information by business and government, pose new challenges to privacy³ of a person. The only possible answer to these challenges may be the enactment of privacy law in the country to minimize the risks and compensate those who

2 See Daniel, J. Solove & Paul, M. Schwartz, ‘Privacy Law Fundamentals’ (APP 4th Ed.2017) 1

3 Ibid, 2

may be affected as a result of breach of data. Therefore, it may be the right time to enact a standalone law that governs the right to privacy.

What is Right to Privacy?

The right to information is a complex subject and there is no universal definition. The Constitution protects a person from “arbitrary or unlawful interference with his or her privacy, family, home or correspondence”.⁴ However, what constitutes arbitrary or unlawful interference with his or her privacy, family, home or correspondence remains to be defined. Further, in Bhutan, privacy is defined as eavesdropping by way of “unlawfully engages in wiretapping, mechanical overhearing of conversation or intercepting or accessing of an electronic communication”⁵ or “unauthorized opening of mail or parcel”.⁶ This definition is built on a basis of violation of right to privacy as criminal offence.

In another definition, privacy is defined as law containing “four kinds of distinct invasions of four different interests”⁷ of the person. These are:

1. Intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs;
2. Public disclosure of embarrassing private facts about the plaintiff;
3. Publicity which places the plaintiff in a false light in the public eye; and
4. Appropriation for the defendant’s advantage, of the plaintiff’s name or likeness.

However, as one can find from above, this definition was generally applied only through law of torts and not otherwise. Therefore, this definition is far from suiting Bhutan’s context as it is more on law of tort. Bhutanese legal system is yet to recognize the law of tort. Privacy may also be termed as “the right of privacy, as an independent and distinctive legal concept”⁸ where “the general law of privacy, which affords a tort action for damages

4 See Article 7 Section 19 of the Constitution of Kingdom of Bhutan.

5 See Section 468 of Penal Code of Bhutan

6 See Section 470 of Penal Code of Bhutan

7 See Willaims, ‘Privacy’, (48 Cal.L.Rev.383 (1960)). The author wrote a famous article, privacy after studying over 300 tort cases decided in 70 years in the United States.

8 See Renwick v. News & Observer Pub. Co., 310 N.C. 312, 321, 312 S.E.2d 405, 411 (1984).

resulting from an unlawful invasion of privacy, and the constitutional right of privacy which protects personal privacy against unlawful governmental invasion”.⁹ Going by this definition, the constitutional right to privacy protects only against the government invasion; and not from other corporate or non-governmental agencies or other persons.

However, there are many other entities that holds huge personal information. Therefore, more acceptable definition of privacy in Bhutanese context could be the “right to self-determination, right to the sole control of one’s person and to determine what shall be done with one’s own body, as well as the right to determine for themselves when, how, and to what extent information about them is communicated to others”.¹⁰ It is therefore, important that, an individual has right what to disclose about himself and what not to disclose about himself or his family to others. Even this concept is too liberal and gives unreasonable protection to the individual. It is because no right is absolute¹¹ and the state can impose reasonable restrictions for the public good and security and sovereignty of the country. For example, Anti-corruption Commission should have right to compel the public servants to declare their assets, Department of Revenue and Customs must have the authority to compel the citizens to pay taxes and provided their tax information and similar with other agencies for various purposes including country’s security and sovereignty.

The Black’s law defines right to privacy as “the right that determines the non-intervention of secret surveillance and the protection of an individual’s information”.¹² This is separated into four categories. First is “physical” – where a person is protected others from knowing about that individual¹³. Second, “decisional” – a person has the absolute authority to make the decision whether divulge information about himself or not. Third “informational” – where others are prevented from “searching for unknown information”¹⁴ and finally, “dispositional” – where others are prevented from making attempts to “know the state of mind of an

9 ibid.

10 See 10A Fla. Jur 2d Constitutional Law § 359

11 Article 23 Section 7 of the Constitution of Kingdom of Bhutan 2008

12 Accessed on 10 Feb 2018 at < <https://thelawdictionary.org/privacy/>>

13 ibid.

14 ibid.

individual”.¹⁵ But this definition seems to be too abstract in some sense while it also makes a good sense in terms of defining right to privacy in more general way.

In nut shell, right to privacy may be understood in Bhutanese context as the right to protect his or his family’s private information on private matters including his family from any unlawful intrusion or other means without his consent but may be permitted to collect his or her information and use within the legal and policy frameworks of the country for the good of the country.

Protection of Privacy

In Bhutan, right to privacy is recognized explicitly through the Constitution as one of the fundamental rights as well as legal rights under various laws.

Privacy as Fundamental Right

The constitution recognized the right to privacy as one of the fundamental rights.¹⁶ The Constitution does not specify in what manner or what constitutes right to privacy against “arbitrary or unlawful interference with his or her privacy, family, home or correspondence”.¹⁷ As a fundamental right, a person’s privacy is protected from state actions in any form including laws that contravene this article. As a result, state cannot arrest a person¹⁸ without warrant unless other permitted by act of parliament under special circumstances.¹⁹ The state is prohibited from search or entering any premise or conveyance without search warrant²⁰ except when permitted by law.²¹ Further, the Courts are barred from issuing general search warrant and can issue only for specific places or premises to prevent abuse of such orders. By this way, the fundamental right to privacy is well protected in Bhutan.

Privacy as Legal Right

15 *ibid.*

16 Article 7 Section of the Constitution of Kingdom of Bhutan 2008.

17 Article 7 Section 9 of the Constitution of Kingdom of Bhutan 2008.

18 Section 158 of Civil and Criminal Procedure Code.

19 A person may be arrested without warrant under cognizable offences listed under Section 165 of Civil and Criminal Procedure.

