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Dedication

Bhutan witnessed unparalleled progress, peace and stability during the reign of His Majesty the Fourth Druk Gyalpo Jigme Singye Wangchuck.

His Majesty gave us the Constitution and democracy; and laid a solid foundation for a modern legal system, promoting the rule of law, judicial independence and good governance – nurturing fairness and transparency for a just, harmonious and peaceful society.

His Majesty the King has been the beacon of light as the country continues to fight against the COVID-19. His Majesty secured the health, safety and the wellbeing of the people with His magnanimous relief and humanitarian interventions.

On the occasion of the 65th Royal birth anniversary of His Majesty the Fourth Druk Gyalpo, Bhutan National Legal Institute family joins our fellow citizens in paying our respect and gratitude to Their Majesties for their love, care, compassion and service to the people.

Content

Preface

The COVID-19 crisis has affected the whole world. The situation is changing rapidly and the information and literature are still evolving as the scientists and health officials are engaged in studying the virus. The magnitude of the impact of the crisis is yet to be fully assessed or comprehended as the virus continues to wreak havoc. It has severely hit the health and economic sectors of every country. Bhutan was among the fastest growing economies in Asia before the pandemic spread. The virus has pushed our economy to the brink with growth predicted to plummet to a record low of 1.1 percent.

The onset of the pandemic and the ensuing shutdown of large parts of the economy have also led to a threat of mass insolvencies, closure of business, staff lay offs, and loss of jobs and increase in unemployment. The crises calls for innovative and bold ideas, actions and approaches to confront the unprecedented challenges thrown up by the COVID-19 pandemic, not only of governments but whole societies. Even as the pandemic is predicted to linger for a while, experts are engaged in planning, recovering, rethinking and reshaping the economies to make them resilient, sustainable and inclusive in the future.

Prior to sealing of the international border in March this year, His Majesty the King said, *"COVID-19 will cause great disruptions to the global economy, and Bhutan will not be an exception. The economic repercussions will not just impact a select few sectors, but each and every one of us. At such a time, we must exhibit the strength that comes out of our smallness, remain united and support one another."* His Majesty the King has been leading the fight against the pandemic ever since the first case was detected in the country. His Majesty initiated several interventions such as the loan interest waivers and other Royal relief measures in critical areas since April this year; under these schemes, allowances are granted to the unemployed and people who lost their jobs and livelihoods due to the impact of the virus. His Majesty's compassion reached the elderly citizens, people with underlying health conditions and vulnerable sections of the society; and people who are working or studying abroad. Despite the border closure and lockdown, His Majesty has ensured that people have enough food and essential supplies, including medicines. Since March this year, His Majesty continues to address the people on a regular basis to urge them to be resilient in the times of the crisis. His Majesty frequently tours the Kingdom to monitor

and oversee the relief and combat measures. Lately, His Majesty the Fourth King also visited the southern part of the country and met the officials and people and encouraged them. The government has rallied behind the leadership of His Majesty the King.

The COVID-19 global pandemic has come to teach us a lot of lessons. We have realized how interconnected the world is and that no country is immune as it does not stop at borders. It affects all areas of life. The COVID-19 pandemic and the responses of the countries to it have an unprecedented effect on the functioning of justice systems globally, especially where e-justice systems are non-existent or are at an elementary stage. Courts are closing, reducing, or adjusting their operations, which negatively impact the provision of timely hearing. Such measures contribute to increased case backlogs and judicial proceedings. Women and children are at an increased risk of violence and abuses. The migrants, refugees and asylum seekers, and those in detention centres are affected by these changes. The reduced court operations also result in the prolonged detention of pre-trial detainees and prisoners eligible for early release. Without functioning judicial oversight, persons detained while emergency measures are in place to contain the virus cannot be brought before judges in a timely manner. As countries enact emergency laws and regulations to counter the spread of COVID-19, judicial oversight of the implementation of emergency measures is critical to avoid the excessive use of emergency powers. The socio-economic impact of the crisis also has significant justice-related implications as inequalities are exacerbated. Specific efforts are required to improve access to legal services and information to empower people and communities to resolve their disputes, seek redress for rights violations, or counter discrimination on a range of issues including housing, employment, legal status, and access to health benefits or other social protection mechanisms. The Bhutanese judiciary did not remain insulated and unscathed from the pandemic. It has led to complete or partial suspension of the work of courts depriving citizens and businesses of justice services. The lockdowns closed down the courts, adjourning cases causing further delays in the system and paralyzing access to justice. Difficulty to access information, delays in enforcing orders and judgments were some of the other problems. Law firms and clients have also experienced the effect of the pandemic in their business operations due to lockdowns and restrictions on movement and normal operations of their activities.

In order to address such an unprecedented crisis and contain the spread of Coronavirus within the population, countries have introduced measures interfering with the rights and freedoms of individuals, notably freedom of movement. Measures to prevent the spread of the virus include the temporary suspension of all family visits and activities with outside persons, such as sport, professional or vocational trainings. The outbreak of the pandemic also has an impact on the exercise of rights of suspects and accused persons. Direct communication with lawyers, interpreters or with third persons, while the suspects or accused persons are deprived of liberty is more difficult. It's not surprising that when people can't go to work during the lockdowns, and when finances are limited, tempers flare and conflicts arise more easily at homes. The situation of victims of domestic violence is particularly aggravated by social distancing and isolation during periods of confinement. Persons with abusive partners and children with abusive parents are on the one hand more exposed to coercive control, violence and neglect; and on the other hand, their access to support and protection is more limited. Despite apparent lack of human interactions and commercial activities, many people are in need of legal assistance during the lockdowns in the wake of the pandemic. Many countries have imposed strict movement restrictions to prevent the spread of the virus. People break quarantine rules for many reasons bringing them in conflict with the various rules and measures put in place by the government, which calls for legal advice and representations. There are significant fines and penalties in place for breaches of quarantine and social distancing rules. Cases are filed against those accused of breaking social distancing and quarantine rules. Bhutan also witnessed detention and prosecution of few people under the *Penal Code* related to the restrictive movements and the risk of spread of the virus.

COVID-19 creates unprecedented challenges for justice systems across the world. The pandemic challenges access to essential justice services that are hindered by inequalities based on wealth, health or livelihood. The pandemic brings new opportunities for criminals to abuse the fears and working conditions of citizens. The number of cyber-attacks are also on increase. With a number of people teleworking from homes, the chances for cybercriminals to exploit opportunities and vulnerabilities have multiplied. An increase in incidents of racism, xenophobia and intolerance targeted at certain national or ethnic communities are also reported in other countries. As a result of the viral outbreak, prison administrations are under pressure

to limit the impact of the virus on the closed, overcrowded and vulnerable environment with the risk of infection in confined spaces. Both staff and prisoners are concerned about their health and hygyiene. Prisoners suffer from the lack of activities and visits, which makes it a challenge to keep staff motivated and prevent riots by prisoners. This prison overcrowding has compelled to pardon or release the prisoners early. The outbreak of the COVID-19 has also affected probation works. Some groups face higher risks of victimization as a result of the pandemic – women, LGBTIQ (Lesbians, Gays, Bi-Sexual, Trans-genders, Inter-Sex and Queer) persons and children increasingly suffer domestic violence caused by the lockdowns that trap victims with their perpetrators. Reduced court operations often result in longer pre-trial detention, or longer imprisonment of those eligible for early release. In many places, the scarce resources are being diverted away from criminal justice services towards more immediate public health measures, which leave potential and existing victims of violence without protection and advice.

Countries and organizations have created new ways of working during and beyond COVID-19. While the COVID-19 pandemic has exacerbated challenges, it also presents opportunities to harness digital innovations to deliver justice. Many countries came up with e-justice measures to ensure that the rights of victims, suspects, accused persons, witnesses and prisoners are protected. Some judiciaries have capitalized on the situation to mobilize fund for the judicial reforms and bring forth the necessary new laws and changes in the existing laws to transit to e-justice systems and internet courts. The use of the audio and video conference facilities to deliver justice has enabled hearings and adjudication of cases at a time of restricted movement and lockdown measures. China, for instance is using the internet Courts and robots to enhance access to justice. Singapore's electronic filing system and paperless courts have become more relevant and useful during the time of pandemic. More than ever before, we have the reason to capitalize on Information and Communications Technology (ICT) and e-justice system to scale up innovative virtual approaches for the achievement of equitable and sustained access to justice as well as accountable and transparent governance. Though all countries are not equally resourced to set up e-justice system, it can overcome some of the restrictions imposed in connection with the Covid-19 crisis, for example with the increased use of videoconferencing facilities to take the evidence of witnesses without the need to attend courts. The new normal and the

reality created by this pandemic have propelled all of us into digital drive.

We must put up a collective fight against the pandemic and mobilize resources to institute the requisite reforms. Therefore, it is important that government, civil society, donor community, private sector and the academia work together to deepen and accelerate e-justice reforms with the help of ICT and other innovative technologies. Right opportunity is presented by the crisis to mainstream ICT in all aspects of the country's development, including the judiciary and the justice sector. As Bhutan is on the threshold of transiting from the *Least Developed Country* (LDC) to a *Middle Income Country* (MIC), a strong judiciary and a very competitive economy, with ICT-based innovations will enhance ease of doing business and attract foreign trade and investments. ICT is central in the ongoing justice reform with efforts aimed at yielding a modern, efficient, effective and responsive justice system that can withstand the current demands of COVID-19 and reduce case backlog. E-justice will be the new normal with multiple benefits including speeding up processes, enhancing access to justice and making information transparent and available to all. Discussions are being held to develop approaches to accelerate institutionalization of the e-justice initiatives that seek to automate processes in the justice sector and lay ground for integration of systems and harness digital solutions in light of the COVID-19 situation. The importance of the *Justice Sector* is being underscored for the people's wellbeing and in ensuring that people live in a safe and just society where they enjoy their rights guaranteed by the *Constitution* and other laws. This is because an effective justice system provides a level playing field for all, including the most disadvantaged, to seek and obtain a remedy for injustice and grievances.

The Bhutanese justice institutions have in recent years leveraged technology in service delivery, the administration of justice, case management and adjudication processes in court proceedings. This includes the use of audio-video conferencing to hear cases and online *Case Information System* to digitize Court documents for analysis and precedents. The accessibility and affordability of internet service, a key enabler of e-governance and e-justice needs to be addressed at the earliest. The Case backlog, low staffing level and high rate of pre-trial detention are other problems. The capacity of key justice actors

to conduct investigations, prosecution, probation and reformation of offenders need to be improved as well. Changing the work culture and existing mind sets of the people manning the sector is crucial to embrace the new tools and ways of doing things in the new normal time of COVID-19 and e-justice. Many countries have already established electronic court systems and digital networks to submit documents. These tools helped the judicial systems remain operational through the quarantines and lockdowns. E-Justice is replacing the paper-based bureaucracy. This has resulted in more transparent and efficient court proceedings, reducing the time it takes to file cases and publish court decisions. E-justice systems are demonstrating their true value as a way for citizens to seek justice without violating quarantines and lockdowns.

The integrated e-justice system enables judges, lawyers and court staff to work from home and keep the stream of justice flowing uninterruptedly. The digital databases of the case files, teleconferencing equipment, and interactive websites also enhance access to justice. Lawyers have begun to use *Skpe*, *Telegram, Zoom* and other facilities to engage with their clients from distance; while legal professionals have been leveraging *Facebook* and *WatsApp* groups to collaborate with each other from their home offices. The public can also access free legal advice and support Online. The judicial leadership under the guidance of His Majesty the King ensured that the justice is not compromised and the *rule of law* is upheld by protecting the people and respecting the rights to equality before the Courts and to a *fair trial*. *"What we do next is critical. The road ahead will be arduous. The enemy that we are confronting is invisible. But we cannot afford to allow COVID-19 to spread unchecked among the population. It is a new virus and, therefore, still unpredictable. Our priority will always be the health and wellbeing of our people. We will continue to do everything to ensure that lives are not put at risk,"* His Majesty said. Therefore, we must ensure access to justice during the pandemic with our preparedness, response, and recovery plans and measures. We must also ensure that our responses to COVID-19 do not impede Goal 16 of the *United Nations Sustainable Development Goals* (UN SDG 2030), on peace, justice, and strong institutions. All the emergency measures must be based on the *rule of law* and international human rights standards.

As His Majesty the King, at the onset of the pandemic said, *"Indeed, an enormous responsibility faces us all – the King, the government, and the people.*

As in the past, if we think and act as one, and exert our concerted efforts, we will surely overcome every obstacle and prevail against all odds." We will prevail over it and remain safe provided we remain diligent, committed and united in purpose and spirit.

It is a momentous period in the history of the judiciary. His Majesty the King appointed the new Chief Justice of the Supreme Court of Bhutan. Upon the command of His Majesty the Druk Gyalpo, the *Bhutan National Legal Institute*, the Research and Training arm of the Judiciary moved into the Library Wing of the Supreme Court Complex. With His Majesty the Druk Gyalpo appointing Sangay Khandu as the Justice of the Supreme Court; and Lobzang Rinzin Yargay, Tshering Dorji, Dr. Jangchuk Norbu, Passang Wangmo and Bir Bahadur as the Justices of the High Court, the appellate and the constitutional courts have the full quorum of five and nine Justices respectively, as per the Constitution. As the guardian and the final arbiter of the Constitution; and with the fourteen Justices as the holders of the constitutional posts being in the judiciary, it is an opportunity for us to prove that we are worthy of the Royal expectations and public trust.

This issue of the *Bhutan Law Review* tries to encourage, develop and inspire thoughts and jurisprudence on the issues and debates around the global COVID-19 pandemic, and the crippling effect it unleashes on all aspects of life worldwide; and how we learn to invent ways around it and grow accustomed to the new normal and do business as usual. Above all, it chronicles how the justice sector views the changes and challenges imposed by the global pandemic; how we are preparing and responding to the new normal; so that we stay relevant and continue fulfilling our institutional mandates of upholding the *rule of law*, protecting the rights of citizens and delivering justice services to the people, COVID-19 and beyond, for their continued wellbeing and happiness.

Tharchean pays tribute to the key source of the Bhutanese laws, the *Thrimzhung Chhenmo*. Marcus M. Baltzer and Lobzang Rinzin Yargay's work traces modern criminological principles in Buddhism. Tashi Delek examines the doctrine of judicial review as a potent tool to check excesses of power and enhance justice. Sonam Tshering analyses challenges in implementation of laws such as the *Tobacco Control Act* during crises such as the COVID-19. Dr. Markus Metz and Austyn Campbell bring us the experiences of Switzerland and Australia in the dispensation of justice and

implementation of laws during the global pandemic. Due to restrictions of movements and lockdowns imposed by the viral pandemic, judiciaries and law enforcement agencies have resorted to online strategies to dispense justice with the help of digital and information and communication technologies, as the works of Sangay, Garab Yeshi and Pempa Shingdan show. Kinley Choki elucidates laws and practices pertaining to performance of specific obligations in commercial and contractual transactions.

We hope you find something of your interest and choice to read. As always, even as we strive to give our best, we indulge in your forgiveness for our lapses; and constructive criticism for the continued improvement of the Journal and growth of the Institute.

Article 7 - Fundamental Rights

The Exposition of Constitutional Kuthangs

The Constitution of the Kingdom of Bhutan is a sacred document of values that we live by. The *Constitution* mirrors the rich legacies of our successive monarchs. It is a unique document that fulfills the deepest hopes and aspirations of the Bhutanese people. Although the *Constitution* will evolve overtime, but what will remain unchanged are the values it enshrines. The *Constitution* is not simply a gift from His Majesty the Fourth *Druk Gyalpo* Jigme Singye Wangchuk, but it is a repository of our finest values and ideas which creates a system of government that ensures the best chance for Bhutan's progress and stability. A fortunate generation of Bhutanese people inherited this sacred document. It is the statement of our faith in a great leader's vision and hopes for Bhutan's future, as a nation. It represents the sanctity of the selfless service of the king that inspires and guides the citizens of Bhutan towards the path of progress and prosperity.

The Constitution of the Kingdom of Bhutan has created our unique system of democracy, which serves as a reminder of our values, rights, duties and national goals. It is a source of our legal and rightful existence as a nation that gives us the balance, values and priorities to enhance the greatest good of all. The *Constitution* is our *supreme law,* which is the collection of all the laws, policies and priorities, hopes and values of the land. The sacred document is a safeguard, designed to keep us on a balanced, just and harmonious path. It sets direction towards our goals as a society and nation. The *Constitution* is the most profound achievement of generations of endeavour and service. As it is granted to us today, we must remember that even more than the wise and judicious use of the powers it confers, is the unconditional fulfilment of the responsibilities we must shoulder. Only understanding our duties will the exercise of our powers be fruitful. If we can serve our nation with this knowledge and in this spirit, then an even brighter future awaits our country. The *Constitution* is a unifying document that guides the Bhutanese nation to follow a path of progress, peaceful and balance co-existence.

As a tribute to His Majesty the Fourth *Druk Gyalpo* Jigme Singye Wangchuck, on His 60th Royal birth anniversary, the *Supreme Court of Bhutan* and the *Bhutan National Legal Institute*, under the noble guidance

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document embodies. The Institute aspires to embrace the profound wisdom and values of it in the *Bhutan Law Review*-illustrating the vision of His Majesty the King for His People.

1. All persons shall have the right to life, liberty and security of person and shall not be deprived of such rights except in accordance with the due process of law.

2. A Bhutanese citizen shall have the right to freedom of speech, opinion and expression.

3. A Bhutanese citizen shall have the right to information.

4. A Bhutanese citizen shall have the right to freedom of thought, conscience and religion. No person shall be compelled to belong to another faith by means of coercion or inducement.

5. There shall be freedom of the press, radio and television and other forms of dissemination of information, including electronic.

6. A Bhutanese citizen shall have the right to vote.

7. A Bhutanese citizen shall have the right to freedom of movement and residence within Bhutan.

8. A Bhutanese citizen shall have the right to equal access and opportunity to join the Public Service.

9. A Bhutanese citizen shall have the right to own property, but shall not have the right to sell or transfer land or any immovable property to a person who is not a citizen of Bhutan, except in keeping with laws enacted by Parliament.

10. A Bhutanese citizen shall have the right to practice any lawful trade, profession or vocation.

11. A Bhutanese citizen shall have the right to equal pay for work of equal value.

12. A Bhutanese citizen shall have the right to freedom of peaceful assembly and freedom of association, other than membership of

associations that are harmful to the peace and unity of the country, and shall have the right not to be compelled to belong to any association.

13. Every person in Bhutan shall have the right to material interests resulting from any scientific, literary or artistic production of which he or she is the author or creator.

14. A person shall not be deprived of property by acquisition or requisition, except for public purpose and on payment of fair compensation in accordance with the provisions of the law.

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

16. A person charged with a penal offence has the right to be presumed innocent until proven guilty in accordance with the law.

17. A person shall not be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

18. A person shall not be subjected to capital punishment.

19. A person shall not be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence nor to unlawful attacks on the person's honour and reputation.

20. A person shall not be subjected to arbitrary arrest or detention.

21. A person shall have the right to consult and be represented by a Bhutanese Jabmi of his or her choice.

22. Notwithstanding the rights conferred by this Constitution, nothing in this Article shall prevent the State from subjecting reasonable restriction by law, when it concerns:

(a) The interests of the sovereignty, security, unity and integrity of Bhutan;

(b) The interests of peace, stability and well-being of the nation;

(c) The interests of friendly relations with foreign States;

(d) Incitement to an offence on the grounds of race, sex, language, religion or region;

(e) The disclosure of information received in regard to the affairs of the State or in discharge of official duties; or

(f) The rights and freedom of others.

23. All persons in Bhutan shall have the right to initiate appropriate proceedings in the Supreme Court or High Court for the enforcement of the rights conferred by this Article, subject to section 22 of this Article and procedures prescribed by law.

Fundamental Rights are the most basic freedoms and entitlement given to the citizens of Bhutan by the *Constitution*. The *Constitution* guards these *Fundamental Rights* and therefore can be defended in the Court of law. The rights and liberties are precious and tangible jewels for every human being. *Fundamental Rights* are natural rights, which are independent of any statute by virtue of the fact that we are the members of the human race. It has to be understood that Article 7 of the *Constitution* does not 'confer' rights on the citizens but it reaffirms the intrinsic existence of the rights and afford them a constitutional legal protection. The purpose of enumerating the rights in Article 7 is to establish them as legal principles to be interpreted by Courts. Thus, each *Fundamental Right* has a foundational value that acts as a limitation on the power of the government.

The *Biography of the Clear-minded Rabbit* states:[1]

Free and independent, unrestrained by anyone;
Carefree and open-minded, aloof from others' views;
Being oneself, doing what one pleases;
This is the virtue of being open-minded and relaxed.

1 Bhutan National Legal Institute (November, 2015). *The Exposition of Constitutional Kuthangs*.

As stated above, each individual is destined to be entitled to rights. Article 7, Section 4 of the *Constitution of the Kingdom of Bhutan* guarantees a Bhutanese citizen the right to freedom of thought, conscience and religion.

The *Chronicles of Guru Padmasambhava* states:[2]

Mix not the teachings but uphold your own faith;
Practice not Bon for it is a heretic faith;
Dismiss those who practice the wrong faith.

Although individual in general, have the right to profess and practice any religion, the *Constitution* forbids people to compel a person to belong to another faith. The *Constitution* guarantees the freedom of press, radio, television and other forms of dissemination of information, including electronic media. *Kuenkhen* Mipham stated that:[3]

Although it is not appropriate to reveal secrets;
It is not a violation in the face of a pressing need.

The *Special Utterances* (*Udanavarga*) states:[4]

For all, life is dear;
All fear punishment;
Put oneself in others' place;
Neither beat nor [kill].

These principles contained in the above aphorisms are enshrined in Section 18 of this Article which states that no person should undergo the punishment by death. Further, it also narrates that a person shall not be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence nor can a person be attacked on his honour and reputation.

The *Sutra of the Noble Tree states:*[5]

Drink supreme nectar and medicines;
Not the poison of the wrong view.

2 Ibid., p. 20.
3 Ibid., p. 20.
4 Ibid., p. 20.
5 Ibid., p. 20.

This Article also guarantees a person the right to consult and be represented by a Bhutanese *Jabmi* of his or her choice in line with the principle stated in *The Prayer of the Blissful Realm,* which states:[6]

> *There is little desire to utter meaningful words;*
> *Humbly, truthfully and without resentment.*

Engaging in Bodhisattva Behaviour states:[7]

> *The Compassionate One who sees far;*
> *Has permitted all that is prohibited.*

This constitutional principle is expounded in Section 22 which states that without being swayed by the rights conferred by the *Constitution*, nothing in this Article shall prevent the State from subjecting reasonable restrictions by law in the interest of *sovereignty, security, unity* and *integrity* of Bhutan.

The Sun and Moon

The Sun and the Moon motifs represent the female and male element of the universe.

Jamyang Khyentse Wangpo state:[8]

> *Lifespan like the indestructible Vajra and Mount Meru;*
> *Like the bottomless fathoms of the ocean;*
> *Like the luminous undying sun and the moon.*

The above imageries can be likened to the undimmed radiance of His Majesty the Fourth *Druk Gyalpo* and His Majesty the King Jigme Khesar Namgyel Wangchuck. The sun and the moon motifs symbolize the joyful fruition of the deeds of our monarchs. It is a radiance of the selfless sacrifices and the

6 Ibid., p. 20.
7 Ibid., p. 21.
8 Ibid., p. 22.

benevolent deeds of our kings - past, present and future who illuminates the Bhutanese nation like the radiant sun, the moon and the stars.

The Curved Knife

The curved Knife represent the weapon of destruction.

The Treatise on the Princely Rule: The King's Ornament states:[9]

> *Whoever's duty it is to offer counsel to King;*
> *Speak not of selfish and prejudiced motives.*
> *Whatever good and bad there is to adopt and discard;*
> *Carry out suitably to the best of one's knowledge.*

In line with the above precepts, the Curved Knife symbolizes the ability of the *Parliament* to transparently decide issues of public interest to ensure accountable and good governance.

The Glorious Conch

The Glorious Conch represents the far resounding melody of the religion. *The Treatise on the Princely Rule: The King's Ornament* states:[10]

> *To send the melodious sound reverberating into ten directions;*
> *Spreading fear among all types of heretics and non-believers;*
> *To awaken the consciousness of all sentient beings.*

The Glorious Conch also symbolizes *Lord Buddha*'s radiant white teeth and his Sixty Branches of *Divine Voice*. The right-whorled white and melodious Conch also represents the dharma. It is said that the white dharma Conch born of Five-life Sage's wishes has the power to tame pernicious crocodiles. The virtue of offering the melody of the *Conch* containing Sixty Branches of Divine Voice of the *Buddha* will help one to gain popularity in the future lifetimes. The sound of the *Conch* will stir the heretics and the non-believers with fright and cleanse the sentient beings of afflictive emotions, enabling them to attain higher states of awareness besides preventing diseases and ushering in auspicious times.

9 Ibid., p. 22.
10 Ibid., p. 22.

The Sword of Wisdom

The *Manjushri Nama Samgiti*, it states:[11]

> *The Sword of Wisdom that destroys all;*
> *Cuts through the worldly perceptions best.*

The *Sword of Wisdom* symbolizes the 'skillful means' and 'wisdom' that cuts the 'darkness of ignorance' and 'delusions' that obstructs the accomplishment of any worldly undertaking.

The Glorious Endless Knot

The *Glorious Endless Knot* is a sign of interdependence and interconnectivity. The *Sutra of the Great Assemblage*, it states:[12]

> *The Eternal Knot is auspiciousness of the mind,*
> *The mind of all awakened liberators;*
> *To lead beings on the supreme path of liberation.*

The *Glorious Endless Knot* has no end. It symbolizes the mind of *Lord Buddha* filled with unparralled wisdom, kindness; infinite and undefiled virtues. The virtue of offering the *Glorious Endless Knot* to the enlightened mind of the *Buddha* which is an unlimited fountain of wisdom, compassion, and power will help us fulfil all our wishes and achieve an ever growing discriminating and incisive intelligence.

Volume of Scriptures[13]

> *The scriptural volume, the very image of dharma;*
> *Generates all kinds of noble virtues and qualities.*
> *To awaken the sensory faculties of all beings;*
> *May we be empowered to know all phenomena.*

11 Ibid., p. 23.
12 Ibid., p. 23.
13 Ibid., p. 24.

The Ambrosia

The *Zhi khro na rak dong sprugs* states:[14]

Applied to eight thousand blood vessels;
The ambrosia that destroys all suffering in six transmigrations;
It is the very nature of five families of Buddhas and five wisdoms.

It is believed that when the universe was formed, the oceans were churned and poisons were generated. When the moon gradually appeared, and the elixir of immortality flowed, the gods and demigods all scrambled for it. But only the gods got the elixir. It is further believed that the yeast used for brewing alcohol today originated from that elixir. So, alcohol is also known as elixir today.

The Lotus[15]

The supreme lotus speech is the king of all dharma;
Unblemished by afflictive emotions is the lotus mind.
It is the speech that awakens all beings;
May it bring auspiciousness of the supreme lotus tongue.

Lord Buddha's tongue is likened to lotus because from it flow words sweet and soft like the petals of lotus. The *Buddha's* tongue, resembling lotus in full bloom, is beautiful and light and it can cover the whole face. Although lotus grows from mud, unblemished by mud, it blooms beautiful and supple, yet elastic. The virtue of offering lotus to the tongue of *Lord Buddha* will bless one to be reborn with a beautiful physical appearance without any defect.

The Three-eyed Jewel

Kama Duedor describes the jewel which symbolizes the four kinds of enlightened activity:[16]

The precious jewel that fulfils all wishes;
Is close to the hearts of all beings;
It is abundant with all supreme virtues.

14 Ibid., p. 24.
15 Ibid., p. 25.
16 Ibid., p. 24.

Thus all wishes are fulfilled naturally and effortlessly by the wish-fulfilling jewel. Therefore, the jewel symbolizes the fulfilment of all developmental endeavours undertaken in the spheres of spiritual and temporal traditions without any obstacle.

The Parasol

The *Embodiment Scripture* states:[17]

> *Eliminating all manner of suffering caused by heat;*
> *Triumphing over all kinds of afflictive emotions;*
> *Increasing all types of supreme virtues;*
> *Let parasol's power overcome all non-believers.*

The *Parasol* symbolizes the crown of *Lord Buddha's* head which is round and smooth like a *Parasol*. The *Parasol*, which comes with a handle, is made of multi-coloured fabrics of the gods with their frills adorned with precious pearls. The virtue of offering *Parasol* to the head of the *Buddha* will remove all manner of downfalls, misfortunes, destructive powers of heat, and suffering caused by afflictive emotions. Suppressing all non-believers, it will bless all with supreme virtues and qualities.

The Golden Yoke

The *Chronicles of Padmasambhava* states:[18]

> *Propagate both bulky and heavy golden yoke of secular law;*
> *And soft and tight silken knot of religious law.*

The *Silken Knot* of religious law is derived from the code of monastic discipline. The discipline of monastic education and lifestyle binds the afflicted mind with the heavy yoke of secular law derived from *Ten Divine Virtues* and *Sixteen Pure Human Laws*. The *Golden Yoke* calls upon us to conform all our actions to the dual system of governance in gratitude to the successive monarchs and to fulfil *Gross National Happiness*.

17 Ibid., p. 26.
18 Ibid., p. 26.

The White Scarf Ribbon[19]

The *White Scarf* with a knot on the head was born of the merit of the gods. When *Lord Buddha* was on the summit of Mount *Meru*, *Indra*, the god of gods, offered it to the *Buddha* entreating him to give a teaching. It is a 'material of touch' blessed with the power to summon the great sound of teachings. It symbolizes the upholding of the pure lines of religious traditions in Bhutan with reverence. *Zhabdrung Rinpoche's Great Code of Law* specifies that Bhutan's monastic order follows the *Vinaya* discipline in its external conduct and *Mantrayana* discipline in its mental training. The *White Scarf* shows that the pure moral conduct in the monastic order is the basis for peace and happiness and those who fail to abide by the code of conduct stand to be bound by the unforgiving silken knot of religious law.

Five Objects of Desire

Kongtrul Rinpoche state:[20]

The beautifully coloured and shaped attractive string of ornaments;
Whatever glorious body there is in all directions, at all times;
If one offers all of these to the Buddhas with deep devotion;
One will gain a pure body, mind, and all physical marks of a Buddha.

The *Five Objects of Desire* that one can offer to *Buddha*s and *Bodhisattva*s for the complete accumulation of merit include body, sound, smell, taste, and touch are:

1. **The Clear Mirror**

The *Clear Mirror* has the ability to reflect all objects clearly and realistically. The Mirror is offered to the body of the *Buddha*s to gain supreme awareness of the body. The virtue of making this offering will help one take rebirth with good looks that are adorned with the physical attributes of the *Buddha*s.

2. **The Dranyen**

Good music and melody are considered as sound offerings. The offering of sounds of the *Dranyen* to the ear of the *Buddha*s help us to gain a supreme

19 Ibid., p. 27.
20 Ibid., p. 28.

sense of hearing; cause one to be reborn with a keen sense of hearing and blessed to hear kind words and the sweet melody of teachings incessantly.

3. The Saffron

Offering saffron water contained in a conch shell imbued with the naturally clear wisdom of *Dharma* to the nose of all the *Buddha*s to gain a supreme sense of smell will enable one to be reborn with a keen sense of smell and the *'smell of morality'* emanating from one's body.

4. The Supreme Flavour

Offering ritual cakes and fruits that contain one hundred types of flavour to the tongue of the *Buddha*s to gain a supreme sense of taste will enable one to be reborn with a keen sense of taste and the fortune to feast on sumptuous food and the 'nectar of meditative state.'

5. The Object of Touch

Offering the soft silk – the best of the gods' clothes not woven by ordinary humans, to the body of the *Buddha*s to gain supreme a tactile sense will enable one to be reborn with a keen sense of smell, the virtue of modesty and shame, and the good fortune to wear the best kinds of clothes.

Thrimzhung Chhenmo: The First Codified Law of Bhutan[1]

Introduction

The Bhutanese legal system has evolved over time, to meet the changing needs in the country. This has led to the development of a unique and distinct legal system. Undoubtedly, while this can be ascribed to a large extent to the country's rich culture, traditions and values,[2] the isolation policy adopted by our farsighted monarchs has also played a vital role in the emergence of such a unique system in Bhutan.[3] In this context Richard Whitecross states:

> *…the move towards creating a unified legal system in Bhutan grew out of ideas discussed and developed in Bhutan*[4] *reinforces it*.

