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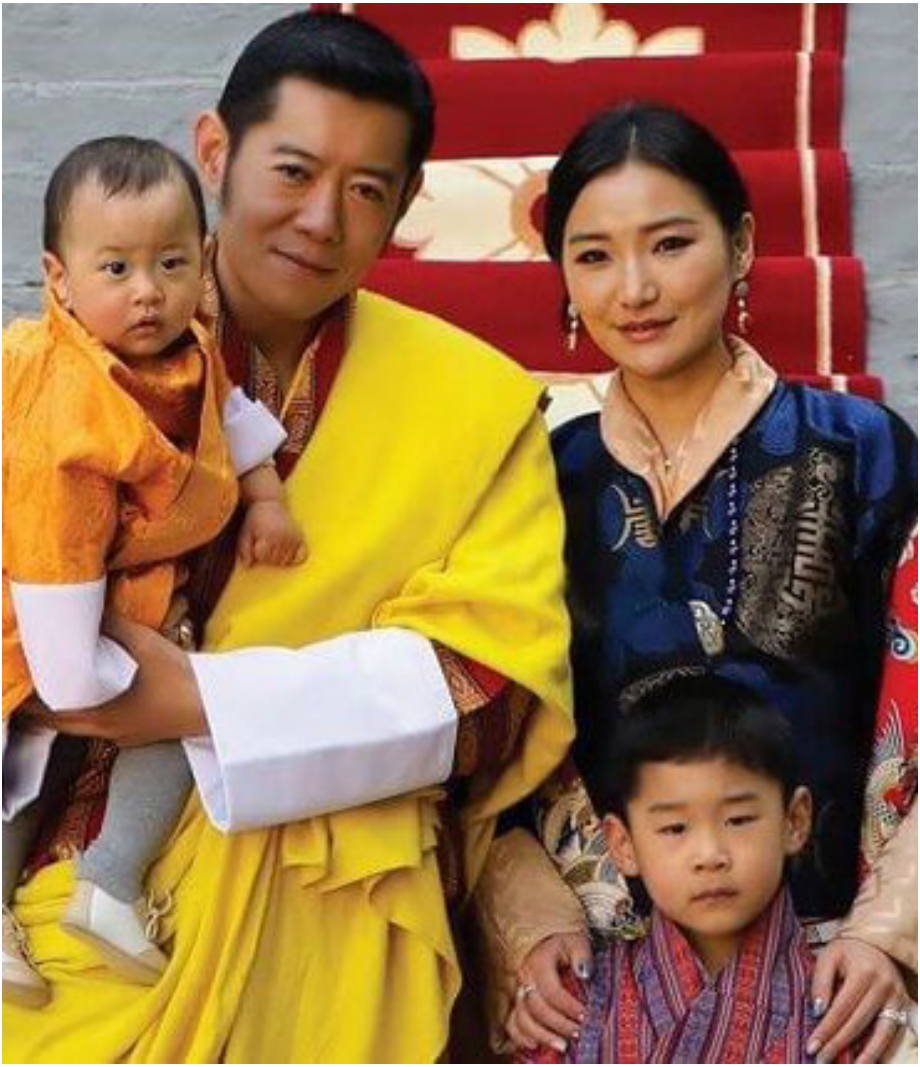
Dedication

In its basic form, leadership is defined as the art of moving others in a struggle for shared aspirations. Bhutan has always been blessed by the reign of our benevolent monarchs, who toiled tirelessly through the generations to give us a nation. His Majesties the Kings of Bhutan has been the fortune of Bhutan, a wish-fulfilling gem among the jewels of the nation, who has the power of truth and blessings.

His Majesty the King is the glorious emanation of the Bodhisattva, whose name, when heard dispels fear, restores hope and refuge and bestows the supreme blessings. His Majesty the King is a great treasury of compassion, the lord of flawless wisdom, and the crowning glory of Bhutan. Gracious, benevolent, blessed, compassionate, a universal embodiment of enlightened body, speech and mind, His Majesty the King is the strength of the nation. He is the symbol of genuine concern, the spirit of Justice, truth and the manifestation of true leadership.

To abide and emulate His golden principles, the Bhutan National Legal Institute is happy to bring out the 15th Volume of the Bhutan Law Review, coinciding with His Majesty's 41st Royal Birth Anniversary. We pledge to enhance Access to Justice, take the Justice closer to the people, and promote legal scholarship and legal education in the country. We reaffirm our service with humility, selflessness and steadfast dedication. May the glorious reign of His Majesty always be an unparalleled source of inspiration, blessings and enlightened actions. May His Majesty's life, noble vision and compassion triumph for eternity.



Content

Preface

The year 2021 is a special and historic moment for the Bhutan National Legal Institute as it marks the completion of a decade of its establishment and service to the *Tsa-Wa-Sum*. While counting the blessings of the Hon. President Princess Ashi Sonam Dechan Wangchuck, it is also a time to reflect how far we have come and; where we have reached as an institution and individuals. At the Institute, we have always drawn our inspirations from His Majesty the King and the Hon. President to work harder and take the institution to the greater heights. This also means that we have to live up to the Royal expectations, which requires us to work harder to fulfill the mandates and purpose of the Institute. Guided by the institutional vision, mission, and values we constantly endeavour to promote continuing legal education and promoting *rule of law* for a free, fair and just society. According to Bhutan National Human Development Report, *"data from a perspective survey on a decade of Parliamentary democracy 2018,"* provides 70.1 percentage of the people at the national level agrees that democracy in Bhutan has enhanced access to justice.

The Institute started its journey back in 2011 and it has come a long way as a training and research arm of the Judiciary. Besides establishing linkages with regional and international institutions, the Institute operates closely with other Justice Sector Institutions, schools, colleges and other stakeholders in Bhutan. As a member of the Justice Sector Institution, it contributed in the formulation of the Justice Sector Strategy. The Institute has carried out activities ranging from training of Judges, Judicial Personnel, legal professionals, Local Government Leaders, youths, and so on. The Institute excels in leading legal education and enhances access to justice and *rule of law*, which ultimately leads to fostering public trust and confidence in the Judiciary. The nature of the work at the Institute requires multi