20 Section 168 of Civil and Criminal Procedure Code of Bhutan.

21 Section 176 of Civil and Criminal Procedure Code of Bhutan.

The Penal Code recognized the right to privacy as criminal offence in case of violation.²² There are two protections given in this law. First one is protection from eavesdropping and second from unauthorized opening of mail or parcel. It amounts to eavesdropping “if the defendant unlawfully engages in wiretapping, mechanical overhearing of conversation, or intercepting or accessing of an electronic communication;²³ and is punishable with minimum of one year to maximum of less than three year imprisonment;²⁴ while unauthorized opening of mail or parcel is considered “if the defendant without lawful warrant intercepts and opens any mail or parcel not addressed to the defendant”²⁵ and graded as offence of felony of fourth degree²⁶ which is quite a serious offence. Felony of Fourth degree can attract mandatory imprisonment of minimum of 3 years to maximum of less than 5 years.²⁷

Another law in Bhutan that explicitly recognizes the right to privacy in relation to use of Information and Communications and Technology (ICT) is Bhutan InfoComm and Media (BICAMA) Act, 2006. This law gives the discretionary power to High Court and Supreme Court to restrict court in making documents available for public if it violates the privacy.²⁸ This law also obligates that ICT facility providers, ICT service providers and vendors to “respect and protect the privacy of personal information they receive from their users or consumers and to make their privacy policy easily accessible from their website”²⁹ with the specific kinds and sources of information being received, collected and maintained online, how users or consumers may review and, when necessary, correct or remove such information; and when the website uses “cookies,” how and why they are used and the consequences, if any, of user’s or consumer’s refusal to accept a cookie.³⁰

Further, the law imposes duty to maintain confidentiality of any information

22 Section 468, 469, 470 & 471 of Penal Code of Bhutan.

23 Section 468 of Penal Code of Bhutan.

24 Section 469 of Penal Code of Bhutan.

25 Section 470 of Penal Code of Bhutan.

26 Section 471 of Penal Code of Bhutan.

27 Section 28 of Penal Code of Bhutan.

28 Section 129 (b) of BICMA Act 2006.

29 Section 157 (1) & (2) of BICMA Act 2006.

30 *ibid.*

online by the ICT facility providers, ICT service providers and vendors and ensure adequate security measures to protect the information of users.³¹ This law also mandates the service providers to take reasonable precautions to the extent possible to prevent any negative impacts on children or minor online including transactions or offensive conversations.³²

Enforcement of Privacy laws

In recent years, with the introduction of internet and more so with the launch of mobile internet facilities in the country, the right to privacy remains a challenge due to the sheer growth and accessibility to internet among the Bhutanese people. It has been increasing even more rapidly where hundreds of thousands of Bhutanese now online mainly through social media. The B-mobile alone has 477,744 subscribers across the country;³³ which means, half the population has access to mobile service of Bhutan Telecom alone. In recent years, Bhutan had numerous reports of leaks of private videos being shared on social media, allegations and personal information on various social media platforms. Royal Bhutan Police took initiatives to counter these problems and yet the outcomes are very minimal at best. There are no records³⁴ where courts have rendered decisions on the basis of right to privacy.

The BICMA law as discussed above requires that websites to make privacy policies easily accessible; but on careful review of some important websites reveals that there are no privacy policies or information on privacy on the websites. This include Bhutan InfoComm and Media Authority (BICMA),³⁵ the authority which is the custodian of this very law; nor their parent agency, the Ministry of Information and Communications.³⁶ Even Bhutan's judiciary website does not have any information on privacy.³⁷ In recent times, Royal Bhutan Police started posting any person arrested for suspected involvement in the drug trafficking even before his or her trial

31 Section 159 of BICMA Act 2006.

32 Section 160 of BICMA Act 2006.

33 Accessed on 10 February 2018 at <http://www.kuenselonline.com/lunana-to-enjoy-reliable-mobile-services/>

34 The inaccessibility to court decisions presumes that there are no such decisions but there may be.

35 <http://www.bicma.gov.bt/bicmanew/?page_id=63>

36 <<http://www.moic.gov.bt/en/about-us/>>

37 <<http://www.judiciary.gov.bt/>>

begins. Does it not violate his right to privacy and innocent until proven guilty by subjecting him or her to public trial before due process of law? How about his or her family's right to privacy? Similarly, all media depicts the names of those persons suspected or alleged to have committed corruption particularly senior public figures. Does the freedom of press override the right to privacy? The Constitution guarantees innocent until proven guilty as fundamental right³⁸ and their guilt can only be proven through due process of law. Where is due process of law for these people? The basic tenet of rule of law is the due process of law but when media or government agencies depict any person before trial by naming and shaming in public derails their very right to privacy and right to presume innocent until proven guilty.

In other countries, the Supreme Court of United States websites for example, provides a clear policy on privacy.³⁹ Similarly website of US Congress,⁴⁰ US Tax Department,⁴¹ US Department of Education,⁴² one of the biggest mobile and internet service provider Verizon⁴³ etc. all have the privacy policy clearly defined and accessible to public. Whereas in our case, even mobile service providers like Bhutan Telecom has no privacy policies accessible to public on their websites. Indeed, in the U.S., neither the Constitution nor the Congress has passed laws on privacy. It is driven mainly by judicial decisions that made the privacy law very strong. However, on the rare and positive side, TashiCell⁴⁴ has privacy policy but not the government or other corporate or offices in Bhutan.

Need for Stronger Privacy Laws

The above brief analysis indicates that Bhutan does seem to have number of laws that not only recognize right to privacy but also provide obligations and remedies. However, the impact on right to privacy remains minimal and still faces numerous challenges since the law of privacy itself and the information explosion in Bhutan is very recent. Few impediments for the

38 Article 7 section 16 of the Constitution.

39 <https://www.supremecourt.gov/policies/privacy_notice.aspx>

40 <<https://www.house.gov/privacy-policy>>

41 <<https://www.irs.gov/privacy-disclosure/irs-privacy-policy>>

42 <<https://www2.ed.gov/notices/privacy/index.html>>

43 <<https://www2.ed.gov/notices/privacy/index.html>>

44 <<https://www.tashicell.com/policies/privacy>>

effective enforcement of the right to privacy may be summarized below:

1. Though right to privacy is enshrined in the Constitution, it is yet to be understood as fundamental right by the people;
2. The BICMA Act does not provide any specific remedies for the violation of obligations;
3. Penal Code of Bhutan provides only punitive remedies which is only for deterrence;
4. There is lack of any civil damages which are essential in case of injury caused to the plaintiff in Bhutan;
5. Even the government agencies in Bhutan including those responsible for enforcement of these laws seem to lack implementation of the laws.

Therefore, considering the above summary of challenges, the right to privacy in Bhutan is still in its nascent stage yet the importance of effective right to privacy in Bhutan cannot be ignored. Bhutan's policy of e-governance and with rapid growth of commerce and trade, especially with the growing e-commerce and so much of data collection by both the government and non-corporate entities, right to protection of privacy has become paramount importance.