Bhutan remained isolated from the outside world and its influence until the 1960s, pursuant to the strategic closed-door policy adopted by the successive monarchs. This policy engineered the Royal government to devote its energy and resources for the growth and development of the country, and ultimately helped secure and consolidate the integrity of the country and strengthened its sovereignty and security.[5] This Paper tries to explore the vital roles played by the principal actors who initiated the move for the drafting and enactment of the *Thrimzhung Chhenmo,* and to assess its significance in the present modern Bhutan's legal and judicial system.

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1 Contributed by Tharchean.

2 Tobgye, S. (2019). Byang Chub Lam Du Drenpi Khrims: The Procedural Reforms Ushered by the Civil and Criminal Procedure Code of Bhutan*, Bhutan Law Review* (12) 12.

3 Mehra, G. N. (1974). *Bhutan: Land of the Peaceful Dragon,* Vikas Publishing House Pvt. Ltd., Delhi*,* p. 110 and also see Rahul, R. (1971). *Modern Bhutan,* Vikas Publications, Delhi*,* p. 9.

4 Whitecross, R. (2002). *The Zhabdrung's Legacy: State Transformation, Law and Social Values in Contemporary Bhutan,* University of Edinburgh, p. 373.

5 Mehra, G. N., & Rahul, R. (1974).

The Establishment of the National Assembly

As the Kingdom advanced it ventured into a new judicial and political paths. The path to transformation of the Judiciary and the legal system of the country encountered numerous challenges. However, it also presented opportunities, which essentially called for the development of an appropriate policy for the interest and well-being of the country and people. As the country was in a nascent stage of socio-economic development, the then reigning monarch, His Majesty the Third Druk *Gyalpo*, Jigme Dorji Wangchuck grappled with the issues of socio-economic development and progressive modernization. Upon ascending the *Throne* in 1952, His Majesty devoted all His efforts to the development of the country.[6]

His Majesty's primary focus, besides the security of the country, was its development. He placed vital importance on the collective wisdom and decision-making by the Bhutanese People. To realize this great vision, and to take the nation forward into the area of socio-economic development and progress, His Majesty believed that such a great objectives could only be achieved with the joint efforts of the government and the people, working together in the spirit of unity and cooperation. [7] Against this backdrop, His Majesty, as part of the Royal Initiative to consolidate and strengthen the nation, established the *National Assembly (Tshogdu)* in 1953.[8] His Majesty emphasized that any matter pertaining to the development and welfare of the people was to be deliberated and endorsed by the *Tshogdu*.[9] The *Tshogdu,* as the legislative branch of the government, comprised of hundred and fifty members with one hundred and six elected representatives of the people from the twenty districts; ten from the *Dratshang* (clergy); and twenty four nominated representatives of the government. The primary functions of the *Tshohdu* making laws and reviewing them. The *Tshogdu* then, marked the birth of the legislative branch of the Government, paved the way for the growth and development of the *Judiciary*.

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6 Ura, K. (1995). *The Hero with Thousand Eyes: A Historical Novel,* Centre for Bhutan Studies, Thimphu, p. 284.

7 Ibid, p. 270.

8 Ibid.

9 Ibid.

The Drafting of the *Thrimzhung Chhenmo*

In the earlier days of the constitution of the *Tshogdu,* as a new institution, people were not very familiar about it. Yet, in the history of Bhutan, it demonstrates the farsighted visions and policy reforms of His Majesty the Third Druk *Gyalpo*.[10] In other jurisdictions, be it in the *Common Law* or the *Civil Law System*, the essential and most important functions of the *Legislature* was to exercise lawmaking powers and review the national policies. In this light, His Majesty, undertook the onus of drafting the *Thrimzhung Chhenmo (Thrimzhung)* with as many as seventeen chapters all by Himself.[11] Thus, the draft *Thrimzhung* arguably contained the comprehensive and exhaustive provisions of laws, dealing with substantive and procedural aspects of both civil and criminal matters. The draft was issued to the members six months in advance to provide enough time for them to analyze and come up with appropriate proposal or suggestions during the deliberations. Following the discussions and deliberations arguably from 1953, the *Tshogdu* ultimately enacted the *Thrimzhung* in 1959.[12]

The *Thrimzhung* is very comprehensive and containing exhaustive provisions on the general principles and procedures of civil as well as criminal matters. The *Thrimzhung* is the first set of codified Bhutanese law. Hence, Whitecross, notes that *Thrimzhung* laid down the "solid legal foundation on which to base the integrity of the country…and the mighty and the humble…both made equal before the law."[13] While Justice Sonam Tobgye,[14] in noting the significance of the *Thrimzhung* in setting the pace for the formal structural development of the Bhutanese judicial system, described it as bringing "a

10 Whitecross, R. (2002). *The Zhabdrung's Legacy: State Transformation, Law and Social Values in Contemporary Bhutan,* p. 357.

11 Ura, K. (1995).p. 285. Also in 2016, Former *Drangpon* Dasho Lhadarla and late Dasho Shingkhar Lam shared with the author that as and when new ideas came through His mind, His Majesty would immediately ask the *Secretary* or [any other attendants] to make note of them for reference.

12 Ibid.

13 Ibid. See also Whitecross, R. (2002). p.358.

14 Former *Chief Justice of Bhutan*.

formal system of law and legal system."[15] Further, he emphasized that the *Thrimzhung* "codified our enduring culture, customs and traditions; and our unique and indigenous Bhutanese civilization."[16] Yargay and Chedup categorically suggest that the enactment of the *Thrimzhung Chhenmo* was a milestone in the Bhutanese legal history. It codified existing procedural and substantive laws of the Kingdom.[17] Ura holds the same view that as the *Thrimzhung* notably established a sound legal base for the emerging Kingdom.[18]

With the birth of the *Thrimzhung,* the legal and judicial sector of Bhutan progressed remarkably. Particularly, the appointment of *judges* [*Drangpons*] in the districts in the 1960s brought about a key transformation and development in the Judiciary. With this development, the judicial branch gained relative independence from the influence of the *Executive* powers.[19] Further, the establishment of the *High Court* as a Court of Appeal in 1968 formalized the Bhutanese legal system, and it ushered in a very important era in the history of the Judiciary in the country. Therefore, the *Thrimzhung* marked the beginning of the lawmaking process in Bhutan, and it bears a historical significance on the development and evolution of the Bhutanese legal system.

Presently, although, almost all the provisions of the *Thrimzhung* been replaced by the successive enactments and has become *"empty shells"* in the words of the Office of the Legislative Counsel of the Province of British Columbia,[20] it laid the solid home grown foundation for the development and creation of subsequent statutes in the country. To reinforce the preceding statements and to highlight the truth of this inference, Sonam

15 Tobgye, S. (2019). p.12.

16 Ibid.

17 Yargay, L.R., & Chedup, S. (2018). The Court-Annexed Mediation: Enhancing Access to Justice through In-House Court Annexed Mediation Services in Bhutan, *Bhutan Law Review* 10 (95).

18 Ura, K. (1995). p. 285.

19 Hainzl, G. (1998). The Study on the Bhutanese Legal System, [Unpublished] at 28. See also Whitecross, R. (2002).p. 362.

20 Retrieved from website: https://www.bing.com/search?q=www.+crownpub.bc.ca+in&cvid, see also Whitecross, R. (2002). p.370.

Tobgye,[21] states that the enactment of the *Civil and Criminal Procedure Code of Bhutan* in 2001 saw migration of almost all the procedural provisions of laws from the *Thrimzhung Chhenmo.* This is natural for all the kinds of legislation since the purpose of the law is to serve the needs of the societies and all outdated laws which fail to meet the emerging needs of the changing societies, ought to be replaced by the subsequent ones.[22]

The laws have to respond to the emerging socio-economic demands of the nation and other challenges of time. Laws are not static and change with time. In this light, the *Thrimzhung Chhenmo* is not only relevant for academic purposes, but it is the sources for many laws; is the genesis of Bhutanese jurisprudence. The aim of this article is to place on record the author's admiration of the framers of the *Thrimzhung* and acknowledge its importance in the evolution and development of Bhutanese laws. *Thrimzhung* laid down the foundation for lawmaking traditions in the country. The principles and values contained therein are still relevant in the present context as they are incorporated in the *Constitution* and other subsequent enactments.

Principles and Values

The *Thrimzhung* enriched the Bhutanese legal system and created an indigenous jurisprudence with the established constitutional and judicial principles for an effective, efficient and transparent Judiciary for the administration of justice and the delivery of judicial services. This reinforced the service centred role of the Judiciary in fulfilling and discharging the sacred function of dispensing justice and judicial services to the people.

As far as the modern principles are concerned, it was a bold step on the part of the framers of the *Thrimzhung*, that they had done away with the concept of serfdom and made all the Bhutanese citizens 'equal under the law' without making any distinction based on their rank, social status, or other official positions.[23] One of the notable aspects of the *Thrimzhung* is

21 Tobgye, S. (2015).

22 Tharchean. (2018). Ignorance of Law is no Excuse: Empowering People though Dissemination of Laws, *Bhutan Law Review,* 9 (59), Barak, A. (2006). *The Judge in a Democracy,* Princeton University Press, 5-8.

23 *Thrimzhung Chhenmo*, *1959*, s. OM.

the provision on the Royal Prerogatives. Section AA of the *Thrimzhung* vested the reigning monarch with judicial powers to increase or reduce or commute sentences in criminal and other cases. This power is similar to the ones which are being exercised by the heads of the states in other nations. It is evident that these principles had far reaching significance on the development and evolution of the Bhutanese legislations and the judicial system. These principles are still relevant even in the post-democratic Bhutan, and they are carried forward and embraced in the pertinent provisions of the *Constitution*.[24]

Natural Justice and Conflict of Interest

As regards to the adjudication of cases, to guide the ones who discharge the judicial functions, the *Thrimzhung* had incorporated the principles of *natural justice*. To this effect, the *Thrimzhung,* provides:

> *A judge shall not preside over a case in which his relatives are involved or a case in which he may have a conflict of interest.* [25]

The *natural justice* has been described as:

> *A great humanizing principle intended to invest law with fairness, to secure justice and to prevent miscarriage of justice.*[26]

Hence, it may be argued that the conception of *natural justice* has a direct relationship with a *conflict of interest*. The expression *conflict of interest* denotes a situation wherein the person who is tasked to adjudicate a matter has his interest in conflict with his duty.[27]

To avoid such a difficult situation, the principles of *natural justice* provide guidance with established principles and standard solutions. As the objective of this doctrine is to afford justice to the parties or to prevent miscarriage of justice, it strictly mandates that any statutory authority discharging judicial functions, is to decide a matter solely based on the merits of the case and in accordance with the law. The judge therefore, exercising the power of adjudication needs to be consciously mindful of his position and maintain

24 *Constitution of the Kingdom of Bhutan*, *2008,* Art. 2 (16) (b & c).

25 *Thrimzhung*, s. DA 1.3.

26 Takwani, C. K. (2008). *Lectures on Administrative law*, Lucknow: Eastern Book Company, p. 170.

27 Ibid., p.182.

neutrality to the litigants and is prohibited from taking sides. The decision or the outcome of the dispute should not be influenced nor be determined by any kind of relationship that may or may not exist between the presiding Judge and the parties. The doctrine in essence suggests that depending on the subject-matter of a dispute between the contending parties, a person who is acting as judge,

> *He must think dispassionately and submerge his feeling on every aspect of a case…and he should not allow his personal prejudice to go into the decision making.*[28]

The sources of *conflict of interests*, based on the nature and types of controversy of the litigants, generally, may arise from biases or predispositions of the judge and it includes:[29]

(i) Pecuniary or financial bias;

(ii) Personal bias and

(iii) Official bias or bias as to subject matter of the dispute.

The impact of influence by such personal interest or demonstrating the appearance of labouring under such an influence,[30] is that a person is disqualified from acting as a Judge or in a case where the decision has been already rendered, it gets set aside and the proceedings vitiated.

Apart from the fairness and justice principles, the *Thrimzhung* also introduced the concept of *open trial* in the Bhutanese judicial system. Section DA 2.13 states that:

> *All persons attending the hearing of a case whether they are litigants, witnesses or members of the public in the gallery shall pay due respect to the Court and not indulge in any act that can be deemed as contempt of court.*[31]

While the *Thrimzhung* encouraged the public to witness the trial, it also ensured the decorum of the court by maintaining the discipline of the the litigants.

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28 Ibid., p.178.

29 Ibid., pp.178-179.

30 Ibid., p.180.

31 *Thrimzhung*, s. DA 2.13.

Appointment of Judges

The *Thrimzhung* also introduced the concepts of modern judicial systems and jurisprudence to the Bhutanese legal system. It provides that only a judge appointed by His Majesty the Druk *Gyalpo* is empowered to hear and decide the cases. No other persons, regardless of rank or position, can either hear the cases or award sentences.[32] It also emphasized that no judge can delegate his/her powers of hearing and deciding cases or awarding punishment[s] under the law to any person.[33] The decisions and award of sentences was to be guided by the law and not to be stirred up or influenced by personal vagaries of whims and fancies.[34]

Codification of the Customary Law

Mediation or *Nangkha Nangdrig* is a means of resolving a dispute which existed since the 8th century A.D. in Bhutan. Mediation, was thus, recognized and implemented as the main dispute resolution method in the country and not as an alternative to the court system.[35] The prevalence and existence of such a system is natural as the occurrence of disputes between individuals, communities and nations is obvious and inevitable. Hence, it is, in the best interest of the litigants and the state that a dispute is settled and resolved at the earliest opportunity with an appropriate dispute resolution mechanism.

This informal conflict resolution technique is the homegrown dispute resolution mechanism in Bhutan. It served the needs of the people in different parts of the country. Thus, the framers of the *Thrimzhung* acknowledging its efficacy and utility for the Bhutanese people, had codified it as the *statutory law* with a separate chapter with detailed provisions on *"Adjudication without Proceedings."*[36] A notable provision of the *Thrimzhung* is that it made a clear distinction between the civil and criminal cases. It categorized cases such as treason, murder, armed robbery and larceny as cases that cannot be settled out of court.[37] Even to this day, the position of

32 *Thrimzhung*, s. DA 1.1.
33 *Thrimzhung*, s. DA 1.2.
34 *Thrimzhung,* s. DA 1.5.
35 Yargay, L.R., & Chedup, S. (2018). p. 92.
36 *Thrimzhung*, c.11.
37 *Thrimzhung*, ss. DA 3.1 & 3.2.

the category and classification of cases is the same, and is followed faithfully by the courts.

Legislative Drafting

Unlike in the 1970s, Bhutan does not have a specific entity or body charged with the responsibility of drafting legislative *Bills*.[38] Hence, the different government agencies and others initiated the drafting of *Bills* either on their own initiative or with the help of foreign experts or consultants,[39] depending upon the mandates or the drafting instructions received from the competent authority or the sponsoring Minister.[40] The lack of specific authority and or guidelines on the legislative drafting techniques, compelled every agency to take upon themselves the task of drafting *Bills* guided by their own judgment, experience and advice from the consultants until recent times.

The making of law is a primary and essential function of the *Legislature.*[41] However, as per the norms of the legislative process, the drafters have to prepare a *Bill* before it is tabled in the *Parliament* for deliberations and consideration. Hence, Professor Helen Xanthaki notes that legislative drafting is the process of constructing a text of legislation[42] and described it as:

> *Legislation is a form of communication: it involves, in its most part, the expression of a prohibition of citizen activity: after all, citizens can do whatever they wish, unless it is prohibited by law. And so the pursuit of modern drafters is to share that message with their audience [the users of the legislation] in a manner that gets them to get heard loud and clear.*[43]

38 Tharchean. (2013). Missing Bhutanese Nuances: Legislative Anomalies, *Bhutan Law Review* 10 (61). See also the *Marriage Act, 1980* and *Inheritance Act, 1980*.

39 Ibid., 62. See also Whitecross, R. (2002). p. 369.

40 Parliament of Bhutan. (2016). *Legislative Drafting Manual*, c. 2 & 3, p. 6 &11.

41 *Constitution of Bhutan,* Art.10 (1).

42 Xanthaki, H. (2013). Legislative Drafting: A New Sub-Discipline is born, *Student Law Review*, 1(57). Retrieved from https://www.researchgate.net/publication/314806485_Legislative _drafting_a_new _sub-discipline _of _law_is born.

43 Ibid., p. 61.

While O.P. Motiwal claims that:

> *Like any other branch of writing, legal writing also requires the fulfillment of the very well-recognized canons of good writing. Simplicity of language, brevity of expression without sacrifice of completeness, consistency of approach and the use of the same words and phrases for the same meaning throughout, clarity, definiteness and directness of expression and lastly elegance of form and design are some of the basic factors which cannot be ignored. Drafting techniques have a long way to go before they satisfy all those who have a right to be satisfied with the state of written laws.* [44]

As both the authors had outlined the basic principles and the characteristic of a good legislative drafting, it is undoubtedly useful and relevant to our context and be of guidance for the purpose. As the primary objective of legislation is to give a legal effect to a government policy, it is necessary to equip the drafters with ability to do it with the application of essential principles and techniques so as to produce a good draft. As for the principles of legislative drafting, Professor Xanthaki suggests that there are two schools of thought depending on the type of legal system that the country embraces. The countries that follow the *Common Law System* believe that "drafting is a pure form of art or a quasi-craft." If it is so, she adds that:

> *It is this approach to the discipline that supported the mentoring style of training for drafters. If drafting is an art or a craft, then creativity and innovation lies at the core of the task. Rules and conventions bear relative value, and the main task of the drafter is to learn the craft from those with more experience. If one believes that drafting is an art, then formal training is not relevant to drafters. In other words, if experience is the only thing that really matters, then simply time spent by a senior may offer the apprentice the only opportunity to learn on the job. But is drafting really a liberal skill possessed by enlightened legal scholars who take part in drafting committees on behalf of a variety of governmental Ministries and agencies drafting legislation?*[45]

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44 Motiwal, O.P. (1974). The Principles of Legislative Drafting, *Journal of Indian Law Institute*, 16 (1). Retrieved from htpps://www.jstor.org/stable/43950311?

45 Xanthaki, H. (2013). p. 63.

She also asks if the drafting is a science or a 'technique.' To which, she responded, saying that this is the approach taken by the *Civil Law* countries. If so then, she claims:

> *If drafting is a science, then there are formal rules and conventions whose inherent* ***nomoteleia*** *manages to produce predictable results, provided that the application is correct. If this approach is followed, then there is plenty of scope for formal training. Drafters may learn the rules and conventions of their science, and the correct way in which these are applied in order to produce predictable results.*[46]

Since the process of legislative drafting entails constructing a legislation text,[47] therefore, it represents a specialized and challenging task for the concerned involved in drafting. To undertake such a task and to accomplish it in the desired manner, it goes without saying that the draftsman has to have the requisite expertise to handle it. In this sense, as the essential legislative drafting skills are not inherently endowed with the drafters, it is necessary and desirable to acquire such skills and know- how either through formal trainings or by individual self-pursuits. Hence, the Bhutanese experience has more common elements with the *Common Law System*. In a similar manner, the type of legal system that a country follows also determines the way the legislative drafting processes are organized. The prevailing practices in the *Common Law* and *Civil Law Systems* are as follows:

> *In Civil Law countries, policy formulation and legislative drafting are closely linked. The same officials who develop the policy are also involved in the drafting of the necessary legislation. Once the legislation is drafted, it is then reviewed by officials in other Ministries such as those in Justice who are generally concerned with ensuring that the legislation achieves its purpose in a constitutional manner.*[48]

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46 Ibid.

47 Ibid., p. 57.

48 Organization for Economic Cooperation and Development, *Good Governance in Egypt: Legislative Drafting Manual for Better Policy*. Retrieved from https://www.oecd-ilibrary.org/sites/9162854f-en/index.html?itemld=/content/component/9162854f-en&mimeType=text/html.

In the *Common Law System*, policy-making and legislative drafting are separated. Once a political decision is made to enact legislation, officials in the *Executive* branch of Government prepare policy papers setting out the problem, alternative solutions, and the final decision as to which policy will be adopted. The policy paper is then sent to legislative drafting specialists who compose the legal texts.[49] As the foregoing paragraphs demonstrate that those legislative drafting processes vary in different jurisdictions, the Bhutanese present system, however, resembles with that of the *Common Law System*.

The *Office of the Parliamentary Counsel* (OPC) of the United Kingdom, which is composed of a group of government lawyers specialized in drafting legislation lists the principles of good law as: necessary; clear; coherent; effective; and accessible.[50] Recognizing the constraints in the preparation of legislative *Bills* in the country, the *National Assembly* adopted *Legislative Drafting Guidelines* in 2004 with an objective to promote uniformity in the structure, style and form of *Bills*, and to ensure procedural consistency in enacting laws. The *Guidelines* was updated to *Manual* in 2016 which set out the legislative process, and prescribe a form and style for a legislation.[51]

As concerned with the legislative drafting approaches and practices in the country, the Hon. President of the *Bhutan National Legal Institute*, Her Royal Highness Princess Sonam Dechan Wangchuck in collaboration with the *Jigme Singye Wangchuck School of Law*, organized a-three day Legislative Drafting Training in 2017 for the Legal Officers of the Government and other Agencies.[52] The training was facilitated by the faculties and the officials of both the Institutions. The training besides drawing upon the *Legislative Drafting Manual* 2016, also introduced research and drafting practices to the Legal Officers responsible for legislative drafting. The ultimate objective of the training was to create awareness on the legislative drafting techniques and to stimulate the desire to establish objective standards for effective legislative drafting processes in the country. It aimed at improving the quality of drafting legislation in the country, and in particular:

49 Ibid.

50 Ibid.

51 Parliament of Bhutan. (2016). *Legislative Drafting Manual*.

52 Bhutan National Legal Institute. (2017). *Background Documents and Training Records*.

(1) To describe clearly the past and present legislative drafting process;

(2) To expose legislative drafters to an internationally-accepted process for distilling draft legislation from policy priorities;

(3) To introduce legislative drafters to appropriate Online research databases;

(4) To instruct legislative drafters in best research and drafting practice;

(5) Indirectly, to encourage the evolution of a Bhutanese practice in legislative drafting, that is common across all agencies; and

(6) Indirectly, to encourage cooperation among legislative drafters in the future drafting activities.[53]

Conclusion

The *Thrimzhung Chhenmo* can rightly be described as the enlightened law that its creator had gifted to the people of Bhutan. For the present legislative organ of the country, the *Thrimzhung* can serve as the best example of the laws in the country, and they can draw useful lessons from it. This is because as we compare the situations and conditions in the present time and the ones during the time of the drafting and enactment of the *Thrimzhung*, it is distinct and clear to all of us and need not require any elaboration. The law as a social instrument is aimed to regulate human conducts. To achieve a good draft of any law is not a joyride. It requires proper planning in trying to unearth and comprehend the policy issues behind the task and strenuous efforts in drafting it. Sowing a seed for good law begins with the first idea of a draft. In the same manner, we can recall the Chinese adage that, *"a thousand mile journey begins with a step."* In this regard, the *Thrimzhung Chhenmo* stands out as one of the most important statutory instruments in the history of this great nation.

53 Ibid.

Case of Angulimala: The Genesis of Criminology in Buddhism[1]

Introduction

Criminology is the scientific study of crime, including its causes, responses to it, and methods of prevention. Leon Moosavi notes that *'like the rest of the social sciences, criminology is dominated by Western literature and perspectives*.'[2] He goes onto explain that this *'is problematic* […] *because it unnecessarily excludes alternative accounts that may be useful for informing criminological scholarship*. [3] The vast scriptures of Buddhism might contain some examples of such alternative accounts. Several Bhutanese scholars have offered valuable insights into how lawmakers, adjudicators and law enforcement agencies here in Bhutan seek to draw on Buddhist ethics, principles and ideas when shaping, interpreting and enforcing the law.[4] This is not merely a matter of personal faith. The Kingdom's *Constitution* requires us all to *'strive to create conditions that will enable the true and sustainable development of a good and compassionate society rooted in Buddhist ethos…* [5] Against that background, it would seem fitting to explore the social phenomena of crime through the lens of Buddhist philosophy and science. However, anyone who has ever seen a comprehensive collection of

1 Contributed by Marcus M. Baltzer and Lobzang Rinzin Yargay.

2 Moosavi, L. (2019). *Decolonising Criminology: Syed Hussein Alatas on Crimes of the Powerful*, Critical Criminology, 27:229–242. A student taking up the study of criminology will probably begin with the classical ideas of European thinkers such as Cesare Beccaria and Jeremey Bentham. Then comes the positivist ideas of other European thinkers like Ceasare Lombroso [often called the 'the father of criminology'] and Émile Durkheim. Chapters further down the table of contents might cover the Chicago School, examining crime in American cities in the early twentieth century.

3 Moosavi, L. (2019). p. 230.

4 Tobgye, S. (2020). *Law and Buddhism: The Vinaya as a Source of Modern Jurisprudence*, Bhutan Law Review, 13: 6–32 and Dubgyur, L. (2019). *Buddhism – A Source of Bhutanese Criminal Justice System*, *Bhutan Law Review,* 11: 17–29. Further evidence of how Buddhism is a source of inspiration is in the *Penal Code*, in which the *Lord Buddha* is quoted on the very front page: *'For the perpetuation of good and chaste actions' Penal Code*, Royal Government of Bhutan.

5 *Constitution of the Kingdom of Bhutan,* Art. 9(20).

Buddhist scriptures will know what a vast and intricate body of knowledge it is.[6] Therefore, this paper examines only the case of *Angulimala* and a few related texts, seeking to identify reasoning that could possibly be relevant to criminological scholarship.

The Case of Angulimala

Angulimala's story is perhaps most well-known from the *Pali Canon*.[7] However, accounts of what happened in the town of *Savatthi*, in what today is the State of Uttar Pradesh, about twenty one years after the *Buddha*'s enlightenment; also appear in both Chinese and Tibetan scriptures. What follows is the authors' amalgamation of the events, compiled from different sources, with a view to identify some fragments of Buddhist criminology.

Angulimala's real name is actually *Ahimsaka*. He enrols as a student of a renowned *Brahmin* clerical master, where he excels in his studies and earns special attention and accolades from the faculty. This gives rise to jealously among *Ahimsaka*'s peers, who begin to take against him and become determined to bring him down. To this end, they spread rumours that *Ahimsaka* has an intimate affair with their teacher's wife. The teacher, a venerated priest, is dismayed by the gossip, yet he fears that taking direct action against *Ahimsaka*, such as calling for his expulsion, might jeopardize the reputation of the school. The problem must, therefore, be solved in a more enigmatic manner. The teacher pretends that he has not heard of the supposed dalliance and lets classes with *Ahimsaka* go on as usual for a while. The teacher eventually summons *Ahimsaka* to tell him that he has done so remarkably well that his training as a true *Brahmin* is almost complete, save for one final ritual. *Ahimsaka* must offer a gift to his master of one thousand fingers, and no two fingers must come from the same person.

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6 One online transcript of the *Pali Canon* alone amounts to well over 16,000 pages, the *Taisho Tripitaka* consists of 100 volumes, and in the *Tibetan canon* the *Kangyur* usually takes up 108 volumes and the *Tengyur* 225 volumes.

7 The *Pali Canon* refers to *Angulimala* in several places. Of these, the oldest is probably verses 866-91 of the *Theragatha* (verses of the elders), a collection of hymns attributed to some of the *Buddha*'s earliest disciples. These verses, however, only obliquely refer to events in the case. The *Angulimala Sutta*, a Sermon found in the *Majjhima Nikaya* (middle length discourses), a collection of early Buddhist discourses, presents a more developed narrative.

The idea is that if *Ahimsaka* attempts to comply with this supposed ritual, then he will soon get himself arrested and severely punished. The teacher will thus fulfill his yearning for vengeance. Not unsurprisingly, *Ahimsaka*'s first reaction is to protest. *'Surely you do not require this of me?'* responds horrified *Ahimsaka*.[8] The teacher nevertheless insists: *'You have taken from me, and in return, you must now do my bidding. Go now and bring a thousand fingers*.'[9] Most regrettably, *Ahimsaka* is persuaded that he must comply with his master's morbid instructions. What then follows is a gruesome saga of violence, reminiscent of a horror novel, as *Ahimsaka* identifies his victims, kills them with whatever implements he can find, and severs their right index fingers. He threads the fingers on a string, which he wears around his neck, and this earns him the name *Angulimala*, meaning *'necklace of fingers.'*[10] At first, he ambushes travellers on secluded stretches of country roads, but as stories of incidents proliferate, people begin to avoid travelling, and *Angulimala*, as he is now known, starts attacking villages. He proves to be a natural and talented fighter and defeats all resistance he faces. The reports of his ravages cause people to abandon their villages and flee to fortified towns and cities. King *Pasenadi* of *Kosala*, in whose kingdom these massacres are unfolding, puts together a special military task force to locate and eliminate *Angulimala* who now poses a threat to state security.

All this takes place as the *monk Gautama*, by then already known as the *Buddha*, is travelling around in the region. One day, as the *Buddha* enters *Savatthi*, the town seems deserted. The wind is hauling through the empty alleys stirring up dust and fallen leaves. The *Buddha* visits a family he knows, and they tell him that *Angulimala* is in the vicinity and therefore the whole town is under lockdown. The family recounts the many atrocities that *Angulimala* has committed, and the *Buddha* listens carefully. They implore him to remain inside and await the arrival of the military. The *Buddha*, however, insists on leaving, saying that he can only preserve the trust of the people of *Savatthi* by continuing to do his alms rounds as usual.

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8 The Dharma Education Association, *The Buddha and His Disciples*, paragraph 66. Retrieved from http://www.buddhanet.net/e-learning/buddhism/disciples10.htm.

9 Ibid.

10 He initially strings the fingers on a thread and hangs them on a tree. However, because birds begin to eat the flesh from the fingers, he starts to wear them around his neck instead.

Once back on the desolate streets, the *Buddha* hears someone running behind him. It is, of course, none other than *Angulimala*. Moments later, *Angulimala* catches up with the lonesome monk but is startled when the *Buddha* does not attempt to flee. The *Buddha* does not even seem jolted by the petrifying sight of a man with nine hundred and ninety nine bloody and decaying fingers strung around his neck. The *Buddha* smiles at *Angulimala*, bows and greets him politely, as is customary. The serenity displayed by the *Buddha* is so disarming that *Angulimala* is unable to draw his blade and attack. He is genuinely puzzled by the man before him; a man who shows no sign of fear or trepidation.

A long conversation then ensues in the middle of that dusty alley. There are many versions of what is said, but what all versions have in common is how the *Buddha* seeks to understand *Angulimala*'s life story without aversion or condemnation. The *Buddha* explains how all cruelty and suffering arises from ignorance, hatred, desire and jealously. The *Buddha*'s words resonate so well with *Angulimala*'s own experiences that he eventually just breaks down in tears. The *Buddha* embraces *Angulimala* and offers him to join the *Sangha*. *Angulimala* does not know what to say or do. He is confused; how can this mysterious monk know so much about him? At the same time, *Angulimala* realizes that he is wanted and that the military is hunting him down. *'I have gone too far on my path of destruction. It is no longer possible to turn back,'* he mumbles. The *Buddha* looks at *Angulimala* and says *'it is never too late for a good act. Though the sea of suffering is immense, look back, and you will see the shore.'* What then happens is quite extraordinary. The *Buddha* offers to help *Angulimala* to avoid capture, saying:

> *I will protect you if you vow to abandon your mind of hatred and devote yourself to the study and practice of the dharma*.