The citizens shall be protected from government's "uninvited observation of or interference in those areas that fall within ambit of zone of privacy"⁴⁵ or wiretapping or government surveillance. For example, "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations. And "Privacy is not a discrete commodity, possessed absolutely or not at all. Those who disclose certain facts to a bank or phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes".⁴⁶ Similarly, Ministry of Health collects huge personal information and therefore, medical records, which may "contain intimate facts of a personal nature, are well within the ambit of materials entitled to

⁴⁵ City of N. Miami v. Kurtz, 653 So. 2d 1025 (Fla. 1995).

⁴⁶ United States v. Jones, 565 U.S. 400, 415, 132 S. Ct. 945, 955, 181 L. Ed. 2d 911, 925 (2012).

privacy protection”.⁴⁷ Private individual themselves share huge information on social media either knowingly or unknowingly or even some with *mala fide* intentions such as adult contents in the public domain which will remain forever online. Any person aggrieved or fall victim of either the state or non-state or individual must have the access to adequate compensation or damages as a result of violation of his privacy. The violation of right to privacy is not merely of that individual person but often affects his entire family and even community and therefore deserves more attention. The injured party must have access to some form of compensation rather than merely imposing punitive sanctions on the defendant. For example, if an intimate private video clips gets circulated, then the entire family of that person may be affected and face social stigma or other forms of mental and physical public harassment in the society. Therefore, the person who shared such video clip may not only be sanctioned with punitive measures but also damages must be paid to the injured plaintiff and his family for the injury caused due to sharing of the video clip.

The Right to Privacy – the Way Forward

1. It may more appropriate for institutions like BICMA to be proactive in the enforcement of the existing laws;
2. Review the existing laws on privacy;
3. Explore possibility of inclusion of civil damages as remedies than mere punitive measures;
4. Government should consider the privacy as important aspect of all government policies and strategies;
5. The corporate agencies particularly the banks, insurance and telecommunications service providers must take privacy protection not only as obedience to law but as corporate social responsibility to ensure that right to privacy is ensured;
6. BICMA should take more proactive steps to carry out adequate measure to carry out more advocacy campaigns particularly targeting children and minors on vulnerabilities of divulging personal information on social media, strangers, social network

47 Doe v. Delie , 257 F.3d 309, 315 (3d Cir. 2001).

friends;

7. Law enforcement agencies should continue to follow the Civil and Criminal Procedure Code while carrying out any law enforcement functions to protect right to privacy;
8. The judiciary as fountain of justice must consider privacy as an even more important in the world of technology to protect a person or his family's right to privacy through strong judicial decisions;
9. Other relevant agencies and non-governmental organizations should also help the country in educating citizens on importance of right to privacy but at the same time also on vulnerabilities and risks associated with giving personal importance.

Conclusion

The citizens will not stop being on social media or use of any ICT services, instead it will only rapidly increase. The government will not stop collecting information or promotion and strengthening e-government. The media will not stop publishing information, which may violate the privacy of a person or his family. Therefore, it may be right time, that we either enact an exclusive privacy law or at least review the existing legal frameworks in the country and strengthen the enforcement of right to privacy.

Access to Justice in Bhutan: Excerpt of the Report of the Survey Commissioned by the Bhutan National Legal Institute¹

Context

This *Survey Report on Access to Justice in Bhutan* commissioned by the Bhutan National Legal Institute (BNLI) in March 2012 was designed with specific objectives to:

- (a) Establish the public opinion on access to justice and Alternate Dispute Resolution (ADR);
- (b) Gauge the satisfaction of the litigators in meeting their expectations;
- (c) Gauge the challenges and constraints faced by courts/judiciary in terms of human resources, infrastructure and other facilities;
- (d) Identify the services expected by judicial personnel from the Bhutan National Legal Institute (BNLI);
- (e) Study type and mode of dissemination of legal information; and
- (f) Explore the scope of establishing institutional linkages by BNLI within and outside Bhutan and its sustainability.

Methodology

The quantitative phase of the survey involved 874 face-to-face interviews with the respondents in their households. The sample comprised of 459 female and 411 male respondents aged 18 and above generally. Survey enumerations were largely carried out in the urban centres for logistic reasons. The respondents interviewed were largely from urban (87.6%). The survey conducted in 9 Dzongkhags (districts) in all the four regions of the country employed a multi-stage cluster random sampling procedure.

1 This is the Executive Summary of the Survey Report on Access to Justice in Bhutan commissioned by the Bhutan National Legal Institute in 2012.

Overview of Findings

Socio-demographic Characteristics of Respondents

Age, gender, marital status, type of residential location, and mother tongue

Of the 874 respondents from the nine participating Dzongkhags 459 (52.5%) were females and 411 (47.0%) were males; 4 respondents (0.45%) did not indicate their gender. Majority of the respondents came from the age groups of 26-35 years (29.6%) and 36-45 years (28.9%); proportions of respondents from other age groups were, in descending order, 46-55 years (17.2%), 18-25 years (12.9%), 56-65 years (7.6%), under 18 years (2.2%), and 66 years or over (1.6%).

In terms of marital status of the respondents, 61.1% of respondents are 'married with children', 17.1% 'divorced', 12.3% 'single', 4.5% 'married without children', and 4.0% are 'widowed'. While 0.45% did not indicate their marital status, 0.9% 'declined to respond'. With regards to type of residential areas of the respondents, a majority of the respondents (87.6%) are from urban centres as the enumerations were largely carried out in the urban centres for logistic reasons. Proportions of respondents from 'semi-urban', 'semi-remote', and 'remote' were 6.1%, 5.8%, and 0.6% respectively, with 0.6% failing to indicate their residential type.

The bulk of the respondents were those who spoke Sharchopkha (38.6%) and Dzongkha (28.4%), followed by Khengkha (12.9), Kurtoepkha (7.6%), Lhotshamkha (7.3%), Bumthangkha (2.3%), Chalipkha (1.5), and Mangdipkha (1.1%).

Education, Occupation, and Income Levels of Respondents

In terms of respondents education level, majority of the respondents were 'illiterate' (29.7%) followed by 'Class XII and below' (17.2%), closely followed by 'non-formal education' (13.8%) and 'Class X and below' (10.6%). Other education levels of the respondents in minority and in the decreasing order were – 'Class VI and below' (7.3%), 'Class VIII and below' (6.9%), 'First degree and above' (6.8%), 'Technical education (diploma/certificate)' (6.6%), and respondents with 'monastic education' background constituting only 0.9%.