Angulimala then kneels, places his sword on the ground, and prostrates himself at the *Buddha*'s feet. Now sobbing uncontrollably, *Angulimala* looks up and says,

> *I vow to abandon my evil ways. I will follow you and learn compassion from you. I beg you to accept me as your disciple.*[11]

11 Hanh, T. N. (2018). *Old Path White Clouds,* Full Circle Press pp. 354 – 355.

Angulimala accompanies the *Buddha* back to *Jetavana*, where the *Sangha* has its camp. The *Buddha* introduces *Angulimala* to the *bhikkhus* who welcome him and begin initiating him into their community. None of the *bhikkhus* ask *Angulimala* any questions about his past and *Angulimala* begins taking part in the routines of the *Sangha*. Just two weeks later, even the *Buddha* is amazed by the transformation that *Angulimala* has undergone; he shows no signs of neither anger nor violence. The *bhikkhus* call *Angulimala* by his real name, *Ahimsaka*, which means *'the non-violent one.'*

Meanwhile, the military force, now led by King *Pasenadi* himself, continues their search for the *serial killer*, but of course, nobody thinks of looking for *Angulimala* at the encampment of the *Buddha* and his peaceful followers. Nevertheless, one day, as the *bhikkhus* are conducting their morning alms round, they meet the King, mounted on his horse, leading a full company of soldiers. The *Buddha* appears surprised at the sight of all the heavily armed men, and he asks, *'Your Majesty, has something happened? Have your borders been invaded?'* King *Pasenadi,* who knows the *Buddha* well, explains how concerned he is for the safety of the citizens of *Kosala*, and how his people expect their King to protect them against the mass murderer *Angulimala*. The King declares that *Angulimala is a danger to every man, woman and child. I cannot rest until he is found and killed*. The *Buddha* contemplates what he has just heard. He knows that *Ahimsaka* is among the *bhikkhus* who have joined the alms procession on this particular morning, but neither the King nor his men can recognize *Ahimsaka* with his shaven head and saffron robe. The *Buddha* asks,

> *Your Majesty, what if Angulimala repented his ways and vowed never to kill again; if he took the vows of a bhikkhu and respected all living beings, would you still need to capture and kill him?*

The King replies at once:

> *If Angulimala became your disciple and followed the precept against killing and lived the pure and harmless life of a bhikkhu, my happiness would know no bounds! Not only would I spare*

> *his life, I would offer him robes, food and medicine. But I hardly think such a thing will come to pass!*

The *Buddha* reflects for a moment on what the King just said, and then points to *Ahimsaka* standing behind him and says,

> *Your Majesty, this monk here is none other than Angulimala. He has taken the precepts of a bhikkhu, and he has become a new man in these past weeks.*

King *Pasenadi* is visibly rattled, and his well-trained men immediately draw their weapons and get into battle formation. The *Buddha* calms them all, *'there is no need to fear anything, bhikkhu Ahimsaka is as gentle as a handful of earth.'*[12] The *Buddha* speaks with King *Pasenadi*, explaining what happened a few weeks back and how *Ahimsaka* is now gradually being rehabilitated with the support of the monks in the *Sangha*. The King, who is very familiar with the *Buddha*'s teachings, understands that all evil deeds are reverberations of a disturbed mind, and so he decides to trust that the *Buddha* and the *Sangha* will ensure that *Ahimsaka* will not jeopardize the safety of the people of *Kosala*.

The Criminology in the Dharma

This is a highly abridged version of the events in *Angulimala*'s case. However, even from this deficient summary, are we able to identify any ideas or examples of how the *dharma* suggests that we might understand the causes of crime and how the state best ought to respond? What follows are some snippets of what hopefully could be described as Buddhist criminology.

a) Punishment

One classical university textbook on criminal law in England and Wales defines the *'criminal law as a series of prohibitions backed up with the threat of punishment.'*[13] This definition seems broad enough to serve as a portrayal of the criminal law in most countries today. The purposes of punishment also vary remarkably little across jurisdictions and legal traditions, at least

12 All quotes in this paragraph are taken from Hanh, T. N. (2018). *Old Path White Clouds*, p. 357.

13 Allen, M.J. (1999). *Textbook on Criminal Law*, Blackstone Press, p.3.

officially. On paper, most *Criminal Justice Systems* in the world consider four general purposes of criminal sanctions:

(a) Retribution,
(b) Deterrence,
(c) Incapacitation and
(d) Rehabilitation.[14]

Can anything be deduced, from *Angulimala*'s case, about what the *Buddha* might have thought of these aims of the criminal law? The purpose of retribution is served when punishment is meted out to the offender because this is what he deserves in response to his infraction of the criminal law.[15] A leading authority on the criminal laws of England puts it candidly:

> *The infliction of punishment by the law gives definite expression and a solemn ratification and justification to the hatred which is excited by the commission of the offence… The criminal law thus proceeds upon the principle that it is morally right to hate criminals and confirms and justifies that sentiment by inflicting upon criminals punishments which express it*.[16]

While James Stephen wrote this in the late nineteenth century, we see the sentiment to which he refers reflected in both Court rulings and media reports about serious crime around the world every day. A more modern take on the purpose of retribution in a Bhutanese context is offered by Lungten Dubgyur:

> *Undoubtedly, a sentence of imprisonment, more than anything else, serves the purpose of retribution where the victim feels that the crime committed against him or her is mitigated*.[17]

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14 These purposes are also applicable to criminal sentencing in Bhutan. See Dubgyur, L. (2006). *Criminal Justice in Bhutan: A Handbook on Criminal Procedure*, Royal Court of Justice, Research Division, p. 117.

15 Allen, M. J. (1999). *Textbook on Criminal Law*, p. 3.

16 Stephen, J. F. (1883). *A History of the Criminal Law of England*, pp. 81-82.

17 Dubgyur, L. (2006). *Criminal Justice in Bhutan: A Handbook on Criminal Procedure,* p. 117.

We know that there was much public hatred directed at *Angulimala* for what he had done, and many people wanted to see *Angulimala* severely punished. King *Pasenadi* presumably must have felt pressured from the public to, as Stephen puts it, give *'definite expression and a solemn ratification and justification to* [that] *hatred...'* Indeed, King *Pasenadi* is on a *'capture and kill'* mission when he meets the *Buddha*. Yet when looking closer at how the scriptures have chronicled King *Pasenadi*'s words and actions, we learn a little more about the King's motives.

The King explains *'Amgulimala is a danger to every man, woman and child. I cannot rest until he is found and killed.'* In criminological terms, the purpose of slaying *Angulimala* would be to incapacitate him and to eliminate the danger to the public thereby. As it happens, the *Buddha* also prioritises the pressing need to stop *Angulimala* from murdering more people. The *Buddha* makes his protection conditional upon *Angulimala* abandoning his *'mind of hatred'* and devoting himself to the *'practice of the dharma.'* So, it seems the *Buddha* and King *Pasenadi* had a common understanding of what the objective is: to prevent *Angulimala* from harming more people. The difference between them is the means they wish to use to attain that objective. The King initially thinks that putting *Angulimala* to death is the only way of restoring security, while the *Buddha* believes that the same result can be achieved by helping *Angulimala* reform his mind.

A criminologist might say that King *Pasenadi* pursued *incapacitation* while the *Buddha* advocated *rehabilitation.* What makes it possible for King *Pasenadi* to agree to the *Buddha*'s proposal for sparing *Angulimala*'s life is that the *Buddha*'s plan for *rehabilitation* entails *incapacitation*. The King is persuaded that rehabilitating *Angulimala* within the *Sangha*, making him follow the precepts, is a better way of incapacitating *Angulimala* than executing him. The King is, in fact, so enthusiastic about the idea that he even offers to sponsor the *rehabilitation* work. The idea of punishing *Angulimala* out of hatred or a desire for vengeance never arises in the exchange between the two men. Moreover, the notion that punishing *Angulimala* is necessary or justifiable for the purpose of deterring other people from becoming mass murderers is absent from the scriptures. Neither the individuals involved in the case nor the people who have documented the case over several centuries seem to have thought in those terms.

Modern criminology has proven that the *Buddha* and his followers were right all along. Having examined a wide array of criminological studies, from across the globe, on the deterrent effect of criminal sanctions, Tom Gash concludes that:

> *Those who have hoped that tougher penalties will eliminate wrongdoing have been disappointed – and will continue to be so… tough punishments do very little to deter those punished from committing crime: indeed painful punishments may even make some people more likely to offend in the future…and prison – while unpleasant – is something that does little to change future behaviour for the better.* [18]

b) Restitution

Even more astonishing than the absence of punishment is the fact that nobody asks *Ahimsaka* to compensate or even apologise to his victims. It is ofcourse perfectly imaginable, even plausible, that *Ahimsaka* offered both compensation and apologies, but even then, it is interesting that the scriptures make no mention of this. If indeed it happened, it was never deemed significant enough to document. Even though the story has been re-interpreted by many monks, scholars and scribes over the millennia, nobody found it necessary to add any details around restitution.

One possible explanation might be that the *Buddha* does not think that compensation will serve the purpose we envisage. We can recall the heart-wrenching tribulations of *Bhikkhuni Patacara*. While she is not directly a victim of any crime, her entire family is wiped out, in a short space of time, under harrowing circumstances. Nevertheless, the *Buddha*'s approach is not to apportion blame for the tragedy and call for compensation. Instead, he seeks to help *Patacara* understand the impermanence. The *Buddha* explains to her that death is as much part of life as birth is. The *Buddha* is like the ocean, and he often uses it as a metaphor. When a wave crashes against the reef and disintegrates into countless droplets, the wave, ofcourse, does not die; it merely returns to the ocean of which it was always part.

18 Gash, T. (2017). *Criminal – The Truth About Why People Do Bad Things*, Penguin Books, p. 222.

In the same way, we humans, and indeed all other organisms, do not, and cannot, die. We merely return to the creation of which we were always part, only to reappear in the form of some other manifestation of creation. There is no self that can die. Once *Bhikkhuni Patacara* gains this insight, she writes: *'My mind was released from all bondage as the morning star appeared.'*[19] The suffering of loss, regardless of whether the loss arises from crime or an accident, cannot ever be overcome with the help of money or material goods. Such loss cannot be 'compensated' for in any event. Easing the financial hardship of one befallen to misfortune is undoubtedly meritorious, but it can never make up for the bereavement. In *Patacara*'s experience, it was instead the understanding of impermanence that allowed her mind to release itself from those bondages of grief and suffering.

c) The victims

For many of us, these are not easy propositions to accept. Those of us who have been victims of crime may have felt the rage and burning urge to retaliate or at least to make the offender 'pay' for his transgressions by forfeiting something valuable such as freedom or money. We know that many people in *Kosala* felt the same way. Long after *Ahimsaka* joined the *Sangha*, a group of men recognize him and assault him. *Ahimsaka* does not attempt to resist their blows and allows his assailants to vent their fury and hatred. The beating is fierce and merciless. The scriptures describe how *Ahimsaka*, in the end, is left at the roadside vomiting blood. Yet somehow, *Ahimsaka* is rescued and carried back to the *Buddha*'s encampment. Upon seeing *Ahimsaka*, the *Buddha* immediately calls to *Ananda* and *Svasti*, two of his closest confidants, to provide first aid. He also sees to it that medicinal plants are collected to treat the many wounds. Once *Ahimsaka*'s condition has stabilised, the *Buddha* speaks with *Ahimsaka* about the ordeal, but the *Buddha* is not interested in finding the attackers. Instead, he tells *Ahimsaka* that:

> *Your sufferings today can rinse away all the sufferings of the past. Enduring suffering in love and awareness can erase the bitter hatred of a thousand lifetimes.'*

19 Hallisey, C. (2015). *Therigatha: Poems of the First Buddhist Women*, Harvard University Press.

The *Buddha* is suggesting that as victims of crime, or indeed in any other state of agony or sorrow, we can endure it *'in love and awareness'* and see it as an opportunity to *'erase the bitter hatred'* of past lives.[20] *Ahimsaka*, an intelligent man by all accounts, clearly understood this advice. For many of us, of more average intellectual ability, this is a tremendously challenging assertion. The *Buddha* would probably point out that the mindset that makes us want to hit back against the perpetrator of a crime is the very same mindset that made that person commit the crime in the first place. He once famously said:

> *Bhikkhus, even if bandits were to sever you savagely limb by limb with a two-handled saw, he who gave rise to a mind of hate towards them would not be carrying out my teaching.*[21]

This shows that if perpetrators of crime are to be rehabilitated through the *dharma*, it is just as imperative to help victims understand the *dharma* and thereby allow them to truly recover and to erase all the bitter hatred that we know arises in our minds when we are wronged or have suffered injustice. Maybe another motivation behind the *Buddha*'s advice is to break the chain of destructive action. Responding to an act of violence with a retaliatory act of violence, even if committed by the state in accordance with positive law, undoubtedly has the effect of increasing the amount of harm done. This, in turn, triggers demand for yet another round of retaliation. The suffering escalates and multiplies not unlike a contagious disease. What the *Buddha* seeks to do is to stop this outbreak. We see clearly, from how he handles *Angulimala*'s case, that his priority is to prevent further harm. When we examine modern C*riminal Justice Systems*, we see how they often respond to crime by imposing what is deemed to be proportional harm on perpetrators, such as imprisonment. Research, from a wide range of jurisdictions, unequivocally shows that this response tends to exacerbate the social, financial, psychological and substance abuse factors that are known to induce offending behaviour.[22] Rates of recidivism are typically high, and

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20 All quotes in this paragraph are taken from Hanh,T. N. (2018). p. 381 – 382.

21 *Kakacupama Sutta* (The Smile of the Saw), *Majjhima-Nikaya* (collection of middle-length discourses) MN 21.

22 For an excellent and very succinct summary of the evidence around the social and economic impact of imprisonment, also see The Economist. (2017). *Too many prisons make bad people worse. There is a better way.*

sadly the severity of crime and the injury caused often spiral in correlation with time previously spent in prison.[23] The cycle of harm accelerates at an alarming rate. It seems conceivable that this is precisely what the *Buddha* seeks to avoid when he decides to intervene in *Angulimala*'s case.

d) Rehabilitation according to the Dharma

The *Buddha* was able to help *Angulimala* in an extraordinary way. Perhaps *Angulimala*'s remarkable mind transformation was possible thanks to his well-documented intelligence. The case is characterized by a meeting of the most enlightened of gurus and a highly able student. When we look at *Criminal Justice Systems* around the world today, we are very far from such optimal conditions. At best we might have an overburdened and underfunded probation service. Typically, we have offenders with drug use disorders, mental health problems, lacking in skills and education, and disowned by whatever friends and family they might once have had. The gap between the meagre resources available and the immensity of the needs can be overwhelming. There is a temptation to dismiss *Angulimala*'s case as a mere fable from a bygone era without practical relevance for how we deal with crime today. Is there anything in *Angulimala*'s case that we can practically apply today?

The *Buddha* knows, ofcourse, that our actions are merely reflections of our state of mind. A confused mind is easily infected by hatred, jealously, and selfishness; emotions that arise from a mind that identifies with an illusionary self. We see how the minds of *Ahimsaka*'s fellow students are infected by jealousy. Through their conspiracy and action, the disease quickly spreads to the teacher, who in turn begins to feel strong resentment against *Ahimsaka*. This resentment then leads the teacher to twist *Ahimsaka's* mind, with devastating consequences. The case illustrates how a mind infected by the disease of believing in a self, with all its thoughts and emotions, can spread swiftly from one person to another, just as a virus or a bacterium does. The *dharma* suggests that when there is no self, there can be none of those destructive thoughts and emotions that drive us to inflict pain and

23 Yukhnenko et al. (2019). *A Systematic Review of Criminal Recidivism Rates Worldwide: 3-year update, Wellcome Open Res* 4:28.

grief on each other.[24] The gist of the *Buddha*'s approach in handling the case is by helping *Angulimala 'abandon* [the] *mind of hatred and devote* [himself] *to the study and practice of the dharma.'*

Many countries across Asia have large monastic bodies with well-read followers, many of whom may be willing and able to share their insights with people whose minds have become disturbed. Much like *Angulimala* was offered the opportunity to join the *Sangha* and transform himself back to *Ahimsaka*, perhaps offenders who are not dangerous can be offered to serve a term living in a monastery with monks and lamas acting as probation officers. After all, that is precisely the role the *Sangha* took upon itself in *Angulimala*'s case. Most countries have provisions in their legislation for probation and community services. In the *Penal Code of Bhutan*, for instance, we see that a court:

> *May order community service in lieu of the imprisonment.*

However, in practice, it is both difficult and expensive to establish such mechanisms.[25] Could time served in a monastic community be a form of community service? Might *monks*, *nuns* and *lamas* be the ultimate probation officers, just as the *Buddha* and his *Sangha* were in *Angulimala*'s case? The *dharma* will undoubtedly have beneficial effects on the minds of both offenders and victims. Furthermore, the routine, camaraderie, and sense of belonging in a monastic setting could help offenders gain the confidence and stability that they are often in such desperate need of.

While the *Buddha* was able to help even an extremely violent offender like *Angulimala*, we cannot expect that from *monks* and *nuns* today; few people

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24 Contrast this approach with many prisons around the world today, which, in most countries, churn out angry and alienated men, full of hatred and contempt of the societies that betrayed them. Prisons are often incubators of all shades of violent extremism, drug addiction and destructive patterns of thought. See e.g. Silke, A. & Veldhuis, T. (2017). *Countering Violent Extremism in Prisons: A Review of Key Recent Research and Critical Research Gaps*, Perspectives on Terrorism, 11(5), pp. 2-11.

25 A recent example of this here in Bhutan was recently reported on BBS news, see *Human resource shortage, a challenge in implementing Child Care and Protection Act* at http://www.bbs.bt/news/?p=118564.

have the abilities of the *Shakyamuni Buddha*. As both King *Pasenadi* and the *Buddha* made clear, we must protect the public from the risk that violent people pose. For this reason, the use of prisons seems justified, but only if they can serve the same purpose as the *Sangha* served in *Angulimala*'s case, i.e. that of helping offenders heal their minds, understand the *dharma*, and commit to not causing further harm to any being. This idea is not at all new. In the United Kingdom, there is a Buddhist prison chaplaincy dedicated to making *'available facilities for the teaching and practice of Buddhism in Her Majesty's Prisons and other places of lawful detention or custody.'*[26] Similar initiatives exist throughout Europe, the United States and in Hong Kong.

The little research that has been undertaken, in the English-speaking world, on how the *dharma* can help rehabilitate people in prisons seems to validate *Angulimala*'s experience. One meta-study that systematically reviewed research papers on what academics call *'Buddhist derived interventions'* in correctional settings pointed to some very promising results. It concluded that intervention participants demonstrated significant improvements across five key criminogenic variables:

(i) Negative affect;
(ii) Substance use (and related attitudes);
(iii) Anger and hostility;
(iv) Relaxation capacity; and
(v) Self-esteem and optimism.[27]

A subsequent study found that through a commitment to the *Noble Eightfold Paths* to reduce suffering, Buddhism in prison has been beneficial in shifting habits of violence to attitudes and behaviours grounded in compassion and understanding. This approach has significantly improved the lives of inmates and the environment of prison life.[28]

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26 As it happens, the charity is named after none other than *Angulimala* himself. See https://angulimala.org.uk.

27 Shonin, E.S., Gordon, W., Slade, K. & Griffiths. (2013). *Mindfulness and other Buddhist-derived interventions in correctional settings: A Systematic Review*. Aggression and Violent Behaviour, 18, pp. 365-372.

28 Kathleen, A.C. (2017). *Buddhism in Prisons*, in *The Encyclopaedia of Corrections*. Retrieved from https://onlinelibrary.wiley.com/doi/epdf/10.1002/9781118845387.wbeoc040.

It is highly likely that further research has been conducted in languages other than English. There seems, however, to be a consensus among academics that far more research must be conducted to accurately determine what kinds of interventions are most effective and in what settings. Bhutan has clearly demonstrated its willingness to place emphasis on *rehabilitation* in its *Criminal Justice System*. One good example of this is the open-air prison system which was introduced to reduce overcrowding, enable prisoners to earn an income, and live with their family members before their prison term ends. While serving their open-air prison term, inmates work in regular workplaces alongside other people. The idea is to facilitate reintegration back into society. One commentator notes:

> *This revolutionary concept helps the inmates re-orient themselves with their innate human nature that may have undergone turmoil and disconnection - as a result of many years spent within the walls of shame and dishonour*.[29]

Prisoners can qualify to serve in open-air prisons [which are actually not prisons at all] by displaying good behaviour. Transfers to open prisons often coincide with auspicious occasions, such as the birth anniversary of *Guru Rinpoche*.[30] Our nation's current development plan sets out that 'strengthening rehabilitative and reformative programmes for inmates' is an essential strategy for delivering *'effective justice services.'*[31] The same plan outlines a *'programme [that] aims to ensure rehabilitative programmes…for meaningful social reintegration of inmates and [to] reduce recidivism.'*[32] This seems to be precisely what the *Buddha* wanted to ensure in *Angulimala*'s case too.

It is evident that the spirit of compassion and enlightened thinking, the very spirit exhibited by the *Buddha* in *Angulimala*'s case, is highly present in the *Criminal Justice System* in Bhutan. This is, ofcourse, not a coincidence.

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29 Dorji, Y. posted at http://yesheydorji.blogspot.com/2019/02/one-more-for-our-men-in-blue.html.

30 *The Bhutanese*. (2013 June 19).

31 National Key Result Area 16.(2019). *Twelfth Five Year Plan 2018 – 2023*, Gross National Happiness Commission, Royal Government of Bhutan, p. 96.

32 Ibid. p. 98.

The Constitution of the Kingdom of Bhutan explains that *'Buddhism is the spiritual heritage of Bhutan,'* and this means that we all have the obligation to *'promote the principles and values of peace, non-violence, compassion and tolerance.'*[33] In Bhutan, showing leniency, sympathy and benevolence is not optional – it is a constitutional duty.

e) Crime prevention according to the Dharma

Angulimala's case illustrates how the *Buddha* suggests that we might wish to respond to crime when it has already occurred. However, the *Buddha* also offers some valuable advice on how to prevent crime. In the *Kutadanta Sutta*, we read of another discussion between King *Pasenadi* of *Kosala* and the *Buddha*. This encounter takes place many years after the events surrounding *Angulimala*. The two men talk about life and death, but also about many social issues. The *Buddha* encourages the King to reform the *System of Justice* and economics in the country. In particular, he points out that corporal punishment, torture, imprisonment and executions are not effective means for preventing crime. The *Buddha* explains that violence and crime arise under certain social and economic conditions characterized by poverty and hunger. He suggests that instead of seeking to respond to crime with harsh punishments, it would be far more effective to invest in developing the economy as a way of preventing crime. The *Buddha* is very pragmatic and points out to the King that not only will this prevent delinquency and improve security it will also expand the nation's revenue base:

> *Your Majesty's revenues will be great, the land will be tranquil and not beset by thieves, and the people, with joy in their hearts, will play with their children, and will dwell in open houses.*[34]

Some two and a half millennia later, social scientists are producing overwhelming and irrefutable proof of the strong correlation between crimes on the one hand and poverty, inequality, and economic stagnation on the other.[35]

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33 *The Constitution of the Kingdom of Bhutan*, Art. 3(1).

34 *The Kutadanta Sutta* (On Sacrifice), *Digha Nikaya* (Collection of Long Discourses) DN5, see also Hanh, T. N. pp. 522 – 523.

35 For a very succinct and well-presented summary of this research, see Wilkinson, R. & Picket, K. (2010). *The Spirit Level – Why Equality is Better for Everyone*, Penguin Books, chapters 10 – 11 (*Violence: Gaining Respect, and Imprisonment and Punishment*).

Ahimsaka actually came from a relatively prosperous family. Nevertheless, it is worth noting that the *Buddha* also recognizes that when people are forced to live in destitution and scarcity, desperation ensues. Minds then become far more vulnerable to being affected in such a way that crime and violence arise. The *Buddha* seems to suggest that a vibrant economy, with ample opportunities for all, regardless of colour or creed, to pursue a dignified livelihood, will do far more to prevent crime than all the police, Courts and prisons in the world.[36] While our *Criminal Justice System* is critical for purposes of responding to crime when it happens, as in *Angulimala*'s case, the *Kutadanta Sutta* makes the point that our social and economic systems are probably far more instrumental for purposes of preventing crime. This resonates well with Bhutan's philosophy of *Gross National Happiness* (GNH), which requires that all public policy and its implementation is compatible with and contributes to the well-being and happiness of all citizens.[37] It is quite likely, therefore, based on what we can learn from the *Kutadanta Sutta,* that the *Buddha* would have considered GNH to be a good crime prevention strategy.

Conclusion

If we are to draw any criminological lessons from *Angulimala*'s case, the main one appears to be that the objective of the criminal law ought to be to prevent or minimize further harm. The question then immediately arises; how is this best done? The *Buddha* seems unequivocal in his answer. We commit crime because our minds have become deranged by hatred, anger, jealously, and illusions about the self. As this is the real cause of crime, the only way to respond to and prevent crime is to address that very cause by healing the mind. The criminology in *Angulimala*'s case hence looks unmistakeable; the purpose of any criminal sentence should be *rehabilitation* and *rehabilitation* alone. The *Buddha* believes that the best way to help rehabilitate *Angulimala* is to invite him into the community of the *Sangha*. This offers not only an opportunity for *Angulimala* to learn about the *dharma* and to clear his mind from misconceptions, but it also provides the kind of social support that his *rehabilitation* requires.

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36 *The Constitution* requires the state *'to develop and execute policies to minimise inequalities of income, concentration of wealth, and promote equitable distribution of public facilities…'* Furthermore, the state must *'enable the citizens to secure an adequate livelihood.' Constitution of the Kingdom of Bhutan,* Art. 9 (7) and (11).

37 For further information on GNH, see GNH Centre Bhutan at http://www.gnhcentrebhutan.org/what-is-gnh/.

The Effect of COVID-19 on Constitutional Rights: A Case of Switzerland[1]

The People of Switzerland are acutely sensitive about their *Fundamental Rights* and other rights contained in various provisions of the laws. These rights, which we normally call as *Fundamental Rights* as is called in any *Constitution*, is reflected under the *Federal Constitution of the Swiss Confederation*.[2] In 2020, the world has witnessed an unprecedented and overscaling health crisis that resisted national and international efforts. While, the scale of the pandemic was mostly viewed from the dimensions of health, it is relevant to describe its effects on medico- legal and socio-legal dimensions. Laws are enacted to secure justice, liberty and *rule of law* in the country, but the pandemic has brought the laws into new frontline boundaries, and tested its impacts on the society, economy and administrative machineries of the government. While the health of the people is of utmost importance, in times as these, it has sowed us forethought to reflect on the importance of law and its necessity, and the need for sound political and legal reasons to substantiate exceptional initiatives.

The present pandemic has invited unequivocal effects on the life, health and safety of the people, and rattled the economies. This also impacted on the enjoyment of various rights thereby affecting the basic premise[s] of the *fundamental constitutional rights* of the people. Presently, without recording the cases of COVID-19, hereinafter, slightly over forty thousand people were infected with the virus; and approximately one thousand seven hundred patients succumbed to the disease. However, we can also note other parallel deaths attributed to other related issues triggered by the pandemic. After the lockdown on March 16, 2020, the *Federal Council*[3] lifted certain restrictions in May. At present, it is evident that a "second wave" of infections is surging across Europe, with a daily increase in the number of infections.[4]

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1 Contributed by Dr. Markus Metz.

2 *The Federal Constitution of the Swiss Confederation*, Art.7-36.

3 The *Federal Council* is the seven-member *Executive Council* that constitutes the federal government of the *Swiss Confederation* and serves as the collective head of state and government of Switzerland.

4 Federal Office of Public Health. Retreived from https://www.bag.admin.ch/bag/en/

The Government of Switzerland has spent more than one hundred billion *Swiss Francs* to combat the pandemic, support the economy and health organizations. The pandemic is resulting in serious damage to the economy which will require many years to recover. In that case, it is not surprising that some [political] leaders are calling for the increase in taxes; while in the same period, the excess mortality has slightly dropped below the average after severe and drastic steps were taken to prevent the pandemic.

Constitution

The legal and constitutional basis for combating the spread of the pandemic is a quintessential tool to ensure that all actions of the government and government agencies are legal. The constitutional legal basis for the steps in combating the spread of a pandemic is found in Article 185 of the *Federal Constitution of the Swiss Confederation* hereby called as the *Constitution.*[5] *The Constitution* says that the *Federal Council* shall take measures to safeguard internal security under Article 185. *The Federal Council* may in direct application of Article 185, issue *Ordinances* and *Rulings* in order to counter existing or imminent threats of serious disruption to *Public Order* or *Internal Security*. Such *Ordinances* must be limited in duration (i.e. six months) as per Article 185 of the *Constitution*. In case of emergency, the government may mobilize the armed forces. If more than four thousand members of the armed forces are called to service or in case the deployment of such troops is expected to last for more than three weeks, the *Federal Assembly*[6] must be convened without delay in accordance to Article 15 (4) of the *Constitution*.

The army [not more than four thousand members] has been mobilized to protect the Swiss borders to prevent people entering into Switzerland with the exception of *frontier workers*. Article 36 of the *Constitution* demands that the restrictions on the *Fundamental Rights* must have a legal basis and *significant restrictions* must have their basis through a *Federal Act*. The restrictions have to be justified in the interest of the public and it must be proportionate. The essence of *Fundamental Rights* is sacrosanct; several *Parliament Commissions*, as well as the scientific community is in

home.html.

5 *The Federal Constitution of the Swiss Confederation, 1999.*

6 *The Federal Assembly* is the *Parliament of Switzerland* consisting of the *National Council* and *Council of States.*

discussion at present whether the restrictions posed by the *Federal Council* in combating the pandemic have fulfilled these criteria.

Existing Legislations

Even in times of emergency, the fundamental aspect of the *Rule of Law* must be followed. The administrative measures undertaken by the government are also covered by the *Federal Act to Combat Transferable Diseases of Humans, 2012*.[7] The *Act* is engaged if an *extraordinary situation* exists threatening the security of the country. The question here is whether COVID-19 pandemic is an *"extraordinary situation"* has to be discussed by the legal and scientific community. Based on the *Constitution* and other relevant laws on disease control, the *Swiss Federal Council* has issued more than forty *Ordinance*s. *The Federal Council* has assumed that the present pandemic is resulting in an *extraordinary situation*[8] in which the security of the whole country is in danger. However, if we weigh the issues differently, the issue may appear disputable from other dimensions.

In addition, the *Cantons of Switzerland* have issued numerous *rulings* in light of their responsibilities. Due to the federative political system in Switzerland, the *Cantons* and the *Federation* have to meticulously liaise and coordinate the measures against the pandemic. All in all, there are myriad of new laws, *Regulations* and *Ordinances*. These laws help to regulate and direct the actions of the government. In this light, it is noteworthy to mention the *Ordinance on Measures to Combat the Coronavirus in International Passenger Transport.*[9] The *Ordinance* instructs persons coming from fifty three different countries [Bhutan is not included in the list] to undergo into mandatory quarantine for ten days after entering Switzerland. The list[s] is updated regularly if the number of new infections in the country or area concerned in the past fourteen days is more than sixty persons per hundred thousand persons. This initiative has tremendously affected international and cross-border passenger travel.

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7 *Federal Act to Combat Transferable Diseases of Humans, 2012* is aimed at timely detection, prevention, monitoring and control of communicable diseases.

8 An *extraordinary situation* is considered in the light of the national security. But these issues are contestable based on varying legal standings.

9 This *Ordiance* introduces measures in relation to international passenger transport to prevent the cross-border spread of the COVID-19.

Administrative measures against persons include identifying the infected people, and making an informed monitoring by the medical experts.[10] If the monitoring is not enough, the law also allows the person to undergo a mandatory quarantine and have a forced medical examination. In addition, such person[s] can be prohibited from certain activities or from exercising his profession or from moving from one *Canton* [District in Bhutan] to the other. According to Article 40 of the law, the *Cantons* [can] prohibit events; close schools and restrict movements of persons from their homes or into or out of certain identified district. This essentially states that any [actions] of the government must be based on sound principles of law. It also outlines severe criminal sanctions with three years of imprisonment or fine of [Ten Thousand] *Swiss Francs* if any person breaches the law. It is very obvious that such measures interferes with and affects constitutional and other fundamental personal rights, and therefore it is felt that the attention of proportionality is of utmost importance.

Normally, like in many countries, the infected patients are contacted by telephone for tracing; they have to disclose their previous contacts so that these contact persons are informed and isolated. In addition, an application software has been created, which on a voluntarily basis, can be installed on mobile phone appliances. By push information, the bearer of such mobile phone appliances can be contacted and warned if he or she has come in close contact with an infected person. This has raised a lot of concerns about protection and data security. However, data experts have confirmed about the security of the data; nonetheless, the *Parliament* is calling and preparing for a special law in view of such communication services.

The New Legislation

After the first "wave" of the pandemic, now *Special Commissions* of the *Swiss Parliament* are checking whether the measures taken by the *Federal Council* were really in proportion to the dangers brought in by the pandemic. On

10 Aside identifying and monitoring the sick person, the *Ordiance* also identifies other inititaives like the health care provisions, including the type of medicines are taken; and provisions for criminal offences.

a personal analysis, we could note that there were no adequate pandemic planning in Switzerland. *The Federal Council* has, based on the experiences gained from dealing with COVID-19, came up with a new legislation for combating extraordinary situations including an *Act* that empowers the *Federal Council* to [act] in extraordinary situations and circumstances. The *Parliament* is expected to deliberate on it and it is expected that fifty thousand voters may demand a *referendum* on such new law, which some experts feels that such law may overtly empower the *Federal Council* and the administration with excessive powers.

The COVID-19 Act has, after a long and urgent debate, just passed one *Chamber of Parliament* primarily the *National Council*. *The Federal Council* proposed in the draft to consider all persons above the age of sixty five as *vulnerable persons.* And in addition, the *Federal Council* is also claiming a lot of decisive power under the new law. This has raised a lot of concerns and invited protest[s] as there is a strong belief that the *Federal Administration,* headed by the *Federal Council*, should not have too much power but has to be controlled by the *Parliament*. Moreover, the *COVID-19 Act* has to be the basis for more financial help to business entities that are affected by the pandemic. The *Act* after it passes the *Council of States* shall be declared as an *Urgent Act* and, immediately be enforced. However, the *Act* will expire on December 2021, but people still has the last decision making power through the process of *referendum*.