Occupations of the respondents were as varied as their education background. Respondents with farming background were in majority (35.7%), followed by government and public employees (19.2%) which are closely followed by people running their own businesses (17.5%), ‘self-employed’ (11.1%), and employed in private sector (9.1%). Respondents under other categories were – ‘unemployed’ (3.4%), ‘not economically active’ (3.4%), and 1% each of ‘retired person’, ‘monk’, and ‘nun’.

Monthly income levels of the respondents vary from those living below Nu.5,000 (41.7%) to those living with income levels beyond Nu.50,000 (1.3%). Other monthly income levels of the respondents are – Nu.5,000-10,000 (23.0%), Nu.10,000-15,000 (12.6%), Nu.15,000-20,000 (10.2%), Nu.20,000-30,000 (5.4%), and Nu.30,000-50,000 (2.5%). Significant proportion of the respondents’ monthly income is from ‘cash crop’ (33.1%), ‘salary’ (29.5%), and ‘business’ (25.8%). Otherwise, other respondents’ sources of income, though in minority are as varied as it can get.

1. Respondents’ Experiences with the Courts

Of all the respondents an overwhelming majority of 89.1% had attended court cases. On the other hand, while 6.4% of the respondents had availed other court services, only 4.5% of the respondents had not availed any services from the courts. Of those who attended court cases 76.1% expressed that the verdict was in their favor while 20.6% of the respondents expressed that the verdict was not in their favour. Further, while 18.2% of the respondents are either ‘very bitter’ (5.2%) or ‘not satisfied’ (13.0%), a high proportion of the respondents (73.2%) reported either being ‘very satisfied’ (35.6%) or ‘satisfied’ (37.6%) with their court cases. 4.4% of the respondents were ‘not sure’ of their experiences.

2. Litigants Satisfaction of the Court System

Overall the litigants seem to be satisfied with the court system in Bhutan. Slightly over eighty-one percent of the respondents have expressed their satisfaction with the way the courts dispensed justice; respondents have either ‘strongly agreed’ (43.2%) or ‘agreed’ (37.9%) with the statement; whereas 6.5% of the respondents were ‘unsure’, 10.1% of the respondents showed their dissatisfaction (disagree – 9.0%, strongly disagree – 1.3%).

The satisfaction levels of the respondents are similar with other aspects of the court system's administration of justice. While the overall satisfaction levels are high, it is led by the statement "The monetary expenses incurred to attend the court was reasonable" (78.6%) closely followed by "I am encouraged to file cases in the court if I am wronged in the future" (77.2%) and "The quality of judgment was good" (76.6%). The lowest on the rung of satisfaction is the statement on "The court procedures were not cumbersome" (66.7%) followed by "The time taken to dispense judgment was reasonable" (69.5%) and "The court clerks dispensed services that were due to me while attending the court" (71.4). The satisfaction levels on other aspects of the court system's administration of justice fall in between the two groups of satisfaction levels.

On the other hand however there are significant proportions of the respondents who have either 'strongly disagreed' or 'disagreed' with these statements. What is even more significant is there are strong correlations between those statements which featured low on the satisfaction levels on one hand with those that featured high on the 'disagree/strongly disagreed' list. These two statements "The time taken to dispense judgment was reasonable" and "The court clerks dispensed services that were due to me while attending the court" are low on 'agreed/strongly agreed' list and high on 'disagreed/strongly disagreed' list, showing strong correlations. Further, the statement "I received all possible explanation from the court on the judgment passed by the court" featuring highest on the 'disagreed/strongly disagreed' list may indicate that 13.9% of the respondents did not receive proper explanations from the court on the judgment passed by the courts.

3. Awareness on Rights and Duties and Court System

Overall over eighty-one percent of the respondents claimed that they have awareness on their rights and duties and of the court system for their justice needs. However, there is a sizeable proportion of the respondents (18.9%) who have either disagreed with probing statements or that they are not sure whether they have the awareness on various aspects of their rights and duties and the court system. Even though not knowing the difference between a High Court and a Supreme Court (30.5%) may not have a direct bearing on their justice needs, 17.7% of the respondents and therefore

the citizens in general will not know even when their rights are violated or obstructed. Similarly, 18.4% of the respondents claimed of not having understanding on the registration process to file a case in the court, and that 17.4% of the respondents do not have the knowledge of the court procedures in case they have to file a lawsuit.

4. Barriers to Justice

Considering the factors discouraging people from filing lawsuit in the court of justice, 62.5% of the respondents find ‘stress’ as being either the ‘most discouraging’ (33.1%) or ‘2nd most discouraging’ (29.4%) factor. The ‘stress factor’ is followed by two closely related factors – ‘cost’ (45.2%) and ‘time’ (45.3%) as the discouraging factors from pursuing lawsuits in the court of justice. On the other hand almost one-fourth of the respondents claimed ‘not knowing what to do’ and ‘lack of confidence that the judges will deal the cases fairly’ are considered as discouraging factors from pursuing lawsuits in the court of justice. These proportions would substantially increase if the ‘3rd most discouraging rating’ were to be considered having any serious implications in the ‘access to justice’ considerations.

Gauging discouraging factors against whole range of income groups i.e. ‘below Nu.5,000’ to ‘above Nu.100,000’, while cost is an issue for respondents from income group Nu.20,000-30,000 and below, ‘stress factor’ seem to apply right across the income groups. Similarly, ‘time factor’ also seem to apply right across the income groups as a factor discouraging people from pursuing lawsuit in the court of justice. In addition, these ‘discouraging factors’ seem to affect males and females in more or less in similar ways.

4. 1 Cost Barrier

Over eighty-two percent of the respondents feel that the courts are located at reasonable proximity for the convenience of the people with only 10.7% of the respondents disagreeing. Similarly, 76.9% of the respondents do not consider the money spent on attending court cases as an issue, even though it is an issue for 7.4% of the respondents. Even though money spent on attending court cases is not an issue, cost of hiring a *Jabmi* (legal counsel) is an issue. While only 59.2% of the respondents have positive response,

a high 15.5% disagreed with the statement. This is closely followed by the ‘time spent by the judges to deliver court verdicts’ (agreed/strongly agreed = 67.6%; disagreed/strongly disagreed = 16.0%), the ‘psychological stress that people face when cases are in court’ (agreed/strongly agreed = 65.5%; disagreed/strongly disagreed = 11.0%), and the ‘risk of consequences if one loses the case (agreed/strongly agreed = 60.3%; disagreed/strongly disagreed = 14.5%)’. These same issues, for some reason seem to be generally issues associated with income groups between Nu.10,000-15,000 to Nu.20,000-30,000. Further, these issues or non-issues apply across the gender board in similar ways.