F**undamental and Constitutional Rights**

It is noteworthy and an interesting legal development to discuss on the important constitutional and *fundamental human rights* that are at stake at the time of the *Corona Virus* public health crisis. It is very important to consider and analyze the interdependence of such rights. The *Constitution of the Kingdom of Bhutan*[11] states that all persons shall have the *right to life, liberty and security of person*. Article 10 of the *Constitution* states that everyone has the *right to life*, to *personal liberty*, to *physical and mental integrity* and the *freedom of movement*.

11 *The Constitution of the Kingdom of Bhutan*, Art.7(1).

During the pandemic situation, all these rights such as the *right to life*, *liberty*, *security and freedom to move* have to be weighed against each other; and against the serious implications of spreading the disease. This directly poses the questions of which [right] is more important; whether liberty of the people can be eclipsed under the security of the country. While wearing of face masks is made mandatory, in public transportations and in many shops, this has not so far been in the public.

Although wearing of face masks are intended to secure public health and hygiene, this is also affecting the physical integrity of the persons; and can be legal only if such wearing of masks [are] intended to actually curb the spread of the pandemic. Whereas the *Constitution of the Kingdom of Bhutan* grants certain constitutional rights to Bhutanese citizens, the *Federal Constitution of the Swiss Confederation* is more open. However, owing to the pandemic and public health situation in the country, many of the *fundamental* and *constitutional rights* had to be suspended.

Freedom of Religion

Freedom of religion encompasses an important right to practice and profess any religion of one's choice. As a constitutional right, Article 15 of the *Constitution* grants the *freedom of religion*. This *Fundamental Right* includes the right to participate in religious services. However, this freedom to freely practice one's religion was restricted to ensure the prevalence of community safety and public health. This helps to create a covalent balance between personal and community rights. However, this also raises a question about *personal freedom* as envisaged under the *Constitution.*[12]

Economic Freedom and Freedom of Artistic Expression

Economic freedom is an important right. It allows people to engage in sustainable economic activities and vocations for gain. The pandemic has severely affected the *economic freedom*[s] of the people especially to freely pursue private economic activities as guaranteed under the *Constitution.*[13] *The Federal Council* had to close many shops, restaurants, cinemas, theatres, circus, and the operas. This directly limited the ability of the people to

12 *Federal Constitution of the Swiss Confederation, 1999,* Art. 10.

13 Ibid., Art. 27.

exercise the right to artistic expressions as enshrined under the *Constitution*.[14] In addition to these, *economic freedoms* were severely restricted reducing the income of the people. The profession of medical doctors were limited to treat only emergency cases. This [might] have violated the rights of the patient[s] to be adequately treated. While there has been a concentrated effort to treat those infected by the virus, this has uncalculated effects on other patients, thereby creating patient treatment imparity in the hospitals. This also reduces their *right to life and integrity*. In most hospitals, their capacity and priority to treat were mostly reserved for the treatment of patients, who could not request for medical help.

Right of Petition and Political Rights

Political Rights and the *Right of Petition* are granted under the *Constitution*.[15] The *Right to Petition* includes the right to openly collect signatures in support of [the] *Petition*. In the light of the pandemic, votes on *Federal* and *Cantonal Acts* were postponed, thereby directly suspending the political participation of the voters.

Freedom of Assembly

Prior to the pandemic, people in different parts of the world, based on their national laws, were allowed to assemble. However, since the disease was contagious, with a risk of person to person transmission, different governments had to instruct their people to avoid gathering in large numbers. In such circumstances, the *Freedom of Assembly* was put on hold. The *Freedom of Assembly* entails the right to gather, assemble, and more importantly organize meetings involving large number of people. The *Constitution*[16] allows people[17] to organize meetings and participate [or not to participate] in meetings of political, cultural, legal and of other

14 Ibid., Art. 21.
15 Ibid., Art. 33.
16 Ibid., Art. 22.
17 This is not limited to citizens of Switzerland, but includes people of other nationalities.

natures. In view of these restrictions, sports and games of similar nature which involved gathering of people were proscribed. These were done in the interest of the larger public health and safety.

Right to Education

Right to Education is regarded as an indispensable right to secure the future of the citizens. It encapsulates that every child should be educated to ensure that they are literate. In Switzerland, Article 19 of the *Constitution* provides for a free primary school education. However, the *right to education* and the pursuit for higher education remained in abeyance since the *Federal Council* had to close all schools from March until May. This necessitated the need for home schooling and home-tutoring. However, the experiences of home schooling have shown that mainly the underprivileged children were at disadvantage. In our jurisdiction particularly, it threw us the question of whether closing of schools were absolutely necessary based on the aspect of proportionality.

Freedom of Movement and Personal Freedoms

The *Freedom of Movement* is an essential right of the people to move and travel. The *Freedom of Movement* is a *Constitutional Right* guaranteed under the auspices of the *Constitution* and is a part of the human rights' framework. However, as a strategy to reconcile with the impending threat of the pandemic, restrictions were imposed on the movement of people, including other *personal freedoms* to freely associate and interact. The *Freedom of Movement* and *Personal Liberty* as enshrined under the *Constitution* were and still are highly limited with severe financial and penal sanctions.

This indirectly exposed the dilemmas of modern living; with persons in retirement homes for the elderly not receiving adequate personal and emotional care. This impacted the personal and emotional wellbeing of the people, including the elderly, who normally underwent an isolated and solitary life. Therefore, when such restrictions are juxtaposed against other *constitutional rights*, it collates if such restrictions were in line with constitutional principles of *personal liberty*. This has become a legal battle with complaints of such nature coming before the Courts of law. The pandemic is not only a public health issue, but it has other legal ramifications, which are personal, constitutional, and political in some

aspects. The pandemic has to be viewed from a medico-legal perspective to ensure that, one action to save the lives of its people, does not contravene with the rights of other people in the country. A deeper legal analysis is necessary to project this pandemic from the perspectives of law, social, economic, political and medical lenses amongst others. In this light, Courts has also become an important arbiter of political, social and legal justice; balancing national and personal priorities of its people.

Conclusion

Like peoples across Europe and elsewhere, the Swiss people are very sensitive when it comes to their personal and individual integrity. They are overtly critical on matters that are of *fundamental* and *constitutional* in nature. They consider the concept of *Rule of Law* as an essential intermediary in respect to governmental interventions that affects personal, political and other rights of the people. This pandemic has seriously affected the *fundamental* and *constitutional rights* of the people, not only in Switzerland, but across the globe *en masse*. This has stirred up legal controversies, issues of *morality* and *justice*; and the issue of *proportionality*. It also opened up different lenses of reasons, the priority of the health of the people, while on the other hand, the issue of *Fundamental Rights* as a *sacrosanct* right of the people. This also gave way for public discourses weighing the issue of *public interest,* when many business entities were going bankrupt. It can be argued that, restrictions on *Fundamental Rights* must be based on sound legal rationale; more importantly significant restrictions must owe its legal basis in the federal laws.[18] The concerns of COVID-19 [or other similar pandemic] in the future which causes *immediate* and *serious danger* to the health of the people across the country has to be discussed by the scientific, legal and political communities. The Courts must clarify the *issues of legality*; and sooner or later the Courts will have to adjudicate legal questions on the matter. The decisions of the Courts will become the guide for the development of medico-legal jurisprudence.

18 *Federal Constitution of the Swiss Confederation, 1999,* Art. 30 para 1.

The Doctrine of Judicial Review: A Potent Tool for Enhancing Justice[1]

Introduction

The Judiciary of the Kingdom of Bhutan is constitutionally mandated to safeguard, uphold, and administer Justice fairly and independently, without fear, favour or undue delay in accordance with the *Rule of Law* to inspire trust, confidence and enhance access to justice. *Judicial Review* is an important tool to assess, examine and study the actions by the Judiciary. It is a tool to ensure that Justice is served and delivered. This article attempts at articulating the scope of *Judicial Review* under the *Constitution of Bhutan* during the COVID-19 pandemic. Although, this is not very relevant, the courts in Bhutan, as elsewhere, had to address specific issues, including change in modality of the hearings, postponement of cases, and altering the fundamental roles of judges. *Judicial Review* although contextually captures the review of judicial decisions, but it also should cover judicial actions.

The doctrine of *Judicial Review* is based on the principle of *Rule of Law* and *Separation of Powers*. It is the process for testing and balancing the *Separation of Powers*. *Judicial Review* refers to the power of the courts to examine the actions of the legislative, executive, and administrative arms of the government and to determine whether such actions are consistent with the *Constitution*.[2] An act which contravenes the *Constitution* is declared unconstitutional, and therefore, *null and void*. The doctrine of *Judicial Review* in this sense depends upon the existence of a written *Constitution*.[3] It means that the *Constitution* is the *supreme law* of the land and any law inconsistent with it is, considered *void*.

Judicial Review is based on the premise that the *Constitution* is the *supreme law* of the land and all governmental organs owe their origin to the *Constitution* and derive their powers from the *Constitution*; must function within the framework of the *Constitution* and must not do anything which is

1 Contributed by Tashi Delek.

2 Tate, C. (2019). 'Judicial Review', *Encyclopedia Britannica*. Retrieved from <https://www.britannica.com/topic/judicial-review.

3 Ibid.

inconsistent with the provisions of the *Constitution*.[4] The role of the Courts is to expound the provisions of the *Constitution* and exercise power of declaring any law or administrative action which may be inconsistent with the *Constitution* as unconstitutional and therefore, *void*. The courts have the right to determine the legitimacy of legislation or any conduct through review of legislative and executive decisions. In the context of balancing the *Separation of Powers*, it refers to Judicial Supervision of the exercise of power by other organs of the government with a view to ensuring that they remain within the limits set by the *Constitution* on their powers.

Judicial Review in the United States has been a model for other countries. However, *Judicial Review* is not explicitly mentioned in the *Constitution of the United States*; it is itself a product of *Judicial Construction*.[5] In *Marbury v. Madison*, the *Supreme Court* of the United States ruled that, because the *Constitution* clearly states that it is the *supreme law* of the land and because it is the province of the Judiciary to uphold the law, the Courts must declare state laws and even acts of Congress *null* and *void* when they are inconsistent with a provision of the *Constitution*.[6] The same principle holds true for *Executive* actions that are contrary to the *Constitution*. The scope of *Judicial Review* extends to administrative actions, legislative actions, and judicial decisions.

Supremacy of the Constitution

A key feature of the *Constitution of Bhutan* is that it is the *Supreme Law of the State*.[7] The supremacy clause in the *Constitution* establishes that the *Constitution* shall take priority over any conflicting law which is in force in Bhutan.[8] Article 1 (9) and (10) of the *Constitution* consolidates the establishment of a *Constitutional Supremacy*, where the *Constitution* is supreme over the *Parliament* and it can exercise its functions within the bounds of the *Constitution. Constitutional Supremacy* is also referred to as *Judicial Supremacy*, since the *Judiciary* is vested with the power to examine

4 Tobgye, S. (2015). C*onstitution of Bhutan: Principles and Philosophies*, p.33.
5 Shugart, M. & Bognetti, G. (2020). *'Constitutional law,' Encyclopedia Britannica*. Retrieved from https://www.britannica.com/topic/judicial-review.
6 5 US 137 (1803).
7 Art.1 (9).
8 Art.1 (10).

the constitutionality of laws made by *Parliament* and can declare a law *void* on the ground of inconsistency with the *Constitution*. The *Principle of Supremacy* of the *Constitution* is characterized by three traits:[9]

1) The possibility of distinguishing between *Constitution* and other laws;
2) The legislator being bound by the constitutional law, which presupposes special procedures for amending the *Constitution*; and
3) An institution with the authority in the event of conflict to check the constitutionality of governmental acts.

The Constitution of Bhutan distinguishes itself from other laws by explicitly stating that *"the provisions of any law, whether made before or after coming into force of this Constitution, which are inconsistent with this Constitution, shall be null and void."*[10] In order to distinguish it from ordinary legislation, constitutional amendments are subject to more stringent procedure than that is required for *ordinary legislations*. *Amendment* of the *Constitution* requires supermajority support in *Parliament*[11] or direct approval by the electorate in a *referendum*.[12] *The Constitution of Bhutan* vests the *Supreme Court* to be the guardian of the *Constitution* and the final authority on its interpretation.[13] These provisions in the *Constitution* clearly establish the fact that Bhutan accepts *Constitutional Supremacy* as opposed to a *Parliamentary Supremacy* which is a salient feature of English constitutional law. *Parliamentary Supremacy* is the idea that *Parliament* is the supreme lawmaker who can legislate at will and that no one is above *Parliament*. The principle of *Parliamentary Supremacy* according to Dicey is:

> *That Parliament has under the English Constitution, the right to make or unmake any law whatever; and further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.*[14]

9 Limbach, J. (2001). The Concept of the Supremacy of the Constitution. *The Modern Law Review* 64 (11). Retrieved from http://www.jstor.org/stable/1097135.
10 Art.1 (10).
11 Art.35 (2).
12 Art.35 (3).
13 Art.1 (11).
14 Dicey, A.V. (1915). *An Introduction to the Study of the Law of the Constitution*, pp.3-4.

Dicey summed up this doctrine in a *'grotesque expression which has become almost proverbial.'* 'It is a fundamental principle of English lawyers, that *Parliament* can do everything but make a woman a man and a man a woman.'[15]

Scope of Judicial Review under the Constitution

The Constitution of Bhutan is similar to the *Constitution of the United States* than the *English Constitution*, where the doctrine of *Parliamentary Supremacy* still holds good. The principle that the *Constitution* is the *fundamental law* of land is the basis of our constitutional set up. The different organs of the government have been well defined with their powers and functions and are expected to function within the constitutional boundaries prescribed for them. The *Constitution* recognizes the need for an independent and strong *Judiciary*[16] as one of the main pillars of our democracy. The *Parliament* enacts the laws[17] for the wellbeing of the society which are implemented by the *Executive*[18] and the court is the final interpreter of the *Constitution.*[19] *The Supreme Court of Bhutan* has the power to interpret the *Constitution* and where the act of the *Executive* and *Legislature* is against the *Constitution* it can invalidate such act or law.[20] This is what is called the power of *Judicial Review*. *Judicial Review* can be classified under two heads:

(i) *Judicial Review* of legislation of *Parliament* and subordinate legislation, which would deal with legislative competence and violation of *Fundamental Rights* or any other constitutional or legislative limitations.

(ii) *Judicial Review* of administrative action of the State and government authorities to ensure that every power must be exercised within the four corners of law and within the legal limit.

15 Ibid., Dicey quoting De Lolme.
16 Art. 21 (1).
17 Art. 13.
18 Art. 20.
19 Art.1 (11).
20 Art. 1 (10).

Judicial Review is a great weapon in the hands of judges. It comprises the power of a court to hold any laws unconstitutional and unenforceable based upon such law or any other action by a public authority which is inconsistent or in conflict with the basic law of the land. The theoretical basis of *Judicial Review* is found in the doctrine of *Separation of Powers*. *The Constitution of Bhutan* recognizes the *Separation of Powers* among the three arms of the government[21] and vests in the *Judiciary*, the power to adjudicate upon the constitutional validity of all laws.[22] Justice Bhagwati, the former *Chief Justice of India* has said that:

> *The Judge infuses life and blood into the dry skeleton provided by the legislature and creates a living organism appropriate and adequate to meet the needs of the society.*

It is worth noting that the role of judges is not only to interpret the *Constitution* but also to give the true meaning to the legislation. The Judiciary is considered as the guardian of the *Constitution*, to uphold the *rule of law*, by protecting the rights and liberties of individuals and limiting the government within its bound. The *Supreme Court* and the *High Court* is constituted as the protector and guarantor of the *Fundamental Rights* under Article 7 (23) of the *Constitution*. Additionally, the *Constitution* under Article 21 (10) allows for the issue of *Orders*, *Directions* or *Writs* by the *Supreme Court* and the *High Court*.

Writs are generally invoked for challenging the administrative actions and thus serve as a better tool for the control of administrative bodies to limit them within their legal limits. *Writs* provide a safeguard for upholding the rights and liberties of the people and the *Writ* system provide an expeditious remedy than any other remedies available through the normal court-processes. However, since the adoption of the *Constitution* has been fairly recent, the extent to which *Writ* jurisdiction would be exercised under the *Constitution* is yet to be tested and the effectiveness of the role of *Writs* in safeguarding the rights and liberties of the people would only be determined with the passage of time.

21 Art.1 (13).

22 Art.1 (10) and (11).

Upon review of the provisions of the *Constitution*, it is observed that in discharging the function of *Judicial Review*, the Courts would be required to do the following:

a) To interpret the *Constitution*;
b) To declare a law unconstitutional if it is inconsistent with the provisions of the *Constitution*;
c) To protect *Fundamental Rights* guaranteed in the *Constitution*;
d) To guard against delegation of essential legislative power by the legislature and to maintain the balance between the *Executive* and the *Legislature;*
e) To relieve the people of the legislative excess;
f) To maintain the harmony between the individual liberty and social needs;
g) To give relief to the citizens by refusing to apply an *Act* that is declared unconstitutional;
h) To alert the legislation to conform to the *Constitution*; and
i) To guard the legislative powers being encroached upon by other agencies of the *Government*.

In *Judicial Review* of legislative actions, whenever any law passed by the *Legislature* infringes any of the *Fundamental Rights*, it is declared as unconstitutional by the Court. In the *Judicial Review* of administrative action, whenever there is arbitrary exercise of discretionary power, the court will declare that action as unconstitutional. Since the adoption of the *Constitution*, there have been a few instances where *Judicial Review* has been exercised by the Court. A case in point is the so called first *Constitutional Case,*[23] which revolved around the issue of constitutional validity of tax revision, which probably is the first instance of exercise of *Judicial Review* by the Court. The *Supreme Court* in its *Judgment* expressly acknowledged the crucial role of the courts in exercising *Judicial Review* by stating that:

> *The Constitution is the guide which the Court shall never abandon. The court shall recognize and respect the roles of*

23 *The Opposition Party v The Government* [2011]. Retrieved from http://www.judiciary.gov.bt/judg/2016/Supreme%20Court/englishj.pdf>.

> *other governmental institutions without abdicating its role as the guardian of the Constitution. The interpretation of the legality of Acts passed by Parliament and actions of government agencies vis-à-vis the provision of the Constitution by the Supreme Court is final not because it is infallible, but because the Supreme Court is the guardian and the final authority to interpret the Constitution.*[24]

It further stated that:

> *Constitutionalism is an anti-thesis to autocracy. Therefore, the Constitution has different centeres of power under vertical, horizontal and intra check and balance ensured through Separation of Powers. The Constitution has carefully crafted the checks and balance inherent to Constitutionalism. It prevents power from being concentrated in too few hands, which could result in an autocratic and dictatorial government.*[25]

Despite this recognition, we have not withstood the test of time to make a determination as to whether *Judicial Review* is exercised in the true sense of the term, as with the ever increasing number of new legislations being enacted, there are instances where the *Legislature* has made excesses in their role.

Another case dealing with the exercise of *Judicial Review* is the prosecution launched by the state against those who were found to be abusing prescription medicine *Spasmo-proxyvon* tablets, a prescription drug supposedly abused for its addictive properties, more popularly known as *SP Plus Case* among the public. There were a huge number of people being convicted by the courts across the *Dzongkhags*, despite the contention of the defence that the chemical composition in the medicine did not comprise any component that was prohibited under the prevailing laws and therefore, the accused could not be convicted as they cannot be held liable for violating any law. Eventually, the *Supreme Court* ruled that the chemical component in *Spasmo-Proxyvon* is not categorized as a controlled substance under the *Narcotic Drugs, Psychotropic Substance and Substance Abuse Act 2015* and

24 Ibid.
25 Ibid.

therefore, instead of sentencing the accused to imprisonment, they were given the option to pay *Thrimthue* in lieu of imprisonment.[26] The *Judgement* served as the basis for similar treatment of all other accused arrested till the day of the *Judgement*.

While seen in the light of the accused being convicted by the courts for a conduct which was not even criminalized under the laws, the intervention of the *Supreme Court* is suggestive of exercising the power of *Judicial Review* in curtailing arbitrary exercise of discretionary power to prosecute. Seemingly, many of the arrested and detained felt the much-needed respite through the ruling of the highest court. However, a critical assessment of the whole episode seems to suggest that, by providing the accused an alternative to pay *Thrimthue*, the court had not concluded that the state authorities had wrongly charged the accused in the first place. As such, it might have been possible that a few of the accused might not have had the resources to pay the *Thrimthue* in exchange for their liberty despite the fact that their conviction was not based on any of the prevailing laws.

Conclusion

Over the years, the role of the Judiciary has undergone a transformation that has witnessed its emergence as a dynamic institution playing an active role in expanding the scope and content of individual and collective rights of citizens. Since, the Judiciary is the ultimate authority to interpret the *Constitution*, it intervenes whenever the *Parliament* misuses its legislative competence to enact new laws or amend the existing ones which may violate the basic spirit of the *Constitution*. Similarly, when the *Executive* discharges its duties contrary to the constitutional mandate, the judiciary has the right and duty to intervene and correct the course of such action. *Judicial Review* is the institutional capacity of courts to determine the constitutional validity of actions taken by other branches of the government. It is a necessity for ensuring the *rule of law* in order to safeguard the liberty and rights of the individuals. The *rule of law* ensures protection against the arbitrary conduct of the government.

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26 Dorji C., & Phuntsho, S. (2017). *Supreme Court Judgement allows convicts in SP+ cases to pay Thrimthue*. Retrieved from http://www.bbs.bt/news.

The power of *Judicial Review* is linked to the protection of *Fundamental Rights*, since depriving the court of its power of *Judicial Review* would tantamount to making *Fundamental Rights* non-enforceable, as they will become rights without remedy.[27] In the absence of *Judicial Review*, written *Constitution* will be reduced to a collection of platitudes without any binding force.[28] Thus it is to be seen that the *Judiciary* is the most important organ of the government which by assuming the power of *Judicial Review* over legislative and administrative action upholds the ideals of the *Constitution* in the interest of the safety and security of the people.

27 Jain, M. P. (2003). *Indian Constitutional Law*, 5th Ed. Wadha, p.1831.
28 Ibid.

Effective Implementation of Laws: Challenges during COVID-19[1]

Introduction

With the institution of a democratic system, law-making is the prerogative of the *Legislature*. Over the last two and half decades, Bhutan enacted numerous laws, diversifying the laws in the country. Among many laws, one of the most debated and controversial law is the *Tobacco Control Act of Bhutan*, *2010*. Although the law was deemed controversial, it eclipsed into silence since 2014. However, with the emergence of the COVID-19 pandemic, the controversies resurfaced. As a deeply spiritual nation that is guided by deep-rooted values of Buddhism, tobacco consumption is viewed as 'unethical' and 'morally wrong' from the dimensions of health, social and Buddhist ethics.

Since the 1980s, Bhutan made notable progress in stemming tobacco consumption in the country.[2] In 2004, coinciding with the *National Day,* Bhutan banned all forms of sale and buying of tobacco and tobacco products in the country. To commemorate the official ban, tobacco products were incinerated at the *Changlingmethang*. The *National Steering Committee* established under the *Ministry of Health* further reinforced the ban. Bhutan also ratified the *Framework Convention on Tobacco Control* (FCTC) of the *World Health Organization*. In fact, the prohibition and nationwide interdict on the sale of tobacco and tobacco products made transaction of tobacco and tobacco products a penal offence.[3]

To strengthen it through a strong national legislation, the *Ministry of Health* initiated drafting of *Tobacco Control Bill* since 2007. The then *Minister of Health* tabled the draft *Bill* in the *National Council* during the *Fifth Session* of the *First Parliament.*[4] The *Parliament* passed this *Bill* on 6 June 2010.

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1 Contributed by Sonam Tshering.

2 Givel, M. (2009). *Tobacco Use Policymaking and Administration in Bhutan.*

3 National Assembly Resolutions. (2004). *The Penal Code of Bhutan*.

4 Parliament of Bhutan. (2010). *Tobacco Control Act of Bhutan, 2010.* Thimphu: National Assembly of Bhutan.

The law was enacted with the objectives of *"recognizing the harmful effects of tobacco consumption and exposure to tobacco smokes from the perspectives of spiritual and social health"*[5] and also to fulfill the obligations under the FCTC. Section 29 of the *Act* designated the *Bhutan Narcotic Control Authority* (BNCA) as the *de facto Tobacco Control Office.* Moreover, section 25 of the *Act* designated the *Narcotic Control Board* as *Tobacco Control Board.*[6]

With the enactment of the *Act*, during the *first sitting* of the *Tobacco Control Board,* they decided on the *maximum quantity a person can import for personal consumption*. The *Board* decided the quantity based on the prior *Notification* issued by the *Department of Trade* preceding the *Act.* As per the decision, a person was allowed to import a maximum of 200 sticks of cigarettes or 150 grams of pipe tobacco or 50 grams of other tobacco and tobacco products per trip. In a time of six months, the BNCA completed framing of the *Rules* therefore; issuing the *Notifications* to the public and training of the relevant law enforcement bodies after the *Tobacco Control Act* was enacted.[7]

Comparatively, there are no other legislations, which are discussed, debated and critically reviewed by different sections of the society as much as the *Tobacco Control Act*. It caught the same glare and attention in the international media too. It also became a distinct law by undergoing three amendments in less than five years after it was first enacted. We can say that the drafters of the law exhausted their 'best intentions' to curtail the 'ill effects of tobacco consumption on health' and 'uphold basic Buddhist values.' Whatsoever, the effectiveness and success of the law still generates debates and differently opinioned contentions. This Paper briefly looks at each of these controversies in light of the COVID-19 pandemic period.

Challenges in Enforcement

The law was enforced on 1 January 2011. As per the records, the BNCA has carried out public advocacies in all districts and sensitized all newly elected *Local Government* officials and representatives. Although, the law seemed

5 Ibid.
6 Ibid.
7 Tshering, S. (2013). *Tobacco Control Activities.* [Unpublished].

undebatable and smooth when first enacted, it began to stir controversies during implementation. With the apprehension of the first suspect, who came in conflict with this law, it later generated debates among the general public. The major problem stemmed from the designation of non-smoking areas, the requirement to produce the tax payment invoices and the quantity which became a ground for incarceration of people within a short span of time.

Social Media phenomenon was new in Bhutan at that point of time. However, it led to the formation of a group known as *"Amend the Tobacco Act.*[8]*"* This group officially took the matter to the *Prime Minister's Office* with online signatures of people who were in favour for the amendment. On the contrary, another group urged the *Home Minister* to make the law even more stringent. Therefore, the views on the law were diversified. International media like the British Broadcasting Corporation and the *Deutsche Welle* (DW), a Germany based newspaper also reported about the strict anti-smoking laws in Bhutan.[9] The DW quoted a Bhutanese on *Social Media* saying, "I am really against the *Tobacco Control Act*."[10] The word 'control' in this *Act* explains the kind of response and governance strategies required.[11] National media including the broadcast and the print media widely covered the law. It also led to the creation of *Bhutan Broadcasting Service's* best show, *the People's Voice*.

The first amendment of the *Act* was carried out in 2012; this abrogated the authority of the *Board* to decide on the quantity and amended a number of other provisions, thereby reducing the penalties and setting a new maximum quantity by the Parliament.[12] While presenting the *Tobacco*

8 Parameswaran, G. (2012, September 28). *Bhutan Smokers huff and puff over tobacco ban*. Retrieved from https://www.aljazeera.com/indepth/features/2012/09/201292095920757761.html.

9 Bhaumik, S. (2011, February 1). *Bhutan monk faces jail for anti-smoking law violations*. Retrieved from BBC News: https://www.bbc.com/news/world-south-asia-12329957.

10 Sherpa, S. (2011, March 4). *Bhutanese monk gets three years for possessing tobacco*. Retrieved from https://www.dw.com/en/bhutanese-monk-gets-three-years-for-possessing-tobacco/a-6459417.

11 Ibid.

12 Parliament of Bhutan. (2012). *Tobacco Control (Amendment) Act 2012.* Thimphu: National Assembly of Bhutan.

Control Bill 2012, the Chairman of the *Tobacco Control Board*, who was the then *Health Minister* informed the *National Assembly* that:[13]

> *While there are problems in implementation of the law, there is actually a huge support from the rural and districts. The officials from Bhutan Narcotic Control Agency went to carry out a nationwide public advocacy on the drugs and tobacco in all twenty Dzongkhags in 2011. The Local Government officials, gewog administration as well as other people who attended the public advocacy not only welcomed the existing law but also fully supported the Tobacco Control Act and Regulations. They further said that there is a decline in use of tobacco and therefore, some even recommended that the current law needs to be amended and make it even more stringent.*

However, the controversies remained, which resulted in another amendment in 2014 by the *Second Parliament*.[14] This amendment completely repealed the first amendment. The second amendment reduced the penalties significantly. It also came up with a new quantity. The new quantity as agreed in the 2014 amendment was 800 sticks of cigarettes or 1200 sticks of *bidis* or 150 pieces of cigars or 750 grams of other tobacco or tobacco products.[15] Allowing such a huge quantity of tobacco for personal consumption per month may defeat the general ideals of the law. In fact, many of the aspiring *National Council* candidates of 2013 used this law as a manifesto. Further, it was the 'quoted lawmaking processes' which caused the most debates and controversies on the matter.

Emerging Controversies

Since the 2014 amendment, the law was out of from the public scrutiny, except in few intermittent cases of smuggling of tobacco and tobacco products in a year. The dilemma of the law resurfaced in light of the COVID-19 pandemic. With the first confirmed case of COVID-19 patient

13 Unofficial translation of the *National Assembly* Deliberations of the *Eighth Session* of the *First Parliament of Bhutan*.

14 Parliament of Bhutan. (2014). *Tobacco Control (Amendment) Act of 2014.* Thimphu: National Assembly of Bhutan.

15 Ibid.

in the country in March, Bhutan closed all its borders and restricted the movement of the people across the international boundaries with India. This silently fueled the rising demand for tobacco and tobacco products in the country. Although, the borders were heavily guarded under the surveillance of our armed forces, the *De-Suups* and other volunteers, it opened a direct risk of disease transmission through sporadic cross-border smuggling of tobacco and tobacco products into Bhutan. On 2 April 2020, a month after the borders were sealed, there were reports that about twelve people were arrested for the possession of tobacco in Samdrup Jongkhar and another seven Bhutanese in Gelephu. On 9 June 2020, another three men were apprehended in Samdrup Jongkhar for the offence of smuggling of tobacco into the country. Till July, the *Bhutanese* news Paper reported that one hundred and ninety two cases involving nine hundred and eighty five people were involved in cases related to import of drugs and smugggling of tobacco and tobacco products into the country.

A survey released on the *World No Tobacco Day* revealed a sketchy report on the effectiveness of the ban on tobacco in Bhutan in the last sixteen years. The report showed that tobacco use among youth was highly prevalent. It was further reported that, although cultivation, harvesting, manufacture, supply, distribution, and sale of tobacco products are banned in Bhutan, the consumers did not encounter any hurdle in accessing the products. Emphasizing and recognizing the ill effects of tobacco use, the then *Minister of Health* was quoted as saying:

> *Knowing all the ill effects of using tobacco products, if we do not take a concerted, united and collective effort today, we will miss the boat. Many of us shy away from starting such topics with our family. If we cannot have this kind of conversation in the comfort of our own homes and in our own relationship, then I think, in whatever we do, we will fall short.*[16]

However, on 31 July 2020, the *Kuensel* news Paper reported that to end the issue of tobacco smuggling across the border and prevent the risks of spreading the disease, the government announced that it will officially

16 Tshedup, Y. (2020, June 1). Tobacco Use among Youth remains High, *Kuensel*. Retrieved from https://kuenselonline.com/tobacco-use-among-youth-remains-high/.

distribute tobacco products through the *Duty-Free Outlets*. The *Prime Minister* said:

> *In the light of the pandemic, to curb the illegal movement of people across the border [smuggling of tobacco] and to control the tobacco black market in the country, the government has devised the mechanism. The mechanism, would allow Bhutanese to buy the specified quantity of tobacco products for personal consumption from the Bhutan Duty Free Limited outlets by paying 100 percent tax*.[17]

Covering a new perspective from the lens of the media, the *Kuensel* through number of editorials supported the actions of the government on the new *action plan*. On 31 July, the *Kuensel* editorial stated:[18]

> *Legally, the tobacco law prohibits sale of tobacco, but not the import of tobacco for self-consumption. With borders sealed and travel restricted, who is going abroad to get the tobacco from an airport duty free shop? Making the Bhutan Duty Free Limited (BDFL) and its outlets the "foreign source" will ensure everyone gets their quota without having to rely on smugglers.*

Allowing the sale of tobacco through the BDFL was mainly aimed at preventing the risks of a community transmission of the disease; eliminate the existing black markets, and ease the burden of access for the people. We will have to park the time to debate the moral and ethical considerations of the decision. We cannot wait to take measures to stop a pandemic. Further on 5 August, justifying the action of the government in view of the pandemic, the editorial asserted:[19]

> *Letting the BDFL sell tobacco is a desperate move. We have a law that banned the sale of tobacco. It has not worked. It is a*

17 Tshedup, Y. (2020, July 31). 'A Solution to End the Illegal Tobacco' Trade, *Kuensel*. Retrieved from https://kuenselonline.com/a-solution-to-end-the-illegal-tobacco-trade/

18 (2020 July). 'A bold and practical decision' [editorial]. *Kuensel*. Retrieved from https://kuenselonline.com/a-bold-and-practical-decision/.

19 (2020 August 5). 'When Rules Don't Work' [editorial]. *Kuensel*. Retrieved from https://kuenselonline.com/when-rules-dont-work/.

> *smart move as it could stop people breaching border protocols and risking a community transmission. The price of tobacco in the black market is too good to resist.*

The *Kuensel* editorial on 6 August 2020 stated:[20]

> *With the government allowing controlled sale of tobacco, a hugely contested and debated issue in the past is being talked about again. The government's decision is appreciated not for making tobacco available from the duty-free outlets, but because it is seen as a rational decision in the wake of Covid-19 and increasing breach of border protocols. There is a discourse on the decision and the whole issue of tobacco. This time, it is a healthy discourse. This is what we need as the government's decision has provided a window of opportunity to table the Tobacco Control Act for amendment. The Act was dubbed as the most draconian legislation when punishment meted out for bringing in a few grammes of tobacco without paying tax was imprisonment for three years. Since then, it has been amended twice. Yet there are issues. The Act has not served its purpose. It has, rather, created several illegal activities like smuggling.*

The *Office of the Attorney General* also supported the move of the government. It stated that[21] with the closure of all entry points land and air into the country in the wake of the pandemic, it forced some individual users to import tobacco products. The *Kuensel* further quoted that:

> *Section 11 (b) and (c) and section 34 of the Tobacco Control Act 2010, restricted the sale and buy of tobacco products, section 12 of the Act permitted an individual to import tobacco for personal consumption as per the legally determined quantities and upon paying duties and taxes.*

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20 (2020 August 6). Retrieved from https://kuenselonline.com/the-tobacco-debate/.

21 Tshedup, Y. (2020 August 6). Government has not breached *Tobacco Act* or the *Constitution*, *Kuensel*. Retrieved from https://kuenselonline.com/government-has-not-breached-tobacco-act-or-constitution-ag/.

However, the provision of the *Act* became non-operational given the lockdown situations and closure of all entry points, which were the initial outlets for declaring tobacco products bought for personal consumption. Unlike in the normal times, the right to import tobacco products as per the provision of the *Act* may invariably become defunct during the exigency of the COVID-19 situation. Any *Executive Order* or *Action* or the *Circular* issued by the government to address COVID-19 and efforts to prevent the entry of the virus in the country does not tantamount to issuing *Circular* and should not be argued that it contravenes Article 20, Section 8 of the *Constitution*.

Article 20 (8) of the *Constitution* shall be applicable only in the normal circumstances where any *Executive Order* or *Circular* contravening or overriding the law or *Constitution* is issued. However, the COVID-19 has been declared as a pandemic and hence *Executive Order* to address the exigent situations cannot be construed as violation of law or the *Constitution* of which the actions of the *Executive* is justified per interim.[22] Other *Political Parties* including the *Opposition*, decided to remain silent. However, the *People's Democratic Party* (PDP) questioned the move of the government through both formal and informal press releases. On 5 August 2020, the then *Foreign Minister*, *Lyonpo* Damcho Dorji wrote on Facebook:[23]

> *With all due respect to the government's noble intentions, it must be noted that while there is no doubt smuggling of tobacco products do endanger import and community transfer of COVID-19, we must also ask ourselves what about everything else that we import, starting from essential food items to narcotic drugs. Shall we also open quota outlets for narcotics drugs as well? Smuggling of such drugs pose equal if not more dangers to the import of the deadly virus if we go by the same standard.*

22 Tshedup, Y. (2020 August 6). 'Government has not breached *Tobacco Act* or *Constitution*,' *Kuensel*. Retrieved from https://kuenselonline.com/government-has-not-breached-tobacco-act-or-constitution-ag./.

23 Dorji, D. (2020). 'Tobacco Quota Outlets! People's Democratic Party-PDP.' Retrieved from https://www.facebook.com/bhutanpdp/posts/10158495523419547.

While this statement from the former Minister did not attract much media attention, his Party, PDP seems to have leveraged on this statement. Subsequently, the PDP officially issued a Press Release further strengthening the informal objections made by *Lyonpo* Damcho Dorji which stated that:[24]

> *While most countries have ex ante laws or parliamentary endorsements to deal with emergencies such as the COVID-19 pandemic, Bhutan does not have such emergency laws although we have a provision on Emergency under Article 33 of the Constitution. Therefore, concurrence of Parliament is essential for any ex post measures of the government if such measures have the potential to violate any laws made by the Parliament.*

Although the COVID-19 is a grave health risk for Bhutan as is in other countries, Bhutan did not declare an emergency under Article 33 of the *Constitution*. Therefore, if the pandemic has to be treated as an emergency, it must undergo the mandatory procedures provided under Article 33 of the *Constitution*. Any *Executive* measure overriding any provision of the law passed by the *Parliament* must have a source in some other laws, which have the effect of paralyzing this provision in case of an emergency.

From a legal perspective, the government, by setting up tobacco outlets and the sale of tobacco products, has violated the *Tobacco Control Act*. As per section 11 (c) of the *Act*, buyers are also liable for penalty for buying of tobacco within Bhutan. On the other hand, the government initiative met another stumbling block. The *Local Government* officials in some districts appeared unsupportive of the government decision. In Dagana *Dzongkhag*, while some *Gups* stated that the tobacco consumers outnumbered the stocks they received, some shared that they wanted to help the people quit the habit of consuming tobacco; some *Gups* mentioned the initiative as a sinful act and contended that tobacco was not an essential food item. They argued that no people would die if they stop consuming tobacco.[25]

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24 People's Democratic Party-PDP. (2020 August 7). [Press Release].

25 Lhadon, Y. (2020 September 4). 'Gups in Dagana refuse to distribute tobacco,' *Kuensel*. Retrieved from https://kuenselonline.com/gups-in-dagana-refuse-to-distribute-tobacco/.

Analysis of the Law

Owing to different issues and controversies generated by the law, the analysis dwells only on the controversies and discussions made on the issue during the pandemic and possible consequences hereinafter.

1.1 Protection of the Sovereignty

The COVID-19 pandemic extends beyond the national borders; it is an international public health crisis. The issues of *internationality* and *territorial integrity* have become the most important aspect of the pandemic in the first place. This included the suspension of international travels and flights through imposed travel restrictions with stringent measures put on to curb illegal crossing of the borders. In fact, way before the *World Health Organization* (WHO) declared this disease as global pandemic; many countries had already closed their borders to protect their *territorial integrity*, and prevent the entry of the disease.

Bhutan is no exception to this phenomenon. Article 20 (1) of the *Constitution* mandates the government to *"protect and strengthen the sovereignty of the Kingdom, provide good governance, and ensure peace, security, well-being and happiness of the people."* Protection and upholding of *territorial integrity* has become a very important aspect of disease prevention and secure the health of our people. Highlighting this, His Majesty the King on the first televised Address to the Nation, commanded that:

> *Adopting a cautious approach, Bhutan stopped the entry of tourists to prevent the virus from entering the country. We have quarantined every Bhutanese returning home for three weeks to eliminate all possible risks of local transmission. Given the vulnerabilities arising from unchecked movement of people along our long and porous borders, we have also sealed the borders and enhanced vigilance. As long as the virus continues to spread across the world, there is every risk of the transmission of coronavirus in our country. To be totally successful in preventing local transmission, we can neither be complacent, nor can we let our guard down. The reckless action of a single person who clandestinely crosses the border for trade, or to meet acquaintances, or to bring someone to Bhutan, risks spreading*

> *the coronavirus in their community and in the country. It will completely undermine all our national efforts. Therefore, to be hundred percent successful in our fight against the coronavirus, it will require the unstinted cooperation of each and every person. Ensuring national security is of paramount importance, especially in these uncertain times.*

His Majesty emphasized and cautioned the people to be cautious and vigilant on cross-border spread of the disease during His numerous visits to the southern parts of the country. Since the entry of the first COVID-19 patient in March, the government took extra precautions, and diligence to ensure that Bhutan was safe, and its people remained healthy. It also established strict quarantine measures with a mandatory quarantine period for every person entering the country. From this perspective, the decision of the government to distribute tobacco products through BDFL can be discussed in light of the existing laws and the *Constitution*. Legally and constitutionally, the security of the nation is of paramount importance and pivotal in decision making in terms of what should be allowed and disallowed into the country.

While the right to consume tobacco as opined by the *Office of the Attorney General* is debatable, the right to protect the security of the country does seem to override other interests of the state at this point in time. The right to protect the sovereignty and national security, without an argument has become the primary responsibility and any state actions in the name of *national security* and *sovereignty* seems legitimate. However, the actions of the government to stop smuggling tobacco into the country may remain disputed. There were still reports of tobacco smuggling across the border even after the government enforced the initiative. On the contrary, the BDFL or distribution points were mostly limited to the capital, nearby districts, and towns; there is hardly any in the rural areas.

1.2 Challenges in Distribution

People were skeptical of the distribution of the tobacco product since the distribution did not happen uniformly and equally across the country. Even in those districts where the product reached many claimed that it was too less for the consumers. Further, the outlets also generated crowds,

right after the nationwide lockdown. Even after the BDFL outlets were established, there were incidences of people getting arrested for the offence of smuggling. Five people were arrested in Toorsa, Phuntsholing while trying to smuggle tobacco products worth Nu. 518,320 from Jaigaon, India.[26] There were also informal reports that the locally appointed distributors were promoting hoarding. Therefore, it may require a careful balancing of different priorities.

1.3 Constitutional Dilemma

The controversy extends beyond the mere distribution of tobacco products or the incidences of bringing in the disease through cross-border transmissions by the people. Although, one school of thought denies the existence of *'constitutional dilemma,'* the other school of thought emerging among certain sections of the society claims that the action of the government amounted to the violation of the tobacco law itself. The different schools of thoughts resulted in different legal opinions and thoughts. However, we should accept that this is an interim measure based on national exigencies.

The *Constitution of Bhutan* ensures a clear *Separation of Powers*[27] where the legislative power[28] is exclusively vested with the *Legislature*. The Chairman of the *Constitution Drafting Committee* said that *Separation of Powers* is one of the fundamental constitutional values that provide powers to the *Executive*, *Legislature* and the *Judiciary.*[29] The Chairman further noted:

> *Parliament is the citadel of justice and embodiment of crystallized wisdom and leadership. Parliament of Bhutan is the representative of the People of Bhutan. It is to represent the constituency, the people in his or her constituency. However, the representative should think of the national good.*

Therefore, it would be wrong for other organs of the government to make laws that does not echo the popular voice. This is further cemented under

26 Rai, R. (2020, October 12). 'Tobacco Worth more than Nu. 0.5M busted from Toorsa area.' *Kuensel*. Retrieved from https://kuenselonline.com/tobacco-worth-more-than-nu-0-5m-busted-from-toorsa-area/.

27 *The Constitution of Kingdom of Bhutan 2008*, Art. 1 (13).

28 Ibid., Art. 10(1).

29 Tobgay, S. (2014). *Making of the Constitution of the Kingdom of Bhutan*.

Article 20 (8) of the *Constitution*. Article 20 (8) explicitly prohibits the *Executive* from issuing any *Executive Order, Circular, Rule* or *Notification* which is inconsistent with or shall have the effect of modifying, varying or superseding any provision of a law made by *Parliament* or a law in force.[30] This principle is based on the theory of Bagehot[31] where he said:

> *Any Government, which violates the profound principle of democracy, shall be null and void. A democratic Government is a bastion against autocracy and dictatorship. Human choice promotes intellectual growth and responsibility. Further, the electoral process should be democratic to allow citizens to compete on a free and equal basis. Free and fair election means the rules of fair play. It should avoid a sense of political alienation of the average citizen through centrist coalition. The political party engineering should endeavour to reject extremes, and isolate the radical and unstable elements.*

Although, the situation was tough for Bhutan with a nationwide lockdown, Bhutan preempted the declaration of a national emergency. Under Article 33 of the *Constitution,* the *Druk Gyalpo* can declare the State of emergency on the written advice of the *Prime Minister*. An emergency will be proclaimed if the sovereignty, security, and territorial integrity of Bhutan or any part thereof is threatened by an act of external aggression or armed rebellion.[32]

His Majesty the Fourth Druk *Gyalpo* during the public consultations on the *Constitution* commanded:

> *(a) If there is no serious threat in our country, the Government will not declare an emergency. Even if so declared, our Parliament has to approve it within 21 days. Therefore, we need not have any doubt on this.*[33]
>
> *(b) An emergency would not be proclaimed in our country unless there is a great national crisis affecting the country.*

30 *The Constitution of Kingdom of Bhutan, 2008*, Art. 20 (8).

31 Walter Bagehot was a 19th century British businessman, essayist, Social Darwinist and journalist who wrote extensively about literature, government, and economic affairs.

32 *The Constitution of Kingdom of Bhutan, 2008*, Art. 33 (1).

33 Public Consultation in Haa on 2 November 2005.

> *Even if such emergency is proclaimed in the country, it would be in force not more than twenty one days from the date of the proclamation. An emergency would be proclaimed when the country is affected tremendously by natural disasters like earthquake, floods, epidemics, political crisis affecting security and sovereignty of the nation. The provisions are very clear and we have included these provisions because if such situations arise in future we can implement these provisions.*[34]

Since the national emergency was not declared officially, the justification of national exigencies or health crisis is questionable under the *Constitution* and constitutionally, Bhutan remained under ordinary circumstances. Further, if State of emergency was declared, only *Fundamental Rights* guaranteed under Article 1(2), (3), (5), (12) and (19) may be suspended.[35] It also requires the approval of the *Parliament*.

Therefore, constitutionally, the government did not have authority to take such action as it violated a number of provisions of the *Tobacco Act*. For example, distribution or selling[36] or buying[37] of tobacco or tobacco products is completely prohibited in the country and is punishable with misdemeanour and fine equivalent to a minimum of twelve months and maximum of thirty five months of minimum wage.[38] Therefore, distribution by the BDFL or the *Local Government* raises a legal question as to the authority of the state to distribute and second to buy the tobacco products within the country. This is because if government issues any *Executive Order*, *Circular*, *Rule* or *Notification* which is inconsistent with or have the effect of modifying, varying, or superseding any provision of a law made by the *Parliament* or a law in force.[39] The current system of distribution which results in selling and buying of tobacco and tobacco products contravenes the explicit provisions of the tobacco control law.

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34 Public Consultations in Paro on 9 November 2005.
35 *The Constitution of Kingdom of Bhutan, 2008*, Art. 33 (7).
36 *Tobacco Control (Amendment) Act 2014*, s. 11(b).
37 Ibid., s. 11(c).
38 Ibid., s. 50.
39 Ibid., s. 20 (8).

1.4 Precedent

The *Rule of Law* forms the basic tenet of strong democracy and any violation of it is considered unhealthy. In this light, let us also recall the *Notification*[40] *of Rationalization of Recurrent Budget* for Financial Year 2020-2021 under COVID-19 situation of 17 September 2020. The government implemented *Uniform Travel Allowances* for all agencies irrespective of position or rank from 1 September 2020.

The *Ministry of Finance* enforced a *Rule* where an official is entitled to receive Nu. 15000 in the first month and thereafter only Nu.10,000 per month for any in-country training, retreat, or workshop except COVID-19 related duty. While this *Notification* was issued with the best intention to prevent the outflow of unnecessary public fund, there is a procedure overriding effect. First, the *Notification* is applied retrospectively and secondly, this *Notification* nullified sections 44, 45 and 48 of the *Pay Revision Act of Bhutan*, *2019.*[41] If the government has violated the *Tobacco Control Act*, then government has also violated the *Pay Revision Act of Bhutan*. As per the Article 30 (2) of the *Constitution,* the *Pay Commission* must first recommend to the Government about the revisions in the structure of the salary, allowances, benefits, and other emoluments of the public servants and Article 30 (3) can be implemented only on the approval of the *Lhengye Zhungtshog*, but the *Parliament* has the final say. Secondly, it seems to have set a tobacco control law as a *precedent* as the government inevitably bypassed two *Parliamentary Acts*. These may require further debates and discourses among the relevant institutions. It requires a careful and in-depth analysis to gauge the long-term consequences. We must recall the golden words of His Majesty the King on the importance of adhering to the *Rule of Law*. His Majesty commanded:

> *When my Father and I introduced democracy in Bhutan 2008, the most important objective we had in mind was to establish the rule of law, which would lead to good governance, which would further lead to transparency, fairness and impartiality*

40 Ministry of Finance. (2020 September). Notification. Retrieved from https://www.mof.gov.bt/wp-content/uploads/2020/09/Notification1809202001.pdf.

41 *Pay Revision Act of Bhutan, 2019*. Retrieved from https://www.mof.gov.bt/wp-content/uploads/2019/07/payrevisionJuly2019.pdf.

> *in the working of the government and the realization of all our short term and long term national goals. Our ultimate objective has always been to ensure the happiness, peace and prosperity of the people for all time to come. I have seen many people describe democracy as a jewel gifted to the people from the Throne. I would say that rather than a gift, democracy is the responsibility given to the people to further strengthen the country.*

Democracy has been interpreted in many different ways by various people. Some people opine that since they have offered power or money in support of a *Political Party*, they feel they are entitled to special favours, even if it contravenes the law.[42]

1.5 Royal Guidance

His Majesty the King has continuously guided the nation including the *Parliament* with His wisdom. Therefore, all arms of the government and in particular, the *Legislature* have an immense responsibility to translate the golden words of His Majesty into our sacred duty. In the *Concluding Ceremony* of the *Third Session* of the *First Parliament*, His Majesty commanded:

> *I have said before that the future is what we make of it. What work we do with our two hands today, and the sacrifices we make will shape the future of our nation.*[43]

When the *Legislature* make any laws, the *Parliament* must scrutinize and look beyond the short-term benefits of such laws. While gracing the *Sixth Session* of the *First Parliament*, His Majesty reiterated that:

> *I have placed our complete faith in you. As King, I have seen that you have served the nation with dedication and commitment from the very first session of Parliament till today. During this session you will be deliberating many important bills and acts.*

42 His Majesty's Address to the *Prime Minister*, *the Cabinet*, and *Members of Parliament* on the occasion of conferring of *Dakyen* to the *Prime Minister*, Tashichhodzong, Thimphu.

43 *Concluding Ceremony* of the *Third Session* of the *First Parliament*, Thimphu.

> *In doing so, I must remind you that in focusing on the words and details of the laws and the needs of the present, do not be blinded to the future of our country and people – and the long-term objectives and priorities of our nation. Let us all, in doing our duties, keep the interest of our people and our future generations above all else*.[44]

His Majesty reminded the *Legislature* to ensure that it dwells, debates and discusses every word of the legislation, the purpose of the law, and think about the long term objectives and priorities of the nation. Democracy only thrives and grows when the *Legislature* makes good and respectful laws. His Majesty the King is clear on the importance of the *Rule of Law* as a means of creating a system of check and balance to build a strong democracy on the foundations of good governance. Further, His Majesty commanded:

> *I would like to say a prayer for our country. I pray that we build a vibrant democracy based on our Constitution, and through it, ensure that powers continue to reach the hands of our people. I pray that with the support of our people, we strengthen the Rule of Law and through the Rule of Law, we consolidate institutions of check and balance, which in turn promote good governance. And I pray that good governance becomes the means to fulfill the hopes and aspirations of our people, reinforce the security and sovereignty of our country and foster the prosperity of our people.*[45]

To uphold the *Rule of Law*, our *Legislature* must first enact laws which benefit the society and minimize their inconveniences. This will help to further strengthen the *Rule of Law* and reduce the question of constitutionality and promote a healthy legislative trend in a democratic society.

1.6 Lessons to be Learnt

The *Tobacco Control Act* must teach us lessons in our endeavour to promote laws and drafting of the laws that are responsive to the needs of the society. Our laws affect the people in various ways, and its impact on people is huge,

44 *Opening Ceremony* of the *Sixth Session* of the *First Parliament*, Thimphu.
45 Closing of the *Tenth Session* of the *First Parliament*, Thimphu.

and any unintended mistakes may result in inconveniences, particularly in contexts, when unforeseen situations arise such as the present COVID-19 pandemic. It should capture the good law-making principles and ideals and create best legal norms that translates the visions of His Majesty the King. The unintentional errors on the part of the *Legislature,* derail the best intentions and wisdoms of the *Legislature* resulting in unintended consequences to the society. In this regard, following recommendations are proposed:

1. Establishment of a *Law Commission* or other similar body to rationalize and ensure that no conflicting provisions in *Bills* are submitted to the *Parliament*.

2. The primary objectives of the laws must be maintained to achieve the objectives of the particular law.

3. The *Standing Committees* of the each *House* must carefully study the laws with a comparative analysis with other similar legal systems; and the Implementing Agencies should be encouraged to come up with strategies in applying the law when the law is still a *Bill*.

4. The *Legislatures* must also ensure that no laws are enacted under an emotional trigger. It is fundamental that laws should be based on rational thinking and spirit.

5. While laws are amended, the amendment should not lead to disconnections between different provisions, resulting in distorted and confused laws.

Conclusion

Laws are a result of human ingenuity and in some cases it may trigger and generate controversies and contentions. The legislative processes should capture the long-term consequences of the laws, with a new aperture for future legislative analysis and improved processes. The pandemic reminds us about how the intent of law should be interpreted to fulfill the aspirations of the people. A vibrant democracy is founded on strong laws that are enacted with in-depth research and analysis. Proliferation of unnecessary

laws, which are not understood by the people, undermines the *rule of law* in some democracies.[46] In this light, we can recall Justice Holmes who said that theory is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house. The law should not only secure the hopes of the people, but it should also reflect the aspirations of the people. The aspirations of the people should be fulfilled through a 'collective will' in lawmaking.

46 The *Opening Ceremony* of the *Third Session* of the *Second Parliament*.

Online Litigations: Challenges and Opportunities for Bhutan[1]

Introduction

Since the 1990s, the *Judiciary* of Bhutan has alleviated itself from the use of bare computers to a systematic *Case Management System* (CMS). Now the *Judiciary* provides web-based judicial and legal services. The reforms are made to capture the [progress] in technology and cyber- development; in line with our age old traditions and practices. The prevailing pandemic has provided us with an opportunity to revisit the [instruments] for *Justice Services* to secure the confidence of the people in the *Judiciary*; as confidence is non-justiciable even in the [worst] of times. During the *Second World War*, the then British Prime Minister, Sir Winston Churchill took the cognizance of [the] heavy casualties and the economic devastations during his time and he asked if the Courts were functioning. When he was informed that judges were dispensing Justice and *Justice Services* as normal, Churchill with relief said, "Thank God. If the Courts are working, nothing can go wrong!"

The Online platforms for *trial* or *litigation* are changing rapidly as it is in other fields of development. It is perceived as an instrument to promote and enhance justice services; with its [rising] demand[s] in view of the COVID-19 pandemic. Even otherwise, it is a necessary platform and a contemporary tool that promises to deliver effective, efficient, accessible, and transparent justice through a robust and systemic reform[s]. For this reason, the Courts have already started Online hearings through the system[s] of video conferences, and the *Judiciary* is inclined towards initiating e-litigations to enhance, expedite and accelerate judicial services by adapting to technology and change. As a matter of fact, initially, in the primary phase, it is instrumental to come up with appropriate and sound *Strategy*.

1 Contributed by Sangay.

No litigations can be compared with other [services] or [business] services that can be easily replaced by Online services. In this context, the *Judiciary* must take serious considerations about other interdependent factors. First, we need to understand the concepts in relation to e-courts, e-litigations and e-judicial services invariably used in other jurisdictions and their practicality in our context. Next, the systemic change should be implemented in [phases]; thirdly see the permissibility of these [new] reforms under the existing legal and judicial frameworks. Moreover, the *Judiciary* should also harness adequate, sustainable human and technology resources to ensure effective and efficient service. Broadly, these are policy issues that need to be settled, but significant challenges would also arise as further innovative steps are taken. In countries like the United States of America, Australia, Singapore and [even] in Indonesia, they have successfully espoused and implemented world-class e-litigation programmes. Initially, they started with e-filing, [outdated] now, which is replaced with the better applications, procedures, e-trials or e-litigations, achieving remarkable milestones as a modern and responsive *Judiciary*.

Background

Our *Judiciary* is cautiously preemptive in responding to changes. The *Judiciary* of Bhutan is the custodian of Bhutanese legal culture, and other intangible cultural heritage. The modern *Judicial System* in Bhutan started in the late 1950s with the adoption of *Thrimzhung Chhenmo* as the *Supreme Law Code*. It was central to the modernization programmes introduced by His Majesty the Druk *Gyalpo* Jigme Dorji Wangchuck. In the early 1990s, the *Judiciary* introduced the use of computers during a time when lots of procedural reforms were taking place in the *Judiciary*.[2] The Internet services were first introduced in Bhutan on 2 June 1999 by His Majesty the Fourth Druk *Gyalpo* Jigme Singye Wangchuck whilst addressing the nation at the *Changlimithang* stadium. The website of the *Judiciary* was later launched on 20 May 2005. Former *Justice* Lungten Dubgyur, and the present *Attorney General of Bhutan* notes in his book,[3]

2 Dubgyur, L. (2005). *The Parasol of Silken Knot*, Royal Court of Justice, p. 21.
3 Ibid.

As the knowledge and access to computer increases by the general public, establishing "e-court" will not be a dream in Bhutan.[4]

The *Case Management System* (CMS) was introduced in 2007 to cater faster and efficient justice service; this resulted in mass capacity development amongst the judicial personnel, mainly the *Bench Clerks*. The erstwhile *Case Information System* (CIS) as it was known at that time was mainly used offline. The CMS that is still in use, produces accurate information on the status of the case, enhance monitoring and transparency by higher Courts, and facilitate in tracking the caseload of each Court amongst others. These developments were key objectives envisaged in the *Justice Strategic IT Plan of 2000* that laid down the prospective plans for an integrated web-based judicial management system. The CMS is thus a web-based medium for next generational use in judicial service delivery. The CMS has enhanced efficiency and effectiveness of judicial services by reducing the repetitive tasks of entering data and case information, auto generation of statistics, and information sharing with the public and litigants regarding Court hearings and accessibility to judicial forms, judgments and statutes.[5] Few glitches occur regarding storage when the judgments are bulky and when cases are transferred to other Courts due to jurisdictional and unforeseen technical issues.

All these developments are however administrative tasks of the Courts, which is a matter of internal facilitation and efficiency. Fascinatingly, the Government's initiative to strengthen delivery of public services through ICT medium in the *Government to Citizenship* (G2C) Project began in 2010. Inventory of various key public services were identified, and judicial services were one of the key services. This e-service initiative has facilitated in delivering notary services, such as appointment seeking for obtaining *Marriage Certificates*, Adoption Cases, Attestation of documents and agreements, and other services. With the commencement of web-based judicial services, the public avails services that are time and cost effective

4 Ibid.

5 Dubgyur, L. *Judicial Reforms and Access to Justice Through the Use of Information and Communication Technology in Bhutan,* Royal Court of Justice, Bhutan. Retrieved from http://www.judiciary.gov.bt/publication/IT%20Paper-Lungten.pdf.

and convenient. However, this is currently done through the G2C web-based application and not through the CMS.

The Post Covid-19 Pandemic

Due to the pandemic, the government is required to restrain mobility, limit public services, restrict trade/business and so forth by enforcing health protocols to mitigate the spread of COVID-19. This uncertainty has called for a paradigm shift; Online or mobile transactions have gained momentum like never before including public sector and official works which otherwise tend to remain in-person. Traditional forms of working strictly from [nine to five] have begun to make less sense and the use of telecommunications and ICT platforms have led to new adaptations and innovations for conventional business to survive.

The *Judiciary* has already initiated Online case hearings or rather video conferencing as a response to the pandemic to continue services without interruptions. Recently, a *Closing Hearing* conducted for a criminal trial by *Trongsa Dzongkhag Court* through virtual conference with a prosecutor and defendant were reported to be the first case of e-litigation in the *Dzongkhag*.[6] Case hearings are, as far as possible, conducted as such although pleadings and submissions including evidence are emailed to a police representative or to a *Bench Clerk* who submits it to Court, which is then communicated during the video conferencing.

Even better, the *Judiciary* has, of late [July 2020], taken steps for a proper e-litigation services in Bhutan taking advantage of the situation aimed at transforming the judicial services delivery in keeping with the changing times. Proposal to make *Regulations* and *Strategic Plans* is commenced by the *Judiciary* to bring forth a full-fledged e-court system. The *Supreme Court*, *High Court* and ten other Courts have been identified as e-litigation pilot Courts.[7]

6 Passang, (2020, October 18). 'First Case of e-Litigation in Trongsa; a man sentenced to two years in prison for Fraudulent cheque writing,' *Bhutan Broadcasting Service*. Retrieved from http://www.bbs.bt/news/?p=132193.

7 United Nations Development Programme, Bhutan. (2020, July). 'Why e-Litigation is critical to mitigating disruption in justice dispensation during the coronavirus pandemic.' Retrieved from https://undp-bhutan.exposure.co/ensuring-access-to-justice.

E-court or E-litigations?

There is no clear definition of electronic Courts. As suggested by Stanfield,[8] the conduct of electronic trials may include a wide range of possible features. He suggested a useful list of basic features for effective working of an e-courtroom:

a) Collection of documents in a consistent electronic format;
b) Adequate preparation using electronic tools;
c) The courtroom itself;
d) Hardware;
e) Electronic Court Book;
f) Transcript management;
g) Visual Display System;
h) Court operator;
i) Appropriate expertise to support the system and
j) Adequate training and preparation for using the electronic tools.[9]

The database accommodates all documents in electronic format[s] including pleadings, affidavits, expert evidence and reports which can be presented electronically at the trial and easily referred to during examination and cross-examination. If computers are available at the Court, there is no need for lawyers to carry computers and electronic equipment. Video conferencing will aid in examining witnesses from anywhere in the world. These electronic tools have the potential to reduce cost, save time and enhance efficiency, especially in complex matters that run into thousands of pages of depositions.

For the e-trial to be effective, there should be a document management system which enables preparatory works such as converting documents and evidence into electronic data, with logical or ideal naming conventions with time and dates for convenient access. Giant Law firms in the United States

8 Jackson, S. (n.d.) New Challenges for Litigation in the Electronic Age, *Deakin Law Review*, 12 (1), 22.

9 Jackson, S. New Challenges for Litigation in the Electronic Age, p. 22.

and Australia have their own software to manage documents, but there are Information Technology firms who offer such facilities solely for lawyers to hire. These data management systems are useful for storage, easy access, sorting and searching, and sharing of electronic materials with solicitors, clients and counsels, both during the pre-trial stages, such as discovery, and during trial proceedings.

The concept and use of e-trial or e-court however differs from country to country depending upon their use, context and legal system. The description of the e-court above best fits that of the United States and Australia, while Singapore has a different version where physical presence of the parties is not even required for a trial; trials are set to happen through an interface system. Likewise, Indonesia has a different system, which is simple yet practical to their context, which could be relevant to Bhutan.

Singapore

The *Judiciary* in Singapore implemented the initial use of *Electronic Filing System* (EFS) in 2000. Due to its inability to cater to the technological changes and ever growing legal sector, the EFS was changed to e-litigation after thirteen years, which revolutionized the earlier EFS.[10] This resulted in a paradigm shift from a document centric electronic filing system to a case centric electronic litigation system. It is a web-based platform that leverages on the content management system and dynamic electronic form technology.