4.2 *Trust and Confidence*

Generally, 75.4% of the respondents have ‘trust and confidence’ on the Bhutanese Law and the court functionaries in accessing justice needs. In particular, the respondents either strongly agree or agree that the ‘Bhutanese judges are highly qualified to be competent judges’ (85.3%), ‘Bhutanese judges are professionals who function without fear and favour’ (79.0%), and that ‘I trust the judges to deliver judgment of high quality’ (76.5%).

On the other hand however, with a caveat that these may not constitute significant proportions, there are certain ‘trust and confidence’ aspects that have been responded to not so favorably by the respondents. For instance, there seem to exist a perception amongst the respondents that not all citizens have been getting a fair treatment under the laws of the country; even though 60.0% of the respondents feel they do (the lowest on the ‘trust and confidence’ rung, 15.9% of the respondents feel not all citizens receive a fair treatment under the country’s laws (the highest on the disagreements list). This is closely followed by the statements – ‘The court clerks function without bias and partiality’ (agreed/strongly agreed = 70.4%; disagreed/strongly disagreed = 15.8%) and ‘I trust the Bhutanese laws to protect the innocent and penalize the guilty’ (agreed/strongly agreed = 72.9%; disagreed/strongly disagreed = 12.5%). This skepticism seems to come mainly from those who have education levels between a high school and first degree and above. It must also be noted that similar responses run across gender.

4.3 *Information Barrier*

For an overwhelming 94.3% of the respondents legal information is very important (very important = 77.1%; important = 17.2%) in their daily lives.

As to the sources of legal information, television broadcasts, newspapers, family and friends, and the courts are cited as the most important sources of legal information by the respondents, followed by other sources such as the internet, *Jabmi* and legal books. In terms of educational qualification levels 'illiterate' respondents' source of information are from television broadcasts, family and friends, the courts, and *Jabmis*. Respondents with other educational background from NFE to higher degrees cite newspapers as the other source of legal information in addition to the sources cited for 'illiterate' respondents. 'Internet' and 'legal books' are cited as other significant sources of legal information by respondents with high school education and above. However, these are cited only in combination with 'TV/Newspaper', 'family/friends', and 'courts'.

Regarding availability of legal information in accessing justice, over eighty percent of the respondents agreed/strongly agreed that 'the courts inform the litigants on what to do before filing the case', followed by 75.0% of the respondents agreeing that 'the courts provide updates on the cases that are under trial'. However, only 65.6% of the respondents agreed/strongly agreed that 'the legal information disseminated to the public is adequate, relevant and timely'; rather a high 12.4% of the respondents have disagreed/strongly disagreed with the statement. Similarly, while only 68.0% of the respondents agreed/strongly agreed that 'Bhutanese citizens are getting adequate legal information', a high 13.0% of the respondents disagreed/strongly disagreed with the statement. Similar response was for the statement 'the court verdicts are generally understandable' that while only 72.2% agreed/strongly disagreed, a high 12.8% of the respondents disagreed/strongly disagreed with the statement.

4.4 *Structural Barrier*

About eighty-five percent of the respondents feel that the courts are conveniently located. Similarly, 82.5% of the respondents feel that ambience such as the sitting arrangement of the judges in the court is

appropriate. Further, 77.1% of the respondents are of the view that the language of the court being *Dzongkha* does not hinder self-representation in the courts, even though 5.5% of the respondents have disagreed and 16.8% of the respondents are not sure about it. However, 14.9% each of the respondents feel that there are neither adequate number of judges to hear all the cases that are filed to the courts nor are there adequate number of clerks to assist in the cases that are filed to the courts; 16.3% and 16.4% of the respondents respectively are not sure about such adequacies or inadequacies in the number of judges and clerks. Similarly, only 60.2% of the respondents have agreed that ‘education of the people does not affect the ways justice is accessed’, which is disagreed to by 11.7% of respondents and a large 27.5% ‘unsure’ whether or not education affects the way justice is accessed. However, the data analysis on ‘structural barrier’ in accessing justice by respondents’ educational background does not show this; the correlation is negative.

With respect to respondents’ perception on factors influencing better court experiences, 90.2% of the respondents feel that the litigants or the justice service users would have better court experiences if the judges used friendly tone while interacting in the courts. Similarly, respondents opine that litigants or the court service users would have better court experiences, if – (1) there were state sponsored legal aid (*Jabmi*) to those who cannot afford (87.6% of the respondents), (2) the time taken to come out with verdicts is reduced (86.6% of the respondents), and (3) the litigants and accused are kept informed on the development of the case (86.4% of the respondents). The fifth and the last factor, the ‘use of a language comfortable to the litigants – not necessarily Dzongkha’ has the least support with only 73.6% of the respondents supporting it; while 7.7% of the respondents have objections, 18.1% of the respondents are not sure of which way to incline.

5. Legal Information Needs

5.1 Legal Information Content

On average 92.3% of the respondents consider almost all legal information content as either ‘very important’ (69.9%) or ‘somewhat important’ (22.4%). ‘Knowledge on fundamental rights of a citizen’ with 95.2% of

the respondents (very important = 80.9%; somewhat important = 14.3%) tops the list of importance of legal information contents. Other closely followed content areas in terms of decreasing order of importance are: 'How to register a court case' (94.6% of the respondents), 'land act' (93.1% of

the respondents), 'Marriage act' (93.0% of the respondents), and 'Criminal justice system' (92.8% of the respondents). But it does not mean that other legal information content areas such as the 'The appeal system – when and how to appeal' (92.0%), 'The procedures of a court in how they dispense justice' (91.6%), 'Forest act' (91.4%), and 'Properties act' (90.8%) are also considered as important by the respondents. What is not considered as important as other content areas is 'The judicial institutions and their role and scope of justice'. The same applies across different educational background and age groups of the respondents.