The challenges with the erstwhile EFS was that the law-firms and users were required to reserve separate computers for EFS use; constant upgradation of both hardware and software was required; and it caused duplication of work for Courts as they had to re-enter the data. The current e-litigation system offers law firms and Court users a single access point to start, and can actively manage case files throughout the litigation process. The process of e-litigation consists of three simple steps: first all information and documents relevant to the case is collected by the parties and uploaded for filing purpose; second, it offers administrative request like selection of

10 Crimson Logic Pte Ltd. 'eLitigation.' Retrieved from https://clprodwebportal.s3.ap-southeast-1.amazonaws.com/2020-02/eLitigation_web_0.pdf.

hearing dates, requests for urgent handling, requests for electronic service of documents and waiver of filing fees; and finally, users can submit the documents. Accordingly, once the hearings are scheduled, electronic hearings are conducted within the electronic sphere with an electronic queue management and display system. During a hearing, the relevant documents and minute sheets are automatically opened for ease of use.[11]

The United States and Australia are also pioneers in the use of e-filing systems; conjointly they mention volumes of the *Common Law* jurisdiction.

The United States

The basis for e-filing in the United States was established in the *Federal Rules of Civil Procedure*. The key provision *Rule* 5(a) was amended in 1996, authorizing, for the first time, the individual Courts with the power to issue a *Local Rule* whereby permitting papers to be filed by litigants through electronic means.[12] In 2001, amendments brought to the *Federal Civil Procedure* allowed parties in the litigation to agree to exchange pleadings, motions, and briefs by electronic mail, fax, or other electronic means. It is mandatory for parties to agree in advance during registration of cases for e-filing.

The *Federal Courts* were among the first Courts in the US system to gain experience and it was successfully implemented in twenty four bankruptcy Courts. The access and usage were however limited to the attorneys who had registered for e-filing with individual Courts. The user name and login passwords assigned to an attorney, which postulates their identity authentication and signature[s]. Certain standards such as: timelines for submission [to be delivered within business hours and if done later will be admitted only next day]; admissible document formats, for instance, requiring to be submitted in pdf format; and Court confirmation for receipt were governed by *Guidelines*. The State of Kansas only provides such use for *pro se* litigants so that individuals representing cases on one's behalf can

11 Ibid.

12 Griese, M. (2002). Electronic Litigation Filing in the USA, Australia and Germany: a Comparison, *Murdoch University Electronic Journal of Law*, 9 (4). Jackson, S. New Challenges for Litigation in the Electronic Age.

access e-filings. Significant difference occurs among the States as they make rules independently.

Australia

Although discussions about e-filing in the Courts in Australia surfaced in 1999, it materialized only in the late 2001 within the *Family Court* of Australia.[13] The model resembled that of the US e-filing system, surprisingly no registration were required to use the e-filing facilities of the *Federal Courts*; so anyone could access the application. *The Federal Transaction Act, 2000* provides a basis for e-filing on the federal level by allowing electronic communications with officials of the government. Now, a number of Courtrooms in Australia are established as permanent electronic Courts[14] due to a large number of benefits that technology can bring, especially in large-scale and complex litigations. The litigation process is executed through e-trial with prior agreements and cooperation between parties or representatives, but in certain cases, Courts directs for the specific use of technology due to convenience, cost and time.[15]

In *Harris Scarfe v Ernst & Young,*[16] a supposed liquidation case, it was estimated that the duration of the case would take at least six months or substantially more time to be completed. The plaintiff and one of the defendants favoured the use of technology, while the other defendants contested the authority of the Court to authorize the use of technology-based litigation. Belby J, who was satisfied that the Court had power to invoke use of technology under the *Supreme Court Rules*, took cognizance that giving of evidence that will be efficient and appropriate through use of technology, hence he directed the parties for e-trial. Objectively, he noted,

> *[Such] rules are made for the purpose of establishing orderly procedures of litigation in the Court and of promoting just and efficient determination of such litigations.*

13 Griese, M. (2002).

14 The 13th Court of the Victorian *Supreme Court* is one equipped as world's most modern courtrooms. Except Western Australia, Tasmania and the ACT, other states have *Practice Notes* published for use of technology guidelines.

15 Jackson, S. 'New Challenges for Litigation in the Electronic Age.'

16 *Harris Scarfe v Ernst & Young* [2005] SASC 407.

Further attempts have been made in Australia for electronic management of electronic [e-discovery] due to potential plans and issues. The United States and Canada have already instituted e-discovery protocols and systems.

Indonesia[17]

What Indonesia has recently achieved in the field of e-litigation is quite astonishing. In a sudden move, to accommodate change in the advancement of technology and to facilitate justice seekers in resolving civil cases, they introduced an e-court application on 13 July 2018. Soon, in about a year, they ameliorated it from the e-filing to e-litigation system by upgrading the earlier *Electronic Case Administration* with the *Electronic Case Administration and Trials in the Courts*. The former e-court application system catered only three types of services including e-registration of case, e-payment and e-*summons* while the e-litigation system enables the delivery of answers, replies, rejoinders, evidence and judgments to be carried out electronically. They simply upload answers, replies, rejoinders and conclusions electronically through the *Court Information System* [e-Court Application] in accordance with a predetermined time by the *Panel of Judges* and are referred to as e-trials. However, evidence hearings are carried out manually in order to authenticate the credibility of the evidence and validate objections made thereto.

This has seen innumerable benefits not only for Court officials but also clients using the e-Court system. Litigants saw reduced costs and faster trials as they did not have to travel for hearings, including the need to travel [for instances] such as for the payment of Court fees. E-*summons* has reduced Court fees which usually scaled up the litigation costs. Case management for Court officials has become easier with the system. However, the major challenges continue to occur, which includes the issue of the security and confidentiality of proceedings; resistance of litigants to use the system; and lack of facilities and knowledge of [IT] for demographic living in rural areas. The legal requirement for Court officials to print all documents that are uploaded by the parties is increasing the workload as well as the cost,

17 Kharlie, A.T., & Cholil, A. (2020). 'E-Court and E-Litigation: The New Face of Civil Court Practices inIndonesia' 29(2*) International Journal of Advanced Science and Technology*, pp. 2206-2213.

which many believe needs urgent amendment of the law to go paperless immediately.

The Legal Basis

The Civil and Criminal Procedure Code of Bhutan 2001 hereinafter the *Procedure Code* does not explicitly prohibit the use of Online or e-filing in case proceedings. For instance, the registration of cases as per section 31 of the *Procedure Code* is fulfilled so long as the case is filed by the victim, aggrieved person or by a prosecutor having a concrete case or controversy. Likewise, hearings are conducted on a designated day to hear charges or claims and their rebuttals on a different day. Evidence hearing and witness hearing is also conducted on a separate day to present their evidence and witness to be examined by the Court, and *Closing Argument* to summarize the case.

Presentation of physical evidence as provided under the *Evidence Act*[18] however indicates that such proceedings cannot be done through an electronic medium. Further, the service of *Summons* requires a copy of *Summon Order* to be delivered or tendered through registered mail, which makes it doubtful whether *Summons* can be delivered electronically. Add to this, pleadings as per section 138 is required to bear necessary legal stamp[s] and sign to be valid, which implies even during registration of case or the submissions it can only be done through submission of hard copies. Otherwise the premise of having to stamp and sign would be lost where submissions are made through intangible mediums.

Except the presentation of physical evidence, service of *Summons* through electronic delivery and stamping on pleadings could however be done electronically. The intention of service of *Summons* is to actually reach the parties when summoned by a Court. In a suit, if the parties agree beforehand to be summoned through electronic means during registration and accordingly furnish their details, facilitation for service of *Summons* would be executed more efficiently. Similarly, the requirement of stamps and signings are well recognized under the *Evidence Act* under *"electronic*

18 *Civil and Criminal Procedure Code, 2001* s. 84.

documents" and *"electronic signature"*[19] unless their genuineness is contested by opposing parties. Thus, the use of an electronic medium even in the process of and signing conventions may be deemed to be valid even without having the need to amend current law or adoption of a separate law.

The rule making power conferred with the *Supreme Court* and the *High Court* under the *Civil and Criminal Procedure Code*[20] will be a useful provision for developing separate procedural rules for Online platforms of trial proceedings. As long as the need for creating substantive rights and duties or overlapping existing laws does not arise, rules may be made for facilitating Court hearings and proceedings to be more accessible, cost effective and efficient. Currently, Indonesia's e-litigation is implemented based on *Circulars* and *Rules* issued by the *Supreme Court* despite their century old procedural laws not accommodating such "radical changes" as described above.

Conclusion

Studies have enumerated about the advantages and disadvantages of e-court systems, for that, the e-trials. While some argue that the e-courts may limit the human or social interactions that are essential, others argue that this indirectly takes away the [unintentional] biases that occur inside the courtrooms. This may wane away the respect and [honour] established of a conventional trial system. However, the *Judiciary* has to take this strategic role discreetly in introducing the e-litigation platforms. The experiences from other countries are an important basis for a way forward but the context of our legal system and other capacities must not be ignored.

Despite the differences in the legal system and e-litigations under the varying jurisdictions, the actual initiation of e-litigation is preceded by e-filings across all jurisdictions. E-litigation or e-trials are normally upgraded from e-filings or is hybrid form of the latter. Given our existing laws, the *Judiciary* could initially commence the e-filing system to provide registration of cases, service of *Summons* and payments of Court fees, through identified pilot Courts. In the next phase, case hearings could be done electronically which should also be seamless because written arguments, more than oral arguments, submitted in Court are usually given more consideration with the exception of evidence hearings and witness hearings where physical

evidence will have to be submitted and justified in presence of the opposing party[s].

In the case of *summary trials* and *negotiated settlements*, all proceedings may be carried out electronically. Experiments up to this stage will provide insight into whether the evidence and witness examination could also go virtual for litigation proceeding. With these, all proceedings could be set for e-litigation in the most suitable manner. *Rules* will have to be adopted by the *Supreme Court* to give proper effect to the e-filing. The *Procedure Code* may require minor amendments to accommodate proper e-litigations [later] if this is to be established permanently. The phase wise implementation offers numerous advantages from capacity development of the users, both Court officials and practicing lawyers, including the individual litigants. However, the current CMS would require upgradation to espouse e-filings, which will result in huge cost savings if found to be compatible. In addition, phase wise implementation will enable better management and administration of the Internet facilities and infrastructure.

Further, in using e-litigation, the consensus of the parties will be important so that service of *Summons* is effective or for a constructive enforcement or administrative reasons. Most litigants or defendants in Bhutan still prefer *pro se* representation, due to which they may lack knowledge of the Court procedures. Similarly, Judges and lawyers may also have reservations in using electronic platforms. In order to avoid resistance and work towards the natural evolution of judicial proceedings, it will be prudent to provide both platforms, conventional as well as e-litigation, as a matter of choice and not by law. However, like the Courts in Australia, Courts should slowly have the authority to direct litigants to use e-litigation services whenever it is convenient in the best interest of the parties.

Currently, the virtual and electronic hearings in Bhutan are limited to the prosecutors of the *Office of the Attorney General* [OAG] or the *State Prosecutors*. The change in the Court system would also demand changes in the whole justice system beginning from an investigation to final enforcement of the judgments. Line agencies will have to liaise, collaborate and work on synergizing the [working] modalities. Such an Online system is expected to inculcate professional, effective, efficient, transparent and accountable *Judiciary* and administration of justice.

Digital Technologies and Data Protection: Legal Perspective[1]

Introduction

Technology has become an essential part of human lives. They have entrenched all fields of human activities including governance, banking, accounting, sports, medicine, law, and now it has become a quintessential tool for health care. Interestingly, human beings are adaptive and easily get acclimatized to such new technological expansions. The rise and progress in *Information and Communication Technology* (ICT) is unprecedented. Advancement in ICT has resulted in numerous digital technologies and we are being introduced to new technological terms such as *Big Data*, *Cloud*, *Artificial Intelligence* (AI), *Virtual* and *Augmented Reality*, *Internet of Things* (IoT), among other contemporary technical terms. Presently, technology has determined and revolutionized how people interact, learn and work, leaving an immense footprint on social, political, professional, and medical fields.

The public health crisis engendered by the COVID-19 pandemic has further augmented the development of new technologies and appliances that retrieve, store, and process data. It has led to the explosive use of digital technologies to gather, store, and process personal data. Digital technologies presently have become a means for information. Considering the complexities involved in the operation of these technologies behind the screens and systems, it inequitably raises the questions of data protection. Currently, with the surge in the need to impute personal data, it has exposed an equal risk of exposing personal data to other unauthorized sources. These challenges are driving the need for enterprises and organizations to ensure their digital experience platform[s] are not only secure but also forward-looking.

As the health crisis evolves, various digital platforms that collect personal data are employed by enterprises and organizations in many countries. In the light of such a trend, data protection becomes critical.[2] The data protection principles and the technical tools that allow striking the right

1 Contributed by Garab Yeshi.

2 Deloitte (2020). *Privacy and Data Protection in the age of COVID-19*.

balance are however, very necessary. Such concerns are addressed through the regulatory framework of data protection, a nomenclature particularly used in Europe and so in this paper. The paper attempts to look into the general overview of the specific laws surrounding data protection. For this attempt, the scope of the paper will be limited to the discussion on international and national perspectives on regulatory framework concerning data protection, the spotlight being the 'larger picture.'

Overview of Regulatory Framework on Data Protection

Digital technologies offer business enterprises the stage to grow much faster than it was some twenty years ago. The growth in businesses is a result of the expansion of digital technologies that are capable of processing customers' financial and personal data very easily. With each business transaction, business enterprises can retain the data footprints of their customers. With an expanding digital technology, businesses, in many aspects have become a global transaction. It is no longer confined to its traditional roles and places. Business enterprises, scientific experiments, medical experiments, and the development of medicines are competitively raced through the aid of technology and digital data. With various digital and assistive technologies, the question of institutional and personal data privacy is at stake.

Although data are processed and used for public and individual purposes, it can also become a contested aspect of protection of personal data.[3] Today, the world has been paced with information. With every human endeavour, a person is required to provide his or her personal data. This results in phenomenal digital transformation, which is used to provide a competitive edge to enterprises that use the data to capitalize on the market. In a general aspect, in the area of business, data is used as a weapon to capitalize on the markets. The personal data are processed with the diverse data interfaces digitally; which generates ethical, legal, and technical questions.

Aside from personal data requirements for all business trajectories, data have also become a requirement to combat the COVID-19 pandemic. Massive online business entities with financial and human resources resort to "data mining" by employing algorithms and AI to customize

3 Mckinsey Global Institute. (2013). *Disruptive Technologies: Advances that will Transform Life, Business, and the Global Economy.*

with the interest of the customers, a process known as the *"Big Data."*[4] *"Digital Darwinism"*[5] pushes enterprises and organizations for expansion and exploration of digital technologies, so that progress is relevant in the digital age. The pace of the evolution of digital technology has even made experts in the field unable to determine the impacts in a precise format. The expansion of digital technology, with an intuitive human reason, is unstoppable. Science and technology are important components of growth and vitalization of modernity. However, the development of science and information technology and the prevalence of digital data can be a very costly techno-legal experience. It directly necessitates various laws to regulate the technology and provide a just environment for data processing and generation of data. Any technology, for that matter, digital technology must be used to serve the interests and aspirations of the people, the betterment of the society, and the advancement of humanity at large. In order to ensure effective use of such technology and to reap the benefit in that matter, it has to be regulated by the law.

The questions about data security in the context of Bhutan are not debated. As people become educated on laws with adequate legal literacy, the questions about data security and breach of data may not be far away. It is claimed that *'the world's most valuable resources are no longer oil, but data.*[6] Data is tailored to information; thus represents power. As oil was the most valuable resource of the 20th century, now data has emerged as the most valuable resource of the 21st century. Simply put, data means information, thus information is the currency of the present century. In a data-driven economy, although data pledges to secure economic and other associated benefits, it also raises other equal and competitive legal and ethical issues posed by data trading and data theft.[7] Another question is where and how

4 Moria, P., & Maeve, M. (2018). Data Protection in an Era of Big Data: The Challenges Posed by Big Personal Data. *Monash University Law Review* 2-5.

5 Association of Chartered Certified Accountants. (2013). *Digital Darwinism: Thriving in the Face of Digital Technology Change*.

6 The Economist. (2017). *The World's Most Valuable Resources is No Longer Oil, but Data*. Retrieved from https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data.

7 Chang, A. *The Facebook and Cambridge Analytica Scandal, Explained with a Simple Diagram*, The Vox. Retrieved from https://www.vox.com/policy-and-politics/2018/3/23/17151916/facebook-cambridge-analytica-trump-diagram. Moria, P.

the data is stored, secured, and protected. Although these questions are best answered by experts, who work in these matters, the issue of legal questions arises when the data is used beyond the scope and mandates for which it is collected and when the user's autonomy over the data is severed. For such reason and instances, a just, responsible, and regulatory legal framework is the imperative intervention.

Data Protection from an International Perspective

The evolving nature of digital technology and its inherent borderless character, certainly invite the attention of international actors to delve into the issue and come up with international instrument concerning data protection. An instrument that provides growth of digital technology for the advancement of mankind and at the same time addressing the issue of data protection, but it is far easier said than done. Nevertheless, history stands as a testimony where laws have always lived with the change, be it social, industrial, or for conflict resolution. Today, with proliferated digitalization, many countries have put up regulatory frameworks, which even regulate how we move and think. As we witness the digital transformation, the laws on data protection are already in place as a distinct field of law at the domestic, regional, and global levels.

The nomenclature of *"data protection"* is generally attributed to European instruments addressing the privacy-related issues of personal data resulting from ICT.[8] The concept is also known through the term *"data privacy."* The former encapsulates the broader concept of protection of data including privacy,[9] while the latter is associated with the traditional right to privacy contextualized with data. The usage of the nomenclature varies; it is largely influenced by the legal culture and tradition of a country.

At the international level, the *Convention for Protection of Individuals with regard to Automatic Processing of Personal Data*, *1981* also known as the *'Convention 108'* which entered into force in 1985 is the only

& Maeve, M. (2018). Data Protection in an Era of Big Data: The Challenges Posed by Big Personal Data. *Monash University Law Review* 8.

8 Bygrave, L.A., 'Privacy and Data Protection in an International Perspective.'

9 Ibid.

binding international instrument that tackles the issue surrounding data protection.[10] The *Convention* was mainly put forward by the *Council of Europe* (CoE) and all the member states of the *European Union* (EU) and few non-member states have ratified it.[11]

The object and purpose of *Convention 108* are to secure in the territory of each Party for every individual, regardless of the nationality or residence, respect for his rights and fundamental freedoms, and in particular his right to privacy concerning automatic processing of personal data relating to him or her.[12] *Convention 108* guarantees basic principles[13] of data protection which mandates the member states to implement the principles in adherence to the *Convention* through the domestic laws. It outlaws the processing of special categories of data revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life and criminal convictions.[14] Other basic principles include data security,[15] safeguards of the data subject,[16] sanctions and remedies,[17] and transborder data flows.[18]

It is argued that the *Convention 108* may not be the comprehensive document on data protection but certainly; it sowed the 'seed from which the right to data protection sprouted.'[19] On that note, the *Convention* itself underwent

10 *Convention for Protection of Individuals with regard to Automatic Processing of Personal Data*, 1981 ETS No. 108 (adopted 28/01/1981 and entered into force on 01/10/1985) (*Convention 108*).

11 Including Uruguay, Mauritius, Senegal, and Tunisia. See Torre, L. (2019). '*What is Convention 108.'* Retrieved from https://medium.com/golden-data/what-is-coe-108-3708915e9846.

12 The *Convention for Protection of Individuals with regard to Automatic Processing of Personal Data,* Art. 1.

13 Ibid. Chapter II.

14 Ibid. Art. 6.

15 Ibid. Art. 7.

16 Ibid. Art. 8.

17 Ibid. Art. 10.

18 Ibid. Art. 11.

19 Torre, L. (2019). '*What is Convention 108.'*

amendment in 1999[20] and CoE began reviewing the *Convention*[21] for the reasons of change resulting from the use of new digital technologies and its outcome being the amendment *Protocol* of 2018[22] also referred to as *'the modernized Convention 108.'* The modernized *Convention 108* reaffirms the principles of data protection laid down in earlier version[23] and principles of transparency, proportionality, accountability, data minimization, and privacy by design are some of the key additional principles that have been integrated into the modernized *Convention 108*.[24]

Along with the modernized *Convention 108*, the *European Union* has also developed a *General Data Protection Regulation* (GDPR),[25] which came into force in 2018 thereby repealing its preceding *Data Protection Directives*.[26] And comparatively, it is viewed as one of the most reliable and comprehensive instruments concerning data protection in force. The core objectives of the GDPR are to lay down the rules relating to the processing of data and free movement of personal data[27] within the region,[28] while also protecting the *Fundamental Rights* and freedoms especially the right to protection of personal data.[29] The GDPR enunciates seven principles relating to the processing of personal data namely, lawfulness, fairness,

20 *Protocol* amending the *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* (ETS No. 108) as approved by the *Committee of Ministers* on 15/06/1999.

21 Torre, L. (2019). '*What is Convention 108.'* Retrieved from https://medium.com/golden-data/what-is-coe-108-3708915e9846.

22 *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, 1981* (as it will be amended by *Protocol CETS No.223*). Retrieved from https://rm.coe.int/16808ade9d. EPIC, *'Council of Europe Privacy Convention.'* Retrieved from https://epic.org/privacy/intl/coeconvention/.

23 Council of Europe, 'The Modernized Convention 108: Novelties in Nutshell.' Retrieved from https://rm.coe.int/16808accf8.

24 Ibid.

25 *General Data Protection Regulation* (GDPR), *Regulation* (EU) 2016/679 (adopted 04/05/2016 and entered into force on 25/05/2018).

26 *Directive* 95/46/EC.

27 The *General Data Protection Regulation*, Art. 1.

28 Ibid. Art. 3.

29 Ibid. Art. 2.

and transparency;[30] purpose limitation;[31] data minimization;[32] accuracy;[33] storage limitation;[34] integrity and confidentiality;[35] and accountability.[36] Further, it enumerates several rights of the data subjects[37] including the right to rectification,[38] right to be forgotten,[39] and right not to be subjected to automated processing including profiling.[40] The GDPR mandates the controller of the data to comply with these principles and respect the rights of data subjects accorded by the GDPR. If a business or public entity fails to comply with provisions of the GDPR, liabilities and penalties are very lofty and stringent. Administrative fines range from Ten Million Euros or up to two percent of the company's total worldwide annual turnover of the preceding financial year;[41] or Twenty Million Euros or up to four percent of the company's total worldwide annual turnover of the preceding financial year.[42] Non-compliance to the GDPR by the companies processing the data of EU citizens would be a very costly failure.[43]

There are other international documents that attempt to formulate the data protection guidelines and resolutions, a soft law on data protection. Although it is not binding, it does have an influencing effect on states to devise the data protection law suiting their own needs and callings. To take into account of few soft laws, *Organization for Economic Cooperation and Development* (OECD) has adopted *Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data* in 1980 incorporating similar principles of data protection like in the *Convention 108*.[44] Likewise,

30 Ibid. Art. 5 (1) (a).
31 Ibid. Art. 5 (1) (b).
32 Ibid. Art. 5 (1) (c).
33 Ibid. Art. 5 (1) (d).
34 Ibid. Art. 5 (1) (e).
35 Ibid. Art. 5 (1) (f).
36 Ibid. Art. 5 (2).
37 Ibid. Art. 12-23.
38 Ibid. Art. 16.
39 Ibid. Art. 17.
40 Ibid. Art. 22.
41 Ibid. Art. 83 (4).
42 Ibid. Art. 83 (5) & (6).
43 Labadie, C., & Legner, C. (2019). *Understanding Data Protection Regulations from a Data Management Perspective: A Capability-Based Approach to EU-GDPR.*
44 Bygrave, L. A. 'Privacy and Data Protection in an International Perspective.'

the *United Nations* (UN) also adopted *Guidelines Concerning Computerized Personal Data Files* in 1990 (*UN Guidelines*) incorporating principles concerning the minimum guarantees that should be provided in member states' legislation.[45] *Asia Pacific Economic Cooperation* (APEC) adopted the *Privacy Framework* in 2004.[46]

There are several other soft laws concerning data protection stemming from various regional and international organizations, conferences, and meetings. For example, the *International Conference of Data Protection and Privacy Commissioners* (ICDPPC) is an international forum that provides independent regulators of data protection to adopt high-level resolutions and recommendations.[47] A notable approach to data protection is the emergence of the concept of *"Privacy by Design."* This concept is pioneered by the ICDPPC through the adoption of a resolution on *"Privacy by Design"* (PbD) in 2010.[48] This approach postulates that the concerns of data protection should be taken 'into the design of systems from the very beginning.'[49] It means that users should be the center of any process while developing digital technologies. In other words, the organizations need to think about how to protect the data of users from the initial period of the design process[50] of a given digital technology. It requires that the data protection of the users should be a default. This concept is also elaborated in the GDPR as *"Data Protection by Design and by Default"* (DPbDabD).[51] Resolutions adopted by the ICDPPC are mainly targeted to participating

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Retrieved from https://www.uio.no/studier/emner/jus/jus/JUS5630/v13/undervisningsmateriale/privacy-and-data-protection-in-international-perspective.pdf.

45 UN General Assembly. *Guidelines for the Regulation of Computerized Personal Data Files* (adopted 14/12/1990). *Key Principles* reflected in the *UN Guidelines* include lawfulness and fairness; accuracy; purpose-specification; interested-person access; and security amongst others.

46 *APEC Privacy Framework*. Retrieved from https://habeasdatacolombia.uniandes.edu.co/wp-content/uploads/APECPrivacyFrameworkOct-2004.pd/.

47 See *ICDPPC Documents*. Retrieved from https://privacyconference2019.info/closed-session-documents/.

48 Fabiano, N.(2017).Internet of Things and the Legal Issues related to the Data Protection Law according to the New European General Data Protection Regulation. *Athens Journal of Law*, 201-14, 210-12.

49 Ibid.

50 Ibid.

51 *The General Data Protection Regulation,* Art. 25.

states' government and member organizations to further strengthen the data protection laws and policies. These international instruments both binding and non-binding had an impact on member states to further reinforce data protection laws and influencing effect to other non-member states to enact laws concerning data protection mirroring their domestic situation and approach.

National Perspective

The emergence of "frontier technology" has ignited a series of far-reaching digital transformations in the world and as well as in Bhutan. This new technology has compelled re-thinking around the conventional application of ICT to fulfill and advance the *Sustainable Development Goals* (SDGs). Now, the emergence of "frontier technology" has added a new landscape to the ongoing digital transformation. Bhutan has a unique opportunity to accelerate digital inclusion and transformation, and strive towards achieving *Gross National Happiness* (GNH).[52] Capturing the unique opportunities to adopt digital generation, Bhutan is embracing digital technologies geared towards the delivery of services through digital transformation. When we look at Bhutan and her development of digital literacy and mobilization of digital facilities, collection of personal data, be it for business, and other reasons is a quintessential norm to ensure the delivery of services.[53] These platforms and collection of data is the main source for the origination of data. While we applaud these enterprises in making our lives much more convenient and easy, a question arises to whether there are enough technical strategies and policies in place for data protection-chiefly on personal data. Like in other countries, though negligible, concerns of data protection are being raised in Bhutan as well.[54]

52 Okuda, A. (2020). Digital Transformation for Sustainable Bhutan. *The Druk Journal*.

53 There are numerous digital platforms where services such as banking, telecommunication, food delivery, transport, online shopping is provided.

54 Nielsen, S.L. (2020). When Your Personal Data Becomes Everybody's Property. *The Druk Journal*. Retrieved from http://drukjournal.bt/when-your-personal-data-becomes-everyones-property/print/; Khamsum, K. (2018). Digital Privacy: Issues and Challenges in Bhutan. *Kuensel.* Retrieved from https://kuenselonline.com/digital-privacy-issues-and-challenges-in-bhutan/: Tshering, S. (2018). Right to Privacy in the Age of Information, Publicity, and Social Media. *Bhutan Law Review* 82-91; Kuensel (2020). Dealing with Cyber Crime. Retrieved from https://kuenselonline.com/

In response to the ever-changing dynamics of digital technologies, our farsighted leaders have rightly viewed these uncertainties; and put in place the law concerning ICT in the country. *The Bhutan Information, Communications and Media Act*, *2006* (BICMA) although does not specifically cover the subject of data protection, it incorporated provisions on cyber-related issues, the online privacy of consumers amongst others. It requires an ICT Service Provider or Vendor to 'respect and protect the privacy of the personal information they receive from their users or consumers.'[55] Further, it requires the ICT Service Vendors to make their privacy policy on the use of consumers' information easily available.[56] The BICMA ensured the protection of information from sharing to third parties.[57] Certain provisions dealing with the purpose of collection,[58] limitation on collection of information,[59] corrections and review of information by consumers[60] resembles the principles of data minimization, purpose limitation, and rectification included in the modernized *Convention 108* and GDPR as discussed earlier.

Just like the *Convention 108* was considered as a seed from where the concept of data protection sprouted, BICMA was a precursor to the *Information, Communications and Media Act of Bhutan, 2018* (ICMAB) where specific provisions on data protection are provided and several other provisions relating to data are integrated. ICMAB is the revised and improved version of the BICMA. ICMAB was developed at the same time, as GDPR and this may be the reason that ICMAB shares similar principles that are found in GDPR. However, to place on the record, ICMAB predates GDPR.[61] Discussion on provisions of ICMAB is made within the scope of a paper hereunder.

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dealing-with-cybercrime/.

55 *Bhutan Information, Communications and Media Act, 2006*, s. 157 (1).

56 Ibid. s. 157 (2).

57 Ibid. s. 157 (5).

58 Ibid. s. 157 (2) (a).

59 Ibid. s. 157 (3).

60 Ibid. s. 157 (2) (b).

61 *Information, Communications and Media Act of Bhutan, 2018* entered into force on 8 January 2018.

Principles of Data Protection

The ICMAB emphasizes data protection including personal data. In furtherance of this mandate, ICMAB incorporates principles of data protection, specifies the obligation of the controller of the data, and guarantees the rights of data subjects. According to ICMAB, data means:

> *A representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalized manner, and which is intended to be processed, is being processed, has been processed, or is capable of being processed in a computer system or computer network, and maybe in any form including computer printouts, magnetic or optical storage media, punched cards, or punched tapes or stored internally in the memory of a computer, computer system or computer network.*[62]

The broad and sweeping definition of data provided by ICMAB assign the responsibilities to the data collector to be wary of its misuse. Different measures in the form of principles and policies are provided by the ICMAB to safeguard data protection as discussed hereinafter.

A. Consent

Consent of the users is only a mechanism through which the data controller obtains controlled rights over the data subjects. ICMAB stresses that a person shall obtain the express written permission of the subject for the collection, collation, or processing of any personal information unless permitted or required to do so by law.[63] Consent is the first condition that must be obtained from the users by the data controller or ICT and Media facility or service provider and vendor to collect, collate, and process any personal data. Consent in the face of digital technology is often tricky and complex. Users of the digital technologies are left with no other options but to provide consent by providing required data to avail the services.

62 *Information, Communications and Media Act of Bhutan*, *2018*, s. 464 (30).
63 Ibid. s. 384.

B. Data Privacy

To ensure the data privacy of a person, ICMAB requires an ICT and Media facility or service provider and vendor to respect and protect the privacy of personal information, including sensitive personal information which they receive from the users or consumers[64] and put in place a privacy policy and make such policy easily accessible from the website and from any other place from where personal data, including sensitive personal data, are either requested or collected.[65] According to ICMAB, personal data means:

> *Any data or information which relates to a person who can be identified from that data or that data or other information, which is in the possession of, or is likely to come into the possession of, an ICT service provider or ICT facility provider, and includes any expression of opinion about that person and any indication of the intentions of the ICT service provider or ICT facility provider or any other person in respect of that person.*[66]

Sensitive personal data includes 'password; financial information such as bank account[s] or credit card or debit card details including physical, physiological and mental health conditions; sexual orientations; medical records and history; biometric information; and other information that may be legally deemed to be private.'[67] The ICMAB compels an ICT and Media facility or service provider and vendor to conform to the principles of data protection through devising their privacy policy.

C. Non-disclosure of Data

The ICMAB restricts the ICT and Media facility or service provider and vendor from disclosing any of the personal information held by it to a third party, unless required or permitted by law or specifically authorized to do so in writing by the concerned person.[68] Also, the ICMAB outlines the

64 Ibid. s. 336.
65 Ibid. s. 337.
66 Ibid. s. 464 (76).
67 Ibid. s. 464 (89).
68 Ibid. s. 385.

responsibility of an ICT and Media facility or service provider and vendor when sharing personal information with third parties. Sharing personal information to third parties can be done only within the parameters of the purpose of transactions except where there is specific and express consent of the users.[69] In doing so, it shall be the responsibility of an ICT and Media facility or service provider and vendor to protect the information shared with the third parties.[70] The ICMAB imposes stringent responsibility and accountability measures when it comes to a matter of security of payment; it states that an ICT and Media facility or service provider and the vendor 'shall ensure that all third parties who are involved in transactions and have access to personal or payment information comply with section 345 of ICMAB.'[71] Further, section 345 provides that 'any security mechanism used for this purpose shall be consistent with current global industry standards and other existing national laws, and appropriate to the type of information collected, maintained, or transferred to third parties.' ICMAB emphasizes the importance of confidentiality, as it is evident from the repetitive provisions upholding the principle of confidentiality and restricting the data including personal data from being shared with third parties.

D. Storage Limitation

ICMAB provides that:

> *The person possessing, dealing, or handling any personal data, including sensitive personal data or information shall delete or destroy all personal information which has become obsolete. Provided that the person may use that personal information for statistical purposes as long as the profiles or statistical data cannot be linked to any person by a third party.*[72]

The principle of storage limitation requires the personal data including sensitive data that enable the identification of data subjects should not be stored for a longer period or when the purpose for which the data is collected becomes obsolete except for statistical purposes.[73]

69 Ibid. s. 341.
70 Ibid. s. 342.
71 Ibid. s. 346.
72 Ibid. s. 386.
73 Bird & Bird. (2019).*Data-related legal, ethical, and social issues.*

E. Data Minimization

ICMAB requires that an ICT and Media facility or service provider and the vendor shall limit the collection, use, and disclosure of personal information, to that which a reasonable person would consider appropriate in the circumstances.[74]

F. Purpose Limitation

The principle of 'purpose limitation' means an ICT and Media facility or service provider and the vendor should collect data only for a specific purpose and it should be clearly stated at the time of collection. The ICMAB provides that an ICT and Media facility or service provider and vendor should inform the data subjects on 'details of the various types and sources of information being received, collected and maintained online, the purposes for which such information is collected, how the information may be used, and to whom the information may be disclosed.'[75] Simply stated, it requires data collected to be stored and used for the intended purpose only.[76]

G. Right to Amend

Akin to the right to rectification and erasure as guaranteed under GDPR to the data subjects, the ICMAB enunciates similar provisions, wherein it states that 'users or consumers may review and, when necessary, have such information amended or removed.'[77] Basically, the right to rectification means users or consumers can rectify the information collected by ICT and Media facility or service provider and vendor when the information is incomplete or incorrect.

H. Right to Remove

The right to erasure also known as 'right to be forgotten' is also one of the concepts found in the GDPR. According to this right, a data subject has

74 *Information, Communication and Media Act of Bhutan, 2018*, s. 339.
75 Ibid. s. 338 (1).
76 Ibid. s. 340.
77 Ibid. s. 338 (3).

a right to obtain from the controller of the data to get his or her personal data erased when the data is used beyond the purpose with which it was collected.[78] Although ICMAB does not list down any further grounds under which the data has to be removed or erased, an inference can be made that the users or consumers can exercise such right 'when necessary.' As per GDPR, the right to be forgotten can be invoked under six grounds, some of which applies when the personal data are no longer necessary for the purpose for which it was collected, when the user withdraws his her consent, when the processing is beyond legal mandates or lacks legitimate grounds, and when his or her personal data is illegally processed, amongst others.[79]

Liabilities for Data Breaches

Chapter 22 of the ICMAB contains detailed provisions on offences and penalties for contravening the provisions of the ICMAB. Offences under the ICMAB entail both civil and criminal sanctions, from compensation to rigorous imprisonment terms under the first-degree felony. This clearly indicates legislative intent behind the enactment of the ICMAB to regulate the technologies and to benefit from the development of such technologies in line with the national philosophy of *Gross National Happiness*.[80]

There are several offences listed under ICMAB. However, the paper will endeavour to discuss only those offences that relate to the breach of data. The ICMAB has put in place provisions on liabilities of data breaches, which comprise both civil and criminal sanctions in a much detailed manner. If a person possessing, dealing, or handling the data which the person owns, controls or operates is negligent in implementing and maintaining reasonable security practices and procedures and thereby causes wrongful loss or wrongful gain to any person, according to ICMAB, that person shall be liable to pay the compensation to the user for the damage caused.[81] The ICMAB declares unlawful disclosure of information as an offence.

78 Ibid. s. 340.

79 *The General Data Protection Regulation*, Art. 17.

80 *Preamble* of the *Information, Communication and Media Act of Bhutan, 2018*.

81 *Information, Communication and Media Act of Bhutan, 2018*, s. 387.

Section 388 of ICMAB provides that:

> *A person having secured access to any material containing personal data or information about another person, with the intent to cause or knowing that it is likely to cause wrongful loss or wrongful gain, discloses such data or information without the consent of the person concerned or in breach of a lawful contract, shall be liable for the offence of misdemeanor and shall pay compensation to the victim for the damage caused, as determined by the Court.*

This provision provides both criminal and civil liabilities. According to the *Penal Code of Bhutan*, a person found guilty of an offence of misdemeanour shall be liable for imprisonment term ranging from a minimum of one year to a maximum of three years.[82]

Similarly, the ICMAB treats unauthorized downloading, copying, and extraction of data as an offence of misdemeanour. If a person, who without lawful permission of the owner or any other person who is in charge of a computer or computer network, downloads, copies, or extracts any data, computer database, or information from the computer or computer network shall be liable for sentence term ranging from one year to three years and shall be liable for compensation to the victim for the damage caused.[83]

Further, regarding breach of confidentiality and privacy, the ICMAB prescribes that if any person, who secures or discloses such data, computer database, information, or other material without the consent of the person concerned, or in contravention of the provisions of the ICMAB and such other subsidiary legislation in force, shall be liable for the offence of misdemeanour, and shall pay compensation to the victim for the damage caused, as determined by the Court.[84] According to the ICMAB, a person who intentionally or without the authority interferes with the data shall be liable for an offence of misdemeanour.[85]

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82 *Penal Code of Bhutan*, *2004*, s. 3 (b) & 6 (12).

83 *Information, Communication and Media Act of Bhutan, 2018,* s. 389.

84 Ibid. s. 391.

85 Ibid. s. 406.

Other offences which relate to data protection directly or if not tenuously where ICMAB prescribes criminal sanctions are: unauthorized access to computer materials which includes data is graded as misdemeanour;[86] unauthorized access to computers, computer systems, networks, computer data, content data, and traffic data is graded as fourth-degree felony;[87] dishonestly receiving computer material or data is equated with an offence of possession of the stolen property as per the *Penal Code of Bhutan*;[88] and identity theft is graded as a misdemeanour.[89] The ICMAB in most of these offences also prescribes the payment of compensation to the victim concurrent to the criminal sanction.

Conclusion

While digital technologies expand exponentially, it has provided free rein on opportunities of many types and counts. At the same time, realizing the trepidations that digital technology poses to the human society, regulatory frameworks aimed at data protection has also witnessed radical transformation both at the international and national levels. With ever-increasing digitally-enabled trade, data is the most sought after resource, especially personal data. The use of IoTs and digital platforms to collate, collect, and process data has to be viewed through the different dimensions and lenses of law to secure data protection and ensure data integrity.

As highlighted in the paper, an intervention in the form of legislation and policy both at international and national levels has given rise to numerous principles and concepts primarily to regulate the utilization of data and its protection. The use of data is not just limited to capitalize on the market; it also extends to a variety of other purposes including social, political, legal, and medical. In the Bhutanese context, the data protection law is rarely invoked and it would be early to drop an opinion on it. As discussed earlier, numerous enterprises employing digital platforms that collect and store data are increasing and any data loss due to theft or data trading of Bhutanese people would result in various [unknown] legal, financial or personal

86 Ibid. s. 413 & 414.
87 Ibid. s. 415 & 416.
88 Ibid. s. 417.
89 Ibid. s. 418.

consequences. Whilst acknowledging that ICMAB contains provisions on data protection that share common principles with instruments like GDPR, the reform of data protection law will be inevitable and shall resonate with the change in the dynamics of future digital technologies.

The COVID-19 Pandemic: Australian Response[1]

Introduction

COVID-19 swept the world in 2020, with the *World Health Organization* officially declaring a pandemic on 11 March 2020.[2] The first case was confirmed in Australia on 22 January 2020.[3] Since then, the effects of the pandemic have devastated the health, tourism and hospitality sectors alike.[4] However, in Australia's Court System, where reform, especially of a technological kind, has historically been a slow process, many rapid changes have taken place.[5] As the law and the legal system are inherently conservative, and judicial processes are complex, the implications of changes are usually carefully scrutinized to ensure protections and the underlying objectives of the system are promoted.[6] However, given the ever-changing nature of the pandemic, Court[s] and tribunals across Australia were required to respond quickly.[7]

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1 Contributed by Austyn Campbell.

2 Ghebreyesus, T. A. (2020 March 11). WHO Director-General's opening remarks at the media briefing on COVID-19. *World Health Organization*. Retrieved from http://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19.

3 Department of Health. (2020 October). *Coronavirus (COVID-19) current situation and case numbers, Australia*. Retrieved from https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/coronavirus-covid-19-current-situation-and-case-numbers.

4 Brown, S.L. (2020 July 8). Restaurants and cafes facing mass closures without more coronavirus support, industry group warns. *The ABC News*. Retrieved from https://www.abc.net.au/news/2020-07-08/coronavirus-hit-restaurants-and-cafes-risk-of-closures-industry/12415648.

5 Sourdin, T. & Chinthaka, L. (2012). The Promise and Reality of Online Dispute Resolution in Australia in Wahab, Katsh, M., & Raney, D. *Online Dispute Resolution: Theory and Practice a Treatise on Technology and Dispute Resolution,* Eleven International Publishing, 471, 471-2; Peter, C., & Eliza, G. (2012). Digital Justice: Online Resolution of Minor Civil Disputes and the Use of Digital Technology in Complex Litigation and Class Actions' 19 *Macquarie Law Journal* 39, 42.

6 McIntyre, J., Anna, O., & Keiran, P. (2020). Courts and COVID-19: Challenges and Opportunities in Australia. *AUS PubLaw*. Retrieved from https://auspublaw.org/2020/05/courts-and-covid-19-challenges-and-opportunities-in-australia/.

7 Justice Connect. (2020). Accessing Australian Courts and tribunals during COVID-19.

At a high level, changes have included closing in-person services at the Court *Registries*, introducing requirements to file documents Online, allowing for hearings and document witnessing to be conducted by telephone or video,[8] postponing "non-urgent" hearings, making more procedural decisions "on the papers," requiring face coverings to be worn and enforcing social distancing inside the Courts and tribunals' buildings. This article will briefly discuss some of the key changes, including the immediate on-the-ground responses by Australian Courts in relation to hearings and trials, the increase of decisions made "on the papers" and the uptake of Online hearings and Online dispute resolution.

Immediate Response

Across most part of Australia, the peak of the pandemic occurred at the end of March 2020, though the state of Victoria continues to be in stricter lockdown after numbers remained high, peaking in mid-August.[9] By mid-March, Courts across Australia moved to delay the hearings except in most urgent of the cases. For example, by 17 March 2020, the *High Court of Australia* (HCA), the nation's highest Court determined that it would not sit as a full Court (with all seven Judges) until August, while the *Federal Court, Family Court* and *Federal Circuit Courts* moved to vacate all matters listed through to June.[10] A week later, the HCA closed its *Registry* for all face-to-face judicial services, while the *Federal Court* closed its public facing counters and face-to-face services.[11]

Retrieved from https://www.justiceconnect.org.au/resources/accessing-courts-during-covid-19/.

8 *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020,* New South Wales.

9 Department of Health and Human Services. (2020). Victorian coronavirus (COVID-19) data. Retrieved from https://www.dhhs.vic.gov.au/victorian-coronavirus-covid-19-data.

10 McIntyre, J., et al. Courts and COVID-19: Challenges and Opportunities in Australia *AUS PubLaw*. Retrieved from https://auspublaw.org/2020/05/courts-and-covid-19-challenges-and-opportunities-in-australia/.

11 Federal Court of Australia. (2020 April). COVID-19: Court Updates. Retrieved from https://www.fedcourt.gov.au/covid19/covid-19#23_3.

On a state and territory level, jury trials in South Australia were suspended on 16 March 2020,[12] and a week later the Australian Capital Territory's (ACT) *Supreme Court* vacated a hearing due to health risks associated with a face-to-face Court hearing. This decision was made despite the circumstances where conducting the final hearing Online may have been prejudicial to the litigants.[13] In Queensland, new jury trials and in-person hearings were suspended on 18 March 2020. Jury trials for criminal proceedings did not resume until 12 June 2020,[14] while in-person hearings for civil matters did not resume until 20 July 2020.[15] As one of the states least affected by the pandemic, criminal jury trials in Western Australia were suspended on 16 March 2020 and resumed on 20 July 2020.[16] Unlike other states, the people in Western Australia were able to attend the Court[s] during this time, although they were subjected to strict health and social distancing measures.[17]

Currently, Courts and tribunals across all Australian jurisdictions (both state and federal) have implemented strict health measures in line with health advice from their respective state health departments. Generally, the current advice is that anyone who is feeling unwell or has been overseas within the past fourteen days is not permitted to attend Courts or tribunals

12 ABC News. (2020, April 6). Coronavirus prompts SA jury trials to be suspended and extra public transport cleaning. Retrieved from https://www.abc.net.au/news/2020-03-16/new-sa-jury-trials-suspended-extra-cleaning-for-public-transport/12058660.

13 *Talent v Official Trustee in Bankruptcy & Anor (No. 5)* [2020] ACTSC 64.

14 Queensland Courts. (2020, May). Notice to Legal Practitioners in Relation to Criminal Proceedings during the COVID-19 Pandemic. Retrieved from https://www.courts.qld.gov.au/data/assets/pdf_file/0006/650373/sdc-notice-to-practitioners-criminal-proceedings-during-covid-19-pandemic.pdf.

15 Queensland Courts.(2020, July). Notice to Legal Practitioners in Relation to the Resumption of In-Person Hearing in Civil Proceedings During the COVID-19 Pandemic. Retrieved from https://www.courts.qld.gov.au/data/assets/pdf_file/0007/654415/sdc-notice-to-legal-practitioners-civil proceedings.pdf.

16 Supreme Court of Western Australia. (2020, June). Public Notice - COVID-19. Retrieved from https://www.lawsocietywa.asn.au/wp-content/uploads/2015/10/COVID-19-Notice-Jury-Trial-Resumption-15.06.2020.pdf.

17 Supreme Court of Western Australia. (2020, March). Public Notice - COVID-19. Retrieved from https://www.supremecourt.wa.gov.au/_files/Speeches/2019/COVID-19UpdatedNotice. (including%20Court%20of%20Appeal)18March2020.pdf.

in any event.[18] In states like Queensland and Western Australia, where there has been little or no community transmission of COVID-19 in recent months, Courts and tribunals are open and hearing cases, relying on social distancing (including leaving a one seat space between each person in the public gallery) alongside rigorous daily cleaning routines.[19] However, in Victoria, where case numbers have remained high, there are still significant measures in place. For example, criminal jury trials are not due to resume until 16 November 2020, and when they do, the *Supreme Court* of Victoria will only conduct three such trials at any one time. [20] These heightened measures are expected to relax over the next months pending the fluctuations in COVID-19 case numbers.[21]

The Decisions

A big procedural change resulting from the pandemic is the movement of state Courts and tribunals to increase the number of disputes resolved "on the papers." This means that decisions are made by Judicial Officers, such as Judges and Registrars, in their chambers solely based on the written submissions of the parties. In these cases, there is no verbal evidence or oral submissions. The benefit of increasing the number of this type of decision-making is the significant reduction of face-to-face contact between parties and Judicial Officers. However, as a result, written submissions now assume an even more important role in advocacy, at least temporarily, as advocates are not able to alter or modify their lines of arguments after written submissions are filed.[22]

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18 Supreme Court of Western Australia. (2020, March). Public Notice – COVID-19. Retrieved from https://www.supremecourt.wa.gov.au/_files/Speeches/2019/COVID-19. Updated Notice(including%20Court%20of%20Appeal)18March2020.pdf>; Queensland Courts, "COVID-19 response" <https://www.courts.qld.gov.au/about/covid-19-response.

19 Queensland Courts. COVID-19 response. Retrieved from https://www.courts.qld.gov.au/about/covid-19-response.

20 Supreme Court of Victoria. (2020, October). Resumption of Jury Trials – Q&A. Retrieved from https://www.supremecourt.vic.gov.au/about-the-court/resumption-of-jury-trials-qa.

21 Supreme Court of Victoria. (2020, October). Resumption of Jury Trials. Retrieved from https://www.supremecourt.vic.gov.au/news/resumption-of-criminal-jury-trials.

22 Nathan, M. (2020). COVID-19 and the impact on our Courts: will there be a 'new

Not all decisions made by Courts and tribunals can be made "on the papers." Usually, this form of decision-making is reserved for decisions relating to case management. Decisions regarding the final determination of a legal matter in dispute are not generally resolved in this manner. For those decisions, and in cases where parties can reasonably explain why a face-to-face hearing is necessary, the Court can instead order an Online hearing, conducted either by telephone or video conference.[23]

Online Dispute Resolution

To prevent considerable delay in hearing matters, Australia's Court System had to rapidly adopt remote working procedures, including Online hearings.[24] Before March 2020, the use of Online hearings by Australian Courts was rare.[25] In the case of the *Federal Court* and *Federal Circuit Court,* Online hearings were typically reserved for parties who, through an application to the Court, demonstrated why it was necessary in the interests of justice. Relevant factors include distance, the availability of technology, and physical safety.[26] However, few cases were heard this way.[27] Now, most Australian Courts have taken up digital solutions to allow Online hearings and Online dispute resolution. For example, the HCA heard the recent case of *Cumberland v The Queen* entirely electronically.[28] While there have been many challenges, the speed at which the *Judiciary* and the legal profession have adapted to a predominantly Online landscape is impressive. Courts have already provided jurisprudence on when it may be

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normal' in 2020? *LexisNexis*.

23 Justice Connect. (2020, April). What are decisions made by Courts and Tribunals 'on the papers'? Retrieved from https://justiceconnect.org.au/resources/decisions-made-on-the-papers/.

24 Nathan, N. (2020). COVID-19 and the impact on our Courts: will there be a 'new normal' in 2020. Tania, S., Bin, L., & McNamara, D. (2020). Court innovation and access to justice in times of crisis. *Health Policy and Technology* (forthcoming), 2.

25 Gray, P. (2020). Remote justice in the time of COVID-19 and beyond. 32(7) *Judicial Officers Bulletin* 65, 66; Krawitz, M. & Justine., H. (2015). Should Australia give more witnesses the right to Skype? 25 *Journal of Judicial Administration* 44, 45.

26 *Family Law Rules 2004* (Cth) r 16.05; *Federal Circuit Court Rules 2001* (Cth) r 25.11. See *Corelli v Beroni* [2017] FamCA 1045, [12]; *Malcher v Malcher* [2018] FamCAFC 23.

27 Gray, P. (2020). Remote justice in the time of COVID-19 and beyond.

28 *Cumberland v The Queen* [2020] HCA 1.

appropriate to hold Online hearings, while the Judicial College of Victoria has begun to collate jurisprudence on, and judicial institutional responses to, the pandemic.[29] Given the inherent health risks posed by face-to-face Court hearings, Online hearings have temporarily become the default position,[30] with only urgent cases entitled to face-to-face hearings.[31] While some Judges have emphasized the undesirability of Online hearings,[32] they also conceded their necessity as a response to the pandemic.[33] Despite the initial reluctance towards new technology in the Courtroom,[34] the *Federal Court* has gone so far as to release a *Guideline* promoting Online hearings and use of associated technology for practitioners and litigants.[35]

In regard to Online dispute resolution, the *Federal Court*, the *Family Court* and the *Federal Circuit Court* have adopted Online dispute resolution solutions. The Online dispute resolution platform "Immediation" allows these Courts to utilize video conferencing to mimic real-life mediation and hearing sessions. The founder of the platform, Laura Keily stated that:

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29 McIntyre, J., Olijnyk, A., & Keiran, P. (2020). Courts and COVID-19: Challenges and Opportunities in Australia' *AUS PubLaw*. Retrieved from https://auspublaw.org/2020/05/courts-and-covid-19-challenges-and-opportunities-in-australia/.

30 Family Court of Australia. (2020 March). *Notice to the Profession – COVID-19 Measures and listing arrangements*.

31 Ibid.

32 *David Quince v Annabelle Quince* [2020] NSWSC 326, [16], [20]; *Australian Securities and Investments Commission v Wilson* [2020] FCA 873, [32], [38]; *Rooney v AGL Energy Limited (No 2)* [2020] FCA 942, [19].

33 *Capic v Ford Motor Company of Australia Limited (Adjournment)* [2020] FCA 486, [25]; *Australian Securities and Investments Commission v GetSwift Limited* [2020] FCA 504, [25]; *JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd* [2020] WASCA 38, [7]-[8].

34 McIntyre, J. et al. (2020). Courts and COVID-19: Challenges and Opportunities in Australia. Tania, S., & Chinthaka, L. The Promise and Reality of Online Dispute Resolution in Australia in Mohamed, W., Ethan, K., & Raney, D. (2012). (eds), *Online Dispute Resolution: Theory and Practice a Treatise on Technology and Dispute Resolution.* Eleven International Publishing, 471, 483; Peter, C., Eliza, G. (2019). Digital Justice: Online Resolution of Minor Civil Disputes and the Use of Digital Technology in Complex Litigation and Class Actions. 19 *Macquarie Law Journal* 39, 42.

35 Federal Court of Australia. (2020, April). *National Practitioners/Litigants Guide to Online Hearings and Microsoft Teams*. Retrieved from https://www.fedcourt.gov.au/online-services/online-hearings.

> *[W]ithout technology support right now, thousands of important matters before the Courts would be put on hold indefinitely*.[36]

However, there remains residual criticism of Online hearings and dispute resolution. This includes concerns about public access, particularly including the access of media, to judicial hearings; the likely departure from traditional Court formalities; and more general limitations posed by technology such as Internet access and financial concerns.[37]

Conclusion

The events of 2020 have given rise to many challenges across the Australian legal landscape. Properly managed, the COVID-19 crisis could represent a great opportunity to improve Australia's Legal System and incorporate better digital innovation across Australian *Judiciary*. However, scrutiny, discussion and deliberations are essential to make permanent and sustainable changes that capitalize on the benefits of technology while avoiding the well-documented risks. Sustainable changes through innovative judicial approaches are appropriate, timely and most relevant in the context of the pandemic. We can rightly recall that the pandemic is an opportune time to harness technology; adapt and adopt to new working methods in the *Judiciary*. Rightly, the pandemic is time for digitalization and mechanization of digital platforms as a new model for the dispensation of justice and judicial services.

36 Barbaschow, A. (2020). *COVID-19 pushes Australian courts to adopt online dispute resolution*. Retrieved from https://www.zdnet.com/article/covid-19-pushes-australian-courts-to-adopt-online-dispute-resolution/.

37 McIntyre, J. et al. Courts and COVID-19: Challenges and Opportunities in Australia.

Specific Performance of Contractual Obligations: Norm or Exception?[1]

Introduction

Contract law plays a pivotal role in the society as almost all exchanges between persons and enterprises alike come within the ambit and are regulated by specific contractual obligations. This forms the basis of all commercial and contractual interactions, thus providing a statutory force on various contractual agreements making it enforceable with a legal force. The law on specific performance of contracts has been aptly called as *"abyss"* by the scholars of comparative law. It is rightly suggested that:

> *In case of a breach of contract, buyer's worry is for the act of seller's obligation and seller's worry is the compensation of price*.[2]

The remedy of specific performance is a court-intervened remedy, where a court order the party breaching the contract to positively execute the [specifics] of the contract. Thus, specific performance is an equitable remedy where the court directs the breaching party to essentially perform the contract. Usually, specific performance is granted when damages are not an adequate remedy. It is also invoked when the subject matter of the contract is 'remarkable' or when the damages cannot be measured with judicious certainty.

The universal purpose of the law of remedies is to place the party in the situation he would have had if the contract had not been breached. There are two diverse methods to attain this end which include the monetary reparation through damages and specific performance. The primary remedy for a breach of contracts in the *Common Law System* is through the system of reparation through damages. In Bhutan, our legal system essentially follows the *Common Law System* and considers specific performance as an exceptional remedy in the law. On the contrary, the *Civil Law System*

1 Contributed by Kinley Choki.

2 Secretariat Commentary (2006). *'Guide to CISG Article 46,'* Pace Law School Institute of International Commercial Law.

provides specific performance as the principal remedy. This system considers that there are no better means to reinstate the aggrieved party to the place he was in, had the breach not happened; than to impose the performance of the contract. This Paper aims at probing the remedies provided under the *United Nations Convention for Contracts of International Sale of Goods* hereinafter called as the *Convention* or CISG and examines the provisions of specific performance as the routine remedy, and the feasibility of specific performance under this *Convention*.

Specific Performance under the CISG

The CISG grants individual remedies to the buyers and sellers. The remedies can be generally categorized into three specific performance,[3] monetary compensation, or damages[4] which are unconventional in nature, and the right to dodge the contract.[5] Conversely, the principal remedy of the *Convention* is the right to enforce the performance of the contract. Article 46 of the *Convention* allows the buyer to *'require performance of seller's obligations'* while Article 62 states that the seller might *'require the buyer to pay the price, take delivery or perform his additional obligations.'* The CISG provides the aggrieved party a right to mandate the performance of the unperformed portions of the contract, a perception drawn from the *Civil Law System.* However, in the *Common Law* practice, specific performance is observed as a peculiar remedy.[6]

Statutory History

The provisions of the *Uniform Law on the International Sale of Goods* (ULIS) and the *Uniform Law on the Formation of Contracts for the International Sale of Goods* (ULF) designed the basis for drafting the CISG.[7] Specific performance under ULIS was limited to cases where the buyer was incapable

3 *United Nations Convention on Contracts for the International Sale of Goods*, Art. 46, 62.
4 Ibid., Art. 72.
5 Ibid., Art. 80.
6 Dimatteo, L., Dhooge, L., Green, S., & Maurer, V. (2005). *International Sales Law: A Critical Analysis of CISG Jurisprudence*, Cambridge University Press.
7 Walt, S. (1991). *For Specific Performance under the United Nations Sales Convention*, 26 Tex. Int'l L.J. 211-251.

of procuring substitutes or the goods were exceptional in nature.[8] It was suggested to integrate the language of Article 25 of the ULIS in the CISG as well. The suggestion was overruled on the ground that it would *"unreasonably limit"* the buyer's right to require the performance of a contract.[9] The pre-convention dialogues witnessed a 'common-civil law debate.' However, the representatives from the *Common Law* countries encouraged for a remedy of specific performance to be rarely used and made accessible only in cases where there is no accessibility of substitute goods; the supporters of *Civil Law System* argued insertion of specific performance as the key remedy. In conclusion, the Committee decided to implement the *Civil Law* method. To some, this may mean that the *Civil Law* principles were favoured over the *Common Law*. On the contrary, a concession was extended by virtue of Article 28.[10] According to Article 28, a court is not bound to grant specific performance unless it would do so within its own law in respect of similar contracts not administered by the CISG. The restriction of *'forum choice'* is not within the scope of the discussion of this article.

Specific Performance in the Common Law System

The *Common Law* discusses specific performance as complementary to the remedy of damages. Therefore, it has been the traditional approach to grant specific performance merely in cases where damages offer an insufficient relief.[11] Judicial practice echoes the entitlement of specific performance will be declined in cases where damages offer full reparation.[12] Subsequently, in the *Common Law*, it is hard for the plaintiff to prove the inadequacy of the remedy.

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8 *Report of the Committee of the Whole Relating to the Draft Convention on the International Sale of Goods, in Report of the United Nations Commission on the International Trade Law on the Work of Its Tenth Session*, 32 U.N. GAOR Supp. (No.16) Annex 1, para. 239, U.N. Doc. A/32/16 (1977).

9 Ibid.

10 Boghossian, N. (2000). *Comparative Study of Specific Performance Provisions in the United Nations Convention on Contracts for the International Sale of Goods*.

11 Beatson, J. (2002). *Anson's Law of Contract*, Oxford University Press.

12 *Harnett v Yielding*, [1805] 2 Sch. And Lef. 549 at 553; *Cud v Rutter* [1620] 1 P Wms 570.

Damages are considered to be insufficient when the subject matter of the contract is scarce, or is an exceptional article[13] or there is a scare alternative for the same.[14] Hence, the burden of presenting such compelling conditions is on the plaintiff demanding specific performance. Further, the *Common Law* necessitates the mutuality of performance. The plaintiff is under compulsion to exhibit that he is prepared and keen to perform his share of the contract.

Likewise, under the *Uniform Commercial Code*, specific performance may be declared where the goods are exceptional or in other suitable situations.[15] The use of the term 'may' specifies that it is the discretion of the court to grant specific performance.[16] Thus, this provision does not confer the aggrieved party the right to entitlement of specific performance.[17] The success of his entitlement will depend upon his capability to show that the goods are exceptional or prove the presence of other such situations. Consequently, under the *Common Law* there is a two-fold burden upon the plaintiff, to prove the existence of the *extraordinary situations* and to fulfil the *test of mutuality*.

Specific Performance in the Bhutanese Laws

In Bhutan, the remedy of specific performance is exceptional in nature. The court has the discretion to see if the order for specific performance is really needed. The order for specific performance will be given to the party committing the breach only if it appears to the court that the payment of the compensation inadequately compensate the party claiming compensation.[18] Conversely, the principal remedy provided by the CISG is specific performance. The traditional hypothesis is that damages will make enough remedy, especially in cases of contracts of sale of goods.

This hypothesis is built on the ground that, given the market situations, it is easy for a buyer to acquire additional goods and sellers to find another

13 *Falcke v Gray*, [1859], *Pusey v Pusay*, [1684].
14 *Behnke v Bhede Shipping Co.*[1927] 1 KB 649.
15 *Uniform Commercial Code*, s. 2-716.
16 Boghossian, N. (2000).
17 Koskinen, J. (1999). *Specific Performance and the Finnish Law*, Faculty of Law of the University of Turku.
18 *The Contract Act of Bhutan, 2013*, s. 217.

purchaser. The CISG however contests this hypothesis. The relevant market under the *Convention* spans over the world at large. Given the international breadth, occasionally extra goods may have to be acquired from various countries, in that way making it challenging for the buyer to arrive into a cover the transactions.[19] Therefore, the aggrieved party is given a preference to choose damages or specific performance and other additional remedies. Meanwhile specific performance can be demanded as a right if there is no mandatory burden on the aggrieved party to prove the insufficiency of damages.[20]

Neither the aggrieved parties are required to exhibit their aptitude to sensibly procure nor resell the goods under the contract.[21] For example, the claim of the advertiser was that it ordered the Publishing House of a Magazine to print a [specific] poster on the cover page of the Magazine. The condition of the printing however was, to prohibit the printing of any extra materials. If the case falls within the jurisdiction of the *Common Law*, the burden is upon the advertiser to prove that the Magazine has some exceptional features due to its readership or other reasons. Nevertheless, if the case falls within the *Civil Law* jurisdiction, the advertiser is not required to claim and demonstrate any factor, but must only prove the breach.[22] He is directly eligible for the remedy of specific performance. Furthermore, the defendant is required to perform his collateral duty and cannot discharge his obligations on the grounds that there are satisfactory alternatives. Moreover, under the CISG, identification of the goods in the contract is not a criterion to entitle for a specific performance.[23]

Discretion of the Courts

Under the *Common Law*, specific performance is not a right of the person pursuing the relief but is at the discretion of the court.[24] Therefore, even if

19 Secretariat Commentary (2006). *'Guide to CISG Article 46.'*

20 Takawire, A. (2007). *Departing from mere compromise: Reformulating the remedy of specific performance under the Convention on the International Sale of Goods (CISG) in line with the Convention's underlying goals,* Retrieved http://www.cisg.law.pace.edu/cisg/biblio/takawira.html.