5.2 Courts' Performance in Disseminating Legal Information during the Court Cases

There is an overall satisfaction of the respondents with the court system's overall performance in disseminating legal information during the cases. High performance rating seem to be particularly associated with 'information about how and where to register the case' (88.6% of the respondents) and 'information about when to report to the court' (87.7% of the respondents). While the courts performance is closely trailed by 'the means and ways courts' summon orders are issued' (81.5%), 'the explanation on court procedures provided by the courts' (80.3%), and 'keeping litigants updated on the progress and development of the case' (80.1%), the areas of court performance that have not been rated as highly are: the 'user friendliness of the court documents such as the forms and verdicts' (75.7%), 'the conduct of the court clerks in providing information services' (77.3%), and the 'interpretations and translations of court documents provided by the judges' (77.9%). These have been rated 'poor' performance by over eight percent of the respondents and that between ten to about fifteen percent of the respondents are not sure about it.

5.3 Expected Mode of Disseminating General Legal Information

As to disseminating general legal information, television appears to be by far the most preferred mode of disseminating general legal information. While 86.3% of the respondents have considered television in the first three preferred modes for disseminating general legal information, 60.2% of the respondents put it as their first option of the seven options available. 68.0% and 63.0% respectively have considered ‘radio’ and ‘newspaper’ in their first three preferred options for disseminating general legal information. Other possible general legal information dissemination modes on the first three preferred options of the seven options have featured very low on the survey: during meetings at the gewog offices (28.2%), website/internet (23.7%), awareness workshops (17.8%), and brochure/pamphlets (13.1%).

Choice of modes for disseminating general legal information is more or less same across type of location, education background, occupation, income level, and gender. On the other hand, however, even though the proportion of respondents is small, website/internet based mode of disseminating general legal information appears to be slightly better mainly with under 18 years age group (52.7%), followed by 18-35 years age group (42.8%). Understandably newspaper is not the preferred mode for the respondents who are ‘illiterate’.

5.4 Preference of Institutions for Receiving Legal Information

The preference for institutions being paired encounters difficulties in pin-pointing the preferred institution from the other. However, studying the number of times an institution gets paired and with proportion of respondents for the paired institutions, the preferred individual institutions can be roughly identified. By this method the Bhutan National Legal Institute gets paired with four different institutions whose total proportion of respondents amount to 91.7%, setting this institution aside as the most preferred institution for receiving legal information. By the same method the next institution respondents prefer for receiving legal information from is ‘local authorities’ (66.9%), followed by private legal firm (45.5%). By location type, ‘Bhutan National Legal Institute and Local authorities’ is

the preferred pair across all location types i.e. Urban (38.7%), Semi-urban (56.6%), Semi-remote (70.8%), and Remote (80.0%) with a clear preference trend increasing from urban to remote. It is understandable that Urban and Semi-urban have also preference for private law firms for receiving legal information as these firms are basically located in urban centres.

6. Perceived Factors for Winning the Cases in Court

More than ninety-five percent of the respondents believe that having honest and fair judges is critical to winning court cases. Similarly, 89.3% of the respondents are of the view that having good lawyers/ *Jabmis* would be very important in winning court cases. Although not considered as critical as the two foregoing factors these other factors are also considered as important for winning the court cases: 'having good contacts or close relations with government or court officials' (73.2%), 'strong pressure from the public or mass media' (75.8%), 'support from social or professional association where [you are] a member' (76.8%), and 'having the ability to incur high costs of litigation' (77.8%). If these be the case it would indicate of loss of trust and confidence in the court system. These perceived factors for winning the court cases more or less are similar across gender, different educational background as well as location types. In fact such perceived factors for winning the court cases is visibly more in the semi-remote and most in the remote areas.

7. Alternative Dispute Resolution Mechanisms

Of the total, 61.4% of the respondents (537 respondents) have settled their legal conflicts outside of the courts using informal dispute resolution mechanisms. Of the total who resolved their disputes outside of the courts 64.1% were males and 59.8% females. In terms of location type 66.0%, 39.6%, 30.0%, and 20.0% came respectively from the urban, semi-urban, semi-remote, and remote.

7.1 Nature of Conflicts Resolved using ADR Mechanisms and Category of People Involved in Resolving it

Of all the conflicts resolved through informal mechanisms, 33.6% has to do with marriage conflicts, followed by land disputes (23.7%), monetary matters (15.0%), and domestic violence (11.6%). While there is generally

no difference between the nature and the intensity of the conflicts involved between male and female respondents, more female respondents (38.0%) are involved in marriage conflicts their male counterparts (28.5%). Similarly, while the nature of conflicts involved with urban and semi-urban respondents are similar, higher proportion of respondents from semi-remote appear to be involved in land disputes (43.8%) and domestic violence (37.5%), and less on marriage conflicts (12.5%).

As to people involved in settling disputes, people of gewog authorities (gups, mangmis, tshogpas) comprise 53.7% of all the people involved in resolving disputes through informal mechanisms, followed by Jabmis (20.8%), and senior family members (18.5%).

7.2 Satisfaction with Settlement Arrangements, Honoring and Enforcement of Settlement, use of such Arrangements in Future

Generally, respondents are satisfied with the informal dispute settlement arrangements. 81.4% of the respondents are either ‘very satisfied’ (48.4%) or ‘satisfied’ (33.0%) with no difference between males and females on the satisfaction levels. However, the satisfaction level on this survey seem to be higher for respondents from ‘semi-urban’ (95.0%) than with respondents from ‘urban’ and ‘semi-remote’. In terms of whether the settlements have been honored and enforced over ninety percent of the respondents (Yes = over 66.3%-76.2% and ‘somewhat’ = 23.8%-26.8%) feel the settlements have been honored and enforced, except in the case of ‘semi-remote’ where 62.5% of the respondents expressed that the settlements have not been honored and enforced.

As to whether the respondents plan to use the informal conflict settlement arrangements in future, the opinions are more or less equally divided between ‘Yes’, ‘May be’, and ‘No’. However, 81.3% of the respondents from ‘semi-remote’ do not plan to use such informal conflict settlement arrangements in future, for some unknown reasons within the scope of this study.

8. Challenges and Constraints Faced by the Courts

The survey conducted with 46 court officials in seven Dzongkhags reveal that they have challenges and constraints involving human resource, infrastructure, and other resources. Of these three major areas of constraints and challenges, human resource tops the list with 44.1% of the respondents expressing its needs, closely followed by other resources (41.0% of the respondents). 14.8% of the respondents have expressed the needs in infrastructure development.