21 Walt, S. (1991). *For Specific Performance under the United Nations Sales Convention,* 26 Tex. Int'l L.J. 211-251.

22 Laither, M. (2005). *The French Law of Remedies for Breach of Contract*, Hart Publishing House.

23 Walt, S. (1991). *For Specific Performance under the United Nations Sales Convention,* 26 Tex. Int'l L.J. 211-251.

24 *Lamare v Dixon*, [1873] LR 6 HL 414 at 423.

the plaintiff proves that the damages are inadequate, he will not inevitably be eligible for an order of specific performance. The court has the power to grant instruction on specific performance only in cases where it believes is reasonable.[25] The Court has the authority to dismiss the order of specific performance, if it believes, it is unfair. The system of remedy at the *Common Law* places the plaintiff at the humane side of the court. Nevertheless, the aggrieved party under the CISG has the option to choose between damages and specific performance, which restricts the discretion of the court.[26]

The CISG is inspired by the principles of the *Civil Law* in granting this remedy. The *Civil Law* court does not have the discretionary power to grant specific performance.[27] Therefore, it suggests that the courts can give no discretion in permitting the remedy.[28] Further, the CISG offers damages only as a secondary remedy. A buyer who is aggrieved is eligible to choose either the damages or other remedies as provided by the CISG.[29] Article 45 (2) states that the buyer has the right to damages even if he or she has availed other remedies. Consequently, the right of the buyer to choose and avail a remedy of his choice is the ultimate benefit under the CISG. So, the variety of the choice of the remedy in addition to the specific relief granted by the court is a right under the CISG. In this matter, the buyer is not required to demonstrate the insufficiency of the damages and absence of extra goods. The aggrieved party is not bound to claim the specific performance of the contract but, they are offered the right to choose it amongst other remedies.[30] Therefore, if the aggrieved party need to enforce the contract, he can claim for specific performance without demonstrating any factors. Conversely, if he decides not to enforce his right, then his right to damages or price reduction cannot be negotiated.

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25 *Stickney v Keeble*, [1915] AC 386, 419.

26 Boghossian, N. (2000).

27 Liu, C. (2005). *Specific Performance: Perspectives from the CISG, UNIDRROIT Principles and Case Law*.

28 Ibid.

29 *United Nations Convention on Contracts for the International Sale of Goods*, Art. 45(1).

30 Judgement by Arbitration court of the Chamber of Commerce and Industry of Budapest, Hungary 5 December 1995; case No. Vb 94131. Translation by *Marko Maljevac*, translation edited by *Dr. Loukas Mistelis*. Retrieved from http://www.cisg.law.pace.edu/case/951205h1.html

In the *Civil Law* countries, the remedy is primarily through a means of granting specific performance. In Germany, the entitlement of specific performance is taken into account to be an innate and usual right flowing from the contract.[31] Therefore, the right to claim performance is considered as a right of the party, than a remedy for the breach of contract. The German law allows the entitlement for specific performance in altogether, including cases that are not part of the contract, but which bears connection with the case. The scope is extensive and comprises compensation in kind. For example, when there has been an unlawful collusion with a third party that involve a transfer of title in goods, the third party has the duty to return the goods for the payment of original contract price.

Nevertheless, this right is subject to certain limitations comprising but not restricted to the ground of impossibility. The following are discussions about cases where specific performance has been denied, cases where payment in kind does not compensate the plaintiff sufficiently, where pronouncement of specific performance involves irrational expense, or which ends in an unreasonable enrichment to the aggrieved person. An imperative ground for limiting this remedy is contracts concerning personal aptitude reliant on the capability of the defendant. The German law differentiates contract concerning specific performance into two, which are personal and non-personal contracts. Personal contracts are those where performance is dependent on the promisor's talent or competence and cannot be executed vicariously. For example, the implementation of a promise made by Leonardo da Vinci to draw a portrait. On the other hand, non-personal contracts are those which are not dependent on the defendant's capability. In these matters, the court has invented the *test of remote performance*. It can be said that non-personal contracts may be vicariously performed, as it does not rely on any superior skill. Consequently, these contracts can be precisely imposed and does not include any unwarranted limit on personal freedoms.

Under the French law, obligations for contracts are of two kinds. They are *'obligations to give'* and *'obligations to do or abstain from doing.'* While

31 Szladits, C. The Concept of Specific Performance in Civil Law, 4(2). *The American Journal of Comparative Law* 208-234.

'obligations to give' can be precisely imposed, *'obligations to refrain from doing'* are normally understood as not likely to be imposed.[32] The French law has not classified the *'obligations to do'* on the ground of displaced performance as opposed to the German law. The French law allow a definite quantity of discretion where the Judges can negate the specific performance.

The court has rejected performance if it is domineering to the personal rights of the debtor, performance is impossible, the cost of implementation compensates the damages suffered or when the rights of third parties are expected to be trespassed. Nevertheless, this discretion is to be drilled economically and not at the cost of the plaintiff's primary right. If the possibility of specific performance is greater in French law, it is only because the court does not rule out this remedy on the ground that damages form a satisfactory relief.

Conclusion

Lord Hoffman observed that:

> *In practice, there is less difference between Common Law and Civil Law Systems than one may suppose. The principles upon which English Judges exercise the discretion to grant specific performance are reasonably well settled and depend upon a number of considerations, mostly of a practical nature, which are very general application. I have made no investigation of the Civil Law Systems, but a priori I would expect that Judges take much the same matters into account in deciding whether specific performance would be inappropriate in a particular case*.[33]

It has been opined that the nature, scope and degree of limitations on specific performance is the same under both the *Common* and *Civil Law Systems*. The relief is subject to discretion of the judges and practical difficulties of implementation, and involvement of administrative costs in the *Civil Law* countries. Consequently, in reality, specific performance as a routine remedy leads to the similar outcome as in cases where it is

32 *French Civil Court*, Art. 1142.

33 *Co-operative Insurance Society Ltd v Argyll Stores Holding Ltd.* [1997] 3 ALL ER 297.

provided as an extraordinary remedy. Nevertheless, notwithstanding the practical limitations interpreting specific performance, the other model is more feasible for the following reasons. Firstly, there is a distinct shift in the burden of proof. The aggrieved party is no longer obligated to bear an adverse burden, i.e., proof of *'no reasonable substitutes'* in the market. In its place the breaching party abides by an optimistic burden to create the accessibility of such sensible alternatives. The twin effects of this shift are; the tedious burden is now open to the defendant, the party breaching the contracts as opposed to the victim of such breach.

Moreover, it is reasonably simple to release an optimistic burden. Secondly, this model delivers a choice to the aggrieved party to claim a remedy of his choice. This exercise of choice is sacrosanct; because it is the aggrieved party who can best decide the remedy that may be of utmost satisfaction.[34] Further, the aggrieved party tolerates the difficulties involved in the implementation and administrative costs upon choosing the remedy of specific performance. The consequence of the shift in burden and provision of choice to the aggrieved party will ensure that the parties do not breach the contract. This will also help them to rethink on their contractual obligations and make enforcement of the contracts more certain.[35]

COVID-19 and the New Era of Virtual Litigations and e-Justice[1]

Introduction

The COVID-19 pandemic has impacted public health, national economies and impeded *access to justice* for the people. Bhutan is not unscathed by the pandemic; it has impacted her economy, affected the health of the people, and reduced their livelihoods. As fundamental as the economy, justice and continued administration of justice is prerequisite to fulfill the aspirations of the people. The principle of *'open justice'* constitutes the right of *access to courts* which guarantees a *'air public hearing.*[2] *'Internet Court'* and *'Robot Justice'* are contemporary judicial alternatives that promote digitalization to ease burden on human judges.[3] Many jurist recalls that:

> *The importance of the continued administration of justice – the principle that justice delayed is justice denied continues to apply, even where the delay arises from the circumstances of the pandemic.*[4]

As we continue to provide judicial and legal services, it demands that the judges, judicial personnel and legal professionals to make appropriate use of modern technology. Remote working may have to be used in a manner that would not have been contemplated prior to the pandemic. Therefore, the situation demands 'creativity' and 'appropriate situational response.' This will be a necessary tool to move forward as a healthy, progressive and resilient society and a nation. No person can be a spectator and be a bystander to this pandemic. It is well accepted fact that the pandemic has disoriented nations, affecting the society on a large scale.

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1 Contributed by Pempa Shingdan.

2 Brickhill, J. (2020). *Constitutional implications of COVID-19: Access to Justice and the functioning of the courts during lockdown,* University of Oxford.

3 Fan, K. (2020). *"The Impact of COVID-19 on the Administration of Justice,"* Kluwer Arbitration Blog, retrieved from http://arbitrationblog.kluwerarbitration.com/2020/07/10/the-impact-of-covid-19-onthe-administration-of-justice.

4 Foster, F. (2020). *COVID-19: Applications for Adjournments or Extensions of Time*, Henderson Chambers.

The situation is changing rapidly and information on this topic is still evolving. However, we should consider that the pandemic is a "positive call for change" with reinvention of social processes and interaction models. It has forced on us the idea of remote working culture, remote workspaces and pushed for new and advanced working practices. In most aspects, the pandemic has ruined the economic prospects of the people; and pushed many people to the brinks of poverty and economic destitution. Bhutan is an extraordinary country that is gifted with incomparable and strong leadership. The *Royal Kidu* initiative had been pivotal in securing the economic and other necessities for families and people affected by the pandemic. If we look at other parts of the world, the COVID-19 has been a battle field for political gain; while the rich got richer, the poorer sections of the society were drastically impacted leaving many hungry and impoverished. The COVID-19 pandemic has taught the world about the true meaning of 'true and genuine' leadership.

In Bhutan, it has been the ubiquitous nature of leadership defined by solidarity and common purpose. His Majesty the King, His Majesty the Fourth Druk *Gyalpo*, the Royal Government of Bhutan and the people channeled a concerted effort to minimize the effects of COVID-19 and prevent a community transmission. The pandemic witnessed the real Bhutanese spirit rightly capturing the solemn pledge as *"WE, the People of Bhutan"* echoed in the *Preamble* of the Bhutanese *Constitution*. People contributed both in kind and cash; and through voluntary services as frontline workers toiling, patrolling and guarding the porous borders of Bhutan. While the rich gave rent concessions; the business entities and corporations rendered financial and other economic supports to the government. The pandemic has defined the spirit of unity, leadership, common purpose and values as a Bhutanese nation. Farmers in different pockets of the country made voluntary contributions in kind and cash consisting of vegetables, fruits, butter and cheese, which is the economic vitality of Bhutan. This is the story of Bhutanese spirit of purpose; and the common effort to fight the invisible enemy. This is the story of benevolent institution of monarchy, resilient leaders, dedicated volunteers, cooperative society, helpful neighbours, and generous farmers.

Technologically Assisted Courts

The government is still maneuvering to halt the spread of the disease and mitigate the public health and economic impacts of the outbreak. As much as the pandemic had destroyed the health and economy of the country and its people, it has taught lessons for the 21st century governance. To this, author Yuval Noah Harari[5] conveyed the message about the challenges that humankind will face in the 21st century. He talks that there will be a global challenge. Global challenge requires global cooperation and no country can solve these problems in isolation. Further, the author stated that we are left with no single global story to continue after the disillusionment of liberal democratic world. However, the twin revolution in information technology and biotechnology has taken place. With the twin revolution in place, there could be cooperation between human and *artificial intelligence* (AI). This will pose threat for the 21st century as much as it will ease the works for humans.

The current situation has presented unprecedented challenges as well as unthought-of opportunities in various fields including new developments in law and legal theory. The pandemic has taught us about the current and future realities; that the world, nations and the societies has to grapple with. The impact of the pandemic has not only infiltrated and retarded the areas of socio-economic progress, but also decimated the progressive *access to justice*. This has impacted judicial service providers, justice agencies, and the consumers of justice. It has convoluted the normal judicial processes; and disrupted the course of dispensation of justice.

Digital development and use of electronic resources as a medium of service and communications, has been seminal for a progressive society. Like others, this has been an apt opportunity to capture and leverage digital progress in the *Judiciary* by engaging evolving digital platforms. In other countries in South Asia, like in Singapore, digitally assisted Courts have been a major judicial reform, which capitalizes on electronic litigation and digital conveyancing. In Bhutan, it is a time to test, retest and adapt to new communication technologies to facilitate electronic conferencing of cases; and electronic litigation. This will ease access to justice, promote

5 Harari, U. N. (2018). *21 Lessons for the 21st Century*.

user-friendly Court processes and systematically provide judicial services through e-registration, e-filing and e-service of process and other basic judicial services. This rightly echoes Richard Susskind, who introduces the three generations of reforms in England and Wales.[6]

He states that firstly, the *Judiciary in England* is computerized, which he terms as the *'automation of the Judiciary'* and this has contributed to simplifying and making judicial works easier and faster. This has effectively increased the speeds of typing and documentations, and it has also improved the ways of storing, and retrieval of case related documents and information. In the *'next generation reform,'* he has termed the progression of the *Judiciary* as *'Online Judging,'* meaning deploying technology to conduct judicial proceedings, like conducting virtual hearings and filing of documents electronically.

However, these developments require an equivalent progress in terms of electronic infrastructure, accompanied by human and technical skills. This necessitates the building of infrastructures for electronic Courts (e-Courts), which has facilities such as video conferencing tools that equips the judges with necessary skills for such reforms. The third generation reform is about incorporating AI into the judicial processes, with online and digital litigation processes. However, we cannot compare the progress of institutions in the fields of digital specialization with other countries, but we can be modest in adopting latest technical developments to use digital drive as a force to reinvent digitally assisted *Judiciary* in Bhutan. These reforms are very necessary, and are apt in the context of spatial global developments.

Over the past decades, the *Judiciary* of Bhutan has seen several digital and information technology-assisted reforms. These reforms has helped to streamline judicial procedures and reduced the time taken for deciding the cases. These reforms were intended to enhance unimpeded *access to justice* and improve judicial services.[7] It was further highlighted that it was a challenge to harmonize laws to cater to the changing times and meet the contemporary needs of the society. In this context, to ease judicial processes

6 Susskind, R. (2019). *Online Courts and the Future of Justice*, Oxford University Press.

7 Dubgyur. L. (2000). *Judicial Reforms And Access To Justice Through The Use Of Information And Communication Technology (ICT) In Bhutan*, p.1.

in the light of the pandemic, it is wise to rethink if we have adapted the *Judiciary* to the context and needs of the time through an enabling environment by drafting a *COVID-Friendly Court Procedure*.

It is an established fact that the pandemic may remain with us for years. We cannot languish with the pandemic, and fighting the disease cannot only be through the discovery of the vaccine, but it can be achieved through process of adaptation, adoption and normalization through new processes, techniques, skills and knowledge. Bhutan has maneuvered different patterns of epidemics in the country. Most efforts were to reduce the impact of the epidemics onto the people. Presently, with newer invention of ideas and methods to curtail and reduce the impact of the pandemic on to the people and the economy, and to enable the machinery of the government to function, streamlined process in enabling services to the people is an essential tool.

Contextually, COVID-Friendly Court Processes are rules and procedures that enable the *Judiciary* to function and operate without violating health protocols of social distancing. More importantly, the pandemic has altered the Court into a remotely functioning institution that is aided through the use of Information and Technology Services. It should be understood that people may be unable to access judicial services and interventions due to new health and social distancing protocols put in place. In this critical time, e-Courts are an important means of dispensing justice remotely through electronic litigation services. However, this requires uninterrupted Internet services; and the use of electronic devices such as smart phones to facilitate continuous and unimpeded *access to justice*. This throws us with a bottom line question of what we can do to enable unimpeded *access to justice* for the people.

Judicial Functions during the COVID-19 Pandemic

Irrespective of the strength of the economies, the pandemic has sweeping effects on countries. The pandemic has rattled the economies of many countries, and jeopardized the health of the public. On comparative economic costs, many companies laid off its employees, tourism industries are at the brink of collapse; and governments in different countries are scrambling for health and economic answers. In Bhutan, many people,

who were left unemployed as a result of the pandemic has started to engage in productive farming initiatives. Many others have entered into the formal construction industries. On the legal aspects, these pandemic has diversified different socio-legal issues. It is reported that the pandemic has increased the issues of domestic violence and the rates of crime. The increasing rate of crime exponentially increases the pressure on the *Judiciary* and judicial services. Moreover, this has increased caseloads of the Courts including civil and monetary matters pending before the Court. In expediting the disposal of cases before the Courts of law, especially monetary cases before the Courts, The *Prime Minister* made a call for *Judiciary* to expedite the proceedings on *Non-Performing Loans* (NPL). Moreover, His Excellency wants *Judiciary* to segregate all Court cases that have economic impact and deal such cases with urgency. According to the Prime Minister, it is the statement of how the *Judiciary of Bhutan* should contribute towards fighting against COVID-19 pandemic. However, the question is what can the *Judiciary* do if litigants are reluctant to come to the Court due to fear of contacting virus? Can the Courts compel the people to appear in person to attend the hearings in the Court? How will the Courts guarantee the health and safety of parties? To this, the *Prime Minister* said that one can contribute by staying in respective offices and redesigning the mode of functioning of it.[8]

Due to the COVID-19 pandemic, Courts have minimized the in-person attendance of litigants in the Courts. Wherever possible, the Courts have modified their judicial processes to ensure that least contacts are made and social distancing rules are in place. In doing this, the priority of the Court is to ensure the health and safety of litigants, court staffs, court representatives, judges and other vulnerable groups, who are directly exposed to the risk. The *Registry of the Court* is the first point of contact. Unless it is strictly regulated, this place may become vulnerable to crowding. Keeping in mind the health and safety of judicial service personnel working at the *Registry*, the Registry Services could be remotely provided by making the services Online, with mandatory attendance only in urgent cases or circumstances, which necessitate an in-person attendance.

Generally, documents are submitted before the Courts of law in hard copies. Hearings are done in-person, and individuals are required to appear

8 The Bhutanese. (2020, September).

physically before the Courts. To reduce the number of people coming before the courts, and enforce strict rules of gathering of least people, Courts made minimal appointments with litigants and called limited number of litigants in each working day. More prominently, most of the issues may arise due to lack of appropriate court procedure that is responsive to meet the social distancing requirements of COVID-19.

Secondly, Courts are not equipped with modern electronic Court technologies. Thirdly, most of the Court[s] users do not have reliable access to the necessary electronic equipment and Internet connections. In addition, most litigant[s], if not all, are unaware about how electronic litigation works; and how Online services can be used. Most of them are skeptical about the effectiveness of the mechanisms in promoting remote *access to justice*; and the quality of justice services to the people. The Courts on the other hand, are skeptical in accessing Online services; and carrying out of remote judicial proceedings. However, to meet the dramatic challenges of social distancing measures, some Courts employed technology to conduct the hearings, while others functioned with reduced Court personnel.

Courts conducted hearings through video conferencing and other remote access technologies. Exchange of documents and documentary evidence were shared through electronic mails. The success of a remote access to Courts will depend upon the facilities available to the parties and ability to coordinate, adapt and employ the technologies. The *Office of the Attorney General* (OAG) prosecuted various cases, with uninterrupted justice services, since both the institutions accessed, and overhauled Online hearing and documentation technologies.

The Civil and Criminal Procedure Code (CCPC)

In response to the COVID-19 pandemic, many countries resorted to Online communications and electronic filing of documents. Countries like Singapore and others had already started electronic litigation with Online judicial proceedings. In many countries, they have enacted emergency legislation, revised *Judicial Procedures* to ensure that initiatives are backed by legitimate legal force. In countries where there have been no revised legislations on electronic litigations; and revised judicial procedures, that does not require the presence of the parties, they used *Guidelines* and *Orders*

issued for virtual proceedings as a temporary measure. At the international level, the *Court of the International Chamber of Commerce* (ICC) has issued a *Guideline Note* for international arbitration proceedings, with a protocol on virtual hearings in civil disputes. With the motto of *'we make business work for everyone, every day, and everywhere,'* ICC developed its *Virtual Hearing Solution* to adapt to any hearing.[9]

It is prerequisite to ensure that the Courts functions and are operational during public health crises and other national contingencies, to avoid undue delay and provide expeditious judicial services to the people. Like any service-oriented institutions, the Royal Courts of Justice are important service institutions. To ensure that the Courts are functional without interruptions, Online communication models are essential development paradigms. In this issue, we can rightly examine if the CCPC is technologically friendly, is adaptive to advancement in technology in improving hearing procedures. The Courts in Bhutan were functional throughout the pandemic period, except in the period of national lockdown. As stated earlier, owing to reduced litigants, the Courts had to focus on urgent and essential judicial matters and cases.

Some Courts conducted hearings through video conferencing tools; and urgent and essential matters would take into account of cases where preservation of assets and evidence is critically important and where criminal sanctions and rights of persons are in stake. As COVID-19 pandemic continues to present an unparalleled public health challenges, Courts and legal professionals in Bhutan must respond with flexibility to ensure that Courts continue to deliver prompt and effective justice services. The *Supreme Court* and the *High Court* has been given the power to make *Rules* in order to give effect to the provisions of the *Code*. One may not find it expressly providing the power to make *Rules* on introducing drastic changes to the *Code*. However, it leaves some scope for Online Court hearings as section 30.1 (c) provides that, both the appellate Courts have power to make Rules on any matter, which gives effect to the provisions of the Code.

9 *ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic.*

Expeditious Proceedings

The Code[10] does not provide about online judicial processes as much as there is no legislation, which allows the *Judiciary* to develop a revised court procedure[11] on the matter. This provides a renewed incentive to the development of electronic litigation processes in the country. It must be forewarned that such new judicial procedures should not disrupt the existing judicial procedures. The *Constitution of Bhutan 2008* hereinafter the *Constitution of Bhutan* mandates the *Judiciary* to safeguard, uphold and administer justice fairly and expeditiously. The procedural component of civil and criminal cases in Bhutan is laid out in the *Code*. Firstly, section 4 of the *Code* provides that every person is entitled to fair and public trial except in those cases where the media is expressly excluded by the law.

The argument in support of public trial constitutes *open justice* or transparency. This requires any information and data findings about Courts and Court proceedings to be understandable and publicly available. The operation of the entire Court System should be open to scrutiny, as should the conduct and conclusions of individual cases. In turn this will build and enhance trust and confidence in the *Judiciary* and the *rule of law*,[12] as mandated by the *Constitution*. However, the scrutiny should not disrupt the functions of the Court by diverting the judicial process, which ultimately diverts the course of justice. The notion of justice espouse *substantive justice* and *procedural justice*. *Substantive justice* is achieved when the Court gives fair decisions by upholding the law. *Procedural justice* on the other hand requires fair procedure which basically considers *natural justice*. This indubitably raises the questions if the virtual procedures can provide justice through a fair judicial procedure. It also raises the issue of how the Courts will accommodate the media in the hearing processes, which is through the virtual platforms.

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10 *The Civil and Criminal Procedure Code of Bhutan*, *2001* mostly provides for public trial with the appearance of persons, whose presence is required. This requires the attendance of the parties before the courts of law.

11 *The Revised Court Procedure* should summarize the steps taken to ensure that remote court processes are adopted to implement the social distancing measures during the pandemic. This system should promote a sustained and systemic e-facilitated procedural change in the *Judiciary.*

12 Susskind, R. (2019). *Online Courts and Future of Justice*.

One of the problems about online hearings are discussed in Turkey, where journalists are prevented from attending the trials; and where evidence are provided through a video conferencing system known as the SEGBIS.[13] Several journalists alleged that the system poses a serious problem in terms of right to *fair trial*. It is universal principle that the right to *fair trial* constitutes as one of the core values of human dignity and rights. *The Constitution of Bhutan* provides that:

> *The state shall endeavor to provide justice through a fair, transparent and expeditious process.*

In this matter, another question arises if the trial through video conferencing can be transparent, expeditious and fair. This juxtaposes the concept of *fair trial*, which has different connotations at various national, philosophical, judicial, historical and geographical dimensions. Legally speaking, a fair and impartial trial is:

> *A trial where the rights of the defendant is safeguarded by an impartial judge and jury deciding the matter.*[14]

The national, regional and international legal systems and other instruments enumerate principles and terms related to *fair trial* in various ways. That is the reason why we find most of the *fair trial* principles have been implemented by various legal traditions under different names such as *justice, divine justice, law of the land, rule of law, due process*, amongst other legally relevant terms.[15] We do not find clear definitions in international instruments and national legislations including the *Constitution of Bhutan*. Therefore, the practical content of fairness is expected to *"vary with changing social standards and circumstances."*[16] What might be fair in one case may not appear fair in another.

The concept of *fair trial* is as old as the concept of *justice*. If it is seen to be doing justice then it is fair. Another similar concept is *due process*, which

13 Ses ve Goruntu Bilisim Sismeti [Turkish]: *Audio and Video Information System in which sound and image are transmitted, recorded and stored in electronic environment*.

14 Black's Law Legal Dictionary 2nd Ed.

15 Bahadir, K. (2016). *A Trial to Understand the Concept of Fair Trial*.

16 Ibid.

has been examined to define the concept of *fair trial. Due process of law* has an American origin and the Indian counterpart of *"procedure established by law"* is narrower in scope.[17] The *Supreme Court* only determines the *substantive question* while determining the *constitutionality of a law*. On the other hand *doctrine of due process* examines both *procedural* and *substantive* grounds. Therefore, in our context, *fair trial* has to be reasonable both in *substantive* and *procedural* grounds. The *"due process of law"* means the measures authorized by the law so as to keep the streams of justice pure, to see that trials and inquiries are fairly conducted, and that arrests and searches are properly made and lawful remedies are readily available, and that unnecessary delays are eliminated.[18] Thus, the concept of *fair trial* is defined as*:*

> *A fundamental safeguard to ensure that individuals are protected from unlawful or arbitrary deprivation of their human rights and freedoms, most importantly of the right to liberty and security of person.*[19]

There has to be *procedural guarantees* as well as *substantive guarantees* on the conduct of judicial adjudication. Therefore, in order to answer whether virtual or remote hearings can uphold the principle of *fair trial*, it is certain that so long it is conducted in accordance with the *due process of law*, such measures will serve to fulfill the *sine qua non* of *fair trial*.

The provisions under the *Code* require persons to attend the Court in-person as well as file documents in a hard copy. Such provisions extend to the right of *Hebeas Corpus*, *subpoena* of summons for witnesses, production of the person before the judge, anongst other processes. Section 37.1 (b) provides that:

> *A summons shall order a perosn to whom it is directed to appear before the Court '**in person**' at the time, date and place specified therein.*

Althouth the begining of the sentence strictly requires physical presence of the person before the Court, the phrase '**place specified**' leaves the space

17 Difference between *'Due Process of Law'* and *'Procedure established by Law.'*

18 Tobgye, S. (2014). *The Constitution of Bhutan: Principles and Philosophies*. p.96

19 Bahadir, K. (2016). *A Trial to Understand the Concept of Fair Trial*.

to employ the discretion of the Court to arrange a person to appear at a particular place within the Court or ouside the Court premises. Therefore, intrinsically, it digs at the purpose why a person is produced before the Judge. The purpose of the initial appearance is to make sure that the person accused of a crime is aware of the charges and is given the *due process*. In Bhutan, our laws mandate that the person must be produced before the judge within twenty four hours of the arrest exclusive of the time necessary for the journey from the place of arrest and Government holidays.[20] At the initial hearing, the judge determines whether there is probable cause for arrest. If the judge finds that a reasonable cause of guilt has not been satisfactorily established, the Court may direct the police to carry out additional investigation. The Court also makes determination as to whether the accused is eligible for bail or not if the request for the bail is made.

During this pandemic, some of the Courts in Bhutan addressed some critical problems through the use of video conferencing tools.[21] This included the cases involving the immediate safety of a person, such as domestic violence that requires immediate attention. Cases of domestic violence and battery involve, in some cases, grave bodily injury[s] and in such cases physical appearance like bruise, scar, cuts and other bodily maim act as self-speaking evidences. It is important that Courts continue to function to provide a continued *access to justice*, irrespective of the situations and the circumstances. Although, there may be other models of hearings, we may also have to assess and see if the services satisfy the consumers of justice. One may be far yet so close to judge, as judges and parties involved will be connected through audio-vsual technology.

Disadvantages of Online Courts

There are great merits that technology could give in such times to provide continued *access to justice* and aid in the administration of justice. However, there are challenges posed by virtual video conferencing mode of hearings. Remote work culture may not lead to building interpersonal relationships between the colleagues or consumers of justice. There are possible chances

20 *The Civil and Criminal Procedure Code of Bhutan*, *2001*, s. 188.1.

21 Tshewang, Y. (2012, May 5). Litigation the E-way. *The Bhutanese.*

that the Courts may lose control over the parties; and moreover, there are inherent challenges that may stem from the legal processes in the administration of justice. The greatest threat of electronic litigation is the security of the documents filed electronically. Without proper data protection procedures put in place, and adequate data protection laws in force, the process of online hearings and electronic filing will expose data to the dangers of online hackers. This may lead to insecurity of data; and information breach.

As is in other electronic documentation processes, online Courts also require people to provide personal details including personal phone numbers, e-mail, and other social networking identification details. In order to secure the transition; and make the system reliable, systemic security has to be established. An example of such effective tool is the web-based portals for online justice in Australia and the *Integrated Electronic Litigation System*[22] (e-litigation) in Singapore, *Internet Courts*[23] in China, among others. However, developing a secured system is both expensive and requires skilled technical and human resource to operate and maintain the system. It also requires technically sound judges, lawyers and Court staffs.

However, its operation is challenged by Judges[24] who are reluctant to use the system; and the users who are uncomfortable to use it due to its complex nature and operational difficulties. Further, it perpetuates systemic differences when there are disparity in the tools available for video conferencing and e-filings among lawyers and the litigants. Thirdly, it poses challenge to the concept of an *open court* as the video conferencing is limited only to parties involved. However, if required, the Courts and parties including the lawyers can come up with the measures to allow media into the virtual hearings.

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22 The Integrated Electronic Litigation System (iELS) or e-Litigation (eLit) is an initiative by the Singapore *Judiciary* to replace the existing Electronic Filing System (EFS) which has been in use since 2000. EFS was conceived and developed in the mid- to late-1990s, and iELS represents the second phase in implementing technology to enhance the litigation process in Singapore.

23 China Justice Observer. (2019). Robot Justice: Rise of China's 'Internet Courts.' https://learningenglish.voanews.com/a/robot-justice-the-rise-of-china-s-internet-courts-/5201677.html.

24 Habibi, S.S. (2012). The Merit and Demerit of Electronic Court in India, *Asian Journal of Development Matters,* 2(3).

After the conclusion of the case, there are chances that people may contest the judgement on ground of improper conduct of remote hearings. This may give way for a special ground of appeal if people are not satisfied with the procedure through remote hearings. This could be made more challenging when a person is residing in an area where there is no reliable Internet connections. Whenever, a person feels like not attending the video conferencing he or she may reason Internet or device as the problem. This will take the parties out of the control of the Court. Hence, the *Guidelines* or *Rules*[25] on e-litigation must address such meticulous problems in detail.

As mentioned in the foregoing paragraphs, the requirement of producing a person in-person has a purpose. This builds up interpersonal relations between the Judge, lawyers and client[s]. In a video conferencing mode, a judge may be blurred from getting the true perspective of the person as the Judge may be unable to fully capture the person behind the screen. This may create a perfect platform to disguise through manipulative and other deceptive practices. If a person is unable to convince the Court virtually, they may lose the trust in the system. Due to remote conferencing techniques, this may leave a gap in adjudicating the case through the use of emotional intelligence. It will take time to make the consumers of justice to firmly believe that justice can be done and achieved through virtual or remote access to the Courts.

Conclusion

Judicial functions and trust in the *Judiciary* depends on the ability to provide unimpedded services to the consumers of justice. On the contrary, the COVID-19 pandemic has reinforced mandatory health and safety practices through social distancing measures. Social distancing measures require people to adopt personal and social distancing methods to counter the spread of the virus. This commands that the Courts need to redesign its functioning through the aid of e-litigation services. E-litigation services demand electronically viable infrastructure with functioning e-Court facilities. To ensure that there is legally enforceable vigour, through *Orders* and *Guidelines* for virtual hearings, the Courts have to ensure that the video conferencing is an effective means of implementing the judicial processes.

25 In many countries, to ensure a legitimate judicial process, they enact legislations, and other subordinate legislations to derive legitimacy.

The Online hearing processes should also reflect customary judicial practices including the dress code as well as behaviour of the parties that befits decorum of the Court of law.

However, as it is with any tool of communication, there are certain disadvantages associated with Online Courts and video conferencing procedures. More importantly, one of the criteria for understanding the parties is through interpretive unexpressed communication methods. These are mostly exhibited through body language, and other kinesthetic expressions, which may also raise safety and privacy issues. In Bhutan, we are confronted with inherent problem about the use of the technology and reliable Internet access. Moreover, such technical innovations and interventions are new to Bhutanese judicial landscape. This may act as hindering bottlenecks to Online Courts.

However, in response to the current pandemic situations and other such unforseeable circumstances in the future, the *Judiciary of Bhutan* should develop robust and sustainable e-litigation processes so that it kickstart a revolutionary change. This should see if e-litigation processes can be adopted through incorporation of these principles in the *Civil and Criminal Procedure Code of Bhutan* or develop sustainable *Rules* or *Guidelines* on e-litigation. It is about a wise balancing between competing issues of easing *access to justice* through virtual platforms and adopting a workable, and informed e-litigation processes that adapts, responds and counters the challenges brought in by these unexpected times. This will promote usage of digital technologies to assist the Courts in dispensing justice. The e-litigation processes must fulfill the procedural aspect of the laws by abiding with the procedural requirements.

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