8.1 *Human Resources*

In terms of the total human resource needs, the bulk of the needs expressed is in professional development of the court staff with 85.2% of the respondents expressing its needs. A further break-up of professional development needs in decreasing order are for: trainings – perhaps of workshops, seminars, study visits including ex-country, seminars, conferences, etc. involving duration up to 1-2 weeks (48.1% of the respondents); short-term training – perhaps from 1-3 months (22.2% of the respondents); and further studies – perhaps of first degree and advanced studies (14.8%). These human resource development needs are mainly expressed by the bench clerks (82.6%); proportion of Drangpons, Registrars, and accountants constitute 3.7%, 7.4%, and 3.7% respectively.

The needs for additional staff in the court system are expressed for the bench clerks (11.1% of the respondents) and IT professionals (3.7%). These needs are expressed mainly by the bench clerks and Drangpons.

8.2 *Infrastructure Resources*

It may appear that there are issues related to the infrastructure for some of the courts in the country. Whereas about fifteen percent of the total respondents have expressed the need for infrastructure development, 11.5% of the respondents have pointed out the need to develop/improve the infrastructure of the courts, 3.3% of the respondents are for the staff quarters. The consultative meetings indicate that these staff quarters are for the residences of the judges and other judicial staff. It may appear that the judicial officials feel deprived of such residences when others in Dzongkhags such as the Dzongdags and other officials are entitled to.

8.3 *Other Resources and Support*

Of the 41.0% of the total respondents who expressed the ‘other resource’ needs, 19.7% are for office equipment and 12.9% are for legal reference materials. The needs for office equipment are largely computers and accessories (9.8%), followed by general office equipment and network facilities (4.9% each). By network it might mean internet connections, and perhaps also intranet, and networking the entire judiciary.

In terms of legal reference materials these are mainly of law books, sufficient copies of all Acts passed by the Parliament and first delivery of amendments, and e-resources. Posing another question on the availability of legal reference materials, while 67.3% of the respondents have affirmed their availability, 32.8% claim their non-availability. Non-availability of legal reference materials appear to be largely of the textbooks on law. The responses to the same question on availability of professional support and guidance to the courts, while 69.0% of the respondents are affirmative about its presence, 31.0% claim otherwise.

The other resources required are additional pool vehicles and enhancement of the budget for the courts.

9. Human Resource Development Needs

9.1 Legal Professional Development Training Programs as of now

Except 14.3% (6) of the respondents who have not received any professional development training after becoming a court staff, other respondents have received at least one professional development training program. Of all the respondents at least one respondent attended all professional development training program listed. Professional skills development training program, for instance for decision-making, dispute resolution, legal research, judgment writing, office administration, computer operation, etc. tops the list of all the training programs 33.3% of the respondents having participated in these trainings. This is followed by professional development training on criminal law and procedure which is participated by 16.7% of the respondents. Other training programs attended by various proportions of respondents include civil law and procedure, land law and procedure,

court administration and case management, judicial role and ethics, and human rights, gender equality and other cross-cutting themes. While legal professional training programs provided are impressively wide ranging, most may have received only one such variety.

Almost sixty percent of the professional development training programs appear to have been provided for by the Royal Government/Royal Court of Bhutan and/or Bhutan National Legal Institute (BNLI) and another about forty percent through donor-funded projects. The satisfaction level of the respondents on those training programs attended is overall very high. While eighty percent of the respondents found the training programs they attended ‘extremely useful’, the other twenty percent found them ‘quite/slightly useful’.

9.2 Professional Development Aspirations

With regards to the nature of the legal professional development training needs expressed, respondents’ ‘First’ order in importance is in ‘acquiring information on law and court procedures’ which is closely followed in importance in the area of ‘acquiring practical skills as judge or court officer’. Their difference has been created only by the respondents’ ‘second’ order of ranking. In the ‘Third’ order of importance respondents would like to keep themselves up-to-date with new laws and latest developments, followed by training needs in solving day-to-day problems in specific cases.

In terms of specific content areas for legal professional development training, in order of importance from ‘First’ to ‘Fourth’ that the respondents would prefer are: Professional skills development (1), Court administration and case management (2), Criminal law and procedure (3), and Civil law and procedure (3). While next in order of importance are Judicial role, ethics and conduct (5), Land law and procedure (6), and Family law and procedure (7), the last of the legal contents they would expect for their training are Business/ commercial law and procedure (9) and Human rights, gender equality and other cross-cutting themes (8).

Respondents’ first choice of the level of professional development training remains to be updates on recent developments through participatory seminars and workshops, as well as through mentoring on-the-job as a

‘second’ preference. The respondents would also prefer these seminars and workshops being delivered by respected judges; university teachers remaining their second choice. Next, the respondents would also prefer organization of their professional development programme at the level of networking and/or experience sharing. Although, legal professional development training in ‘specialist/expertise’ areas such as in forensic pathology, complex accounting featured well in the ‘first’ order rating, it did not feature well overall.

10. Expectations of the Judicial Personnel from the BNLI

From the consultative meetings with court officials it is understood that the expectation of the judicial personnel from the BNLI are wide ranging not only of judicial human resource development but also of improving their service conditions and improvement of the court rooms through renovation of the existing structures and building new ones where necessary. In that they expect BNLI to identify the courts that need renovation and others that require constructing new ones. Overall they expect BNLI to fulfill the needs and challenges faced by the Judiciary and promote judiciary through improved public services.

11. Institutional Linkages

It is understood from the consultative meetings that it would be good to establish linkages between the courts in the country for the purposes of sharing knowledge, information, and experiences the network of which could be extended to various levels of court staff. There is also a feeling that the judiciary conferences should be organized in different Dzongkhags, not just confined to Thimphu.

Suggestion is also to have linkages with other countries in the region and beyond for sharing experiences and learning from each other. This would really benefit the judiciary, it is felt. However, it is cautioned to be selective in the choice of such institutions for the linkages.

Recommendations

01. Review the implementation by the courts of the procedural reforms that has taken place particularly questioning, in light of the litigation satisfaction, as to why the court procedures are still cumbersome;

why the dispensing of judgment still takes a prolonged time; and why there are still inadequacies in the provision of services by the court clerks to the court users in spite of major court procedural reforms.

02. Strengthen and fine tune where necessary the awareness program on citizens' rights and duties and the awareness on the court system that are pertinent to accessing justice for the people, including the issues of adequacy, relevancy, and timeliness.
03. The legal information awareness program should focus on: the knowledge on fundamental rights, court case registration and justice dispensing procedures, criminal justice system, appeal system and procedures, child care and protection act, Penal Code on cantankerous litigation, public intoxication, prowling, sexual harassment, etc., and various acts such as the Marriage Act, Properties Act, Forest Acts, etc.
04. The legal awareness program need to consciously use television and radio programs and newspapers as a standard norm for disseminating general legal information to the general public. Arrangement may also be made for the courts to disseminate legal information through public gatherings and school visits, as well as through gewog officials such as Mangmis.
05. Find ways and means of reducing the cost of hiring *Jabmis* including strengthening and/or instituting legal aid system in more visible and practical ways as provided for by the Constitution of the Kingdom of Bhutan under section 6 of Article 9 as well as the Civil and Criminal Procedure Code of Bhutan 2001, under section 34, and further supported by the Jabmi Act of the Kingdom of Bhutan 2003, to secure justice even by those who cannot afford to do so otherwise.
06. As part of the litigants' right under the Constitution and human right, the Royal Court of Justice needs to secure from the government lawyers for the litigants with criminal cases and arrive at arrangements in increasing the pool of lawyers in the country for such needs.
07. The Royal Court of Justice must expedite the appointment of adequate number of judges and court clerks as may be rationalized and promulgated by the Judicial Service Act of Bhutan 2007 and its amendments and other rules and regulations, if any.

08. The current efforts in training all *Mangmis* of 205 *Gewogs* must not only continue, it must become a regular feature, in that – (1) those *Mangmis* trained now must be able to meet, perhaps annually for short durations, to share their experiences and to provide support where necessary by the BNLI, and (2) periodically when new *Mangmis* assume positions in the *Gewog* administration, the elected *Mangmis* are mandatorily put through the programme of *Nangkha Nangdrik*.
09. As mandated by the Constitution of the Kingdom of Bhutan, establish Alternative Dispute Resolution (ADR) Centres in all *Gewogs* to be headed by the *Mangmis*, the logistics of which may be determined by the BNLI.
10. Spear-headed by the BNLI, develop a Manual for Alternative Dispute Resolution specifying, amongst others, goals of ADR, political support, roles and responsibilities of various players, human resource needs, funding and administrative support to the ADR centres, linking the informal dispute resolution mechanisms with the formal justice system and its acceptability in the event of spill-over from the informal system, manner by which ability to enforce decisions and settlements will be enhanced, making processes and procedures clear, specifying minimum standards, etc., at the same time keeping the manual as simple and user-friendly as possible.
11. Put in place a system of certifying mediators and a process of registration for their mediation practice and a system of refresher courses for the practitioners.
12. Endeavour to put in place a Tribunals Act leading to institutionalizing various tribunals including establishment of administrative tribunals for dealing cases arising out of the civil service and the RCSC.
13. Efforts must be made to appoint and retain only those judicial officers and court clerks who are qualified legal professionals and have undergone successfully the program of Bhutanese National Law as a prerequisite for entry into legal profession in Bhutan.
14. Staffing pattern of the courts may be rationalized so that inadequacies in staff numbers (as well as quality) do not come in the way of dispensing justice to the court users.

15. Set minimum standards of legal reference materials that each court, by level and size, need to possess in dispensing justice and make such provisions available to the courts.
16. Set a minimum standard of office equipment requirements for the courts to function efficiently in the administration and dispensing of justice and assist the courts in making such provisions available to them.
17. Expedite the project(s) on construction of standard court buildings where such projects exist and secure such other projects for those whose needs for such infrastructure are in great need, without which administration and dispensing of justice may be in jeopardy.
18. The issues of professional support and guidance from the centre and inadequacies in budget and need for additional pool vehicles need to be looked into and measures taken to address the issues.
19. Look into the need of separate government residences for the judges and other judicial officials on the basis of judicial independence and security.
20. Rationalize budget provisions for the courts and secure government commitments on certain minimum level annually so that justice is not denied because of shortage of funds from the government. “Justice delayed is justice denied”!
21. Strengthen and streamline the system of providing legal professional development training in identified areas on regular basis to the judicial and court officers for the purposes of enhancing efficiency in dispensing justice.
22. Review the wide ranging legal professional development training programs that are in place at the moment for efficacy, usefulness, and need-based distribution, and work on strengthening on areas that are of paramount importance in efficient administration and dispensing of justice.
23. Design the legal professional development training programs around themes, in decreasing order of importance: acquiring information on

law and court procedures; acquiring practical skills as judges or court officers; keeping up-to-date with new laws and latest developments; and solving day-to-day problems in specific cases.

24. In designing the professional development training programs, focus on major legal content areas, which in decreasing order of importance are: Professional skills development; Court administration and case management; Criminal law and procedure; Civil law and procedure; and Judicial role, ethics and conduct. The Land law and procedure; Family law and procedure; Human rights, gender equality and other cross-cutting themes; and Business/ commercial law and procedure may be included on need basis.
25. Organization of professional development trainings may be essentially through participatory seminars and workshops, networking and experience sharing, and mentoring on-the-job through use of largely in-house respected judges, using university teachers only when and where necessary and appropriate.
26. Continue to use the international legal professionals for talks on various legal themes for international exposure and cross-fertilization of justice ideas and experiences.
27. Develop judicial faculty at BNLI to put in operation effectively and efficiently its function of providing both pre-service and in-service legal education for the judicial service personnel on a continual and sustain basis.
28. Establish networks between courts in the country through web-portals and physical contacts working out mechanism details as to how and what levels these might be done. Such networks could also include other legal professionals.
29. BNLI through its website/portal build networks within the judiciary fraternity at various levels such as the courts, judicial officials, legal firms and lawyers and Jabmis.

30. BNLI, besides the courts and other legal professionals will have to build strong linkages with the RIM and ILCS for legal education purposes.
31. BNLI will need to build linkages with foreign institutions not just for sharing of ideas, experiences, and information but also for legal research and development, for curriculum development and delivery, for awards and certification, for maintenance of quality and accreditation, for faculty and student exchange programs, for further scholarships and research, and the like. There are many outstanding law universities and colleges in the world with whom linkages are possible. For instance, Royal Court of Justice, Ministry of Education and the Royal Education Council already have links with Stanford University Law School. The University has a functional Bhutan Law and Policy Project (BLPP) in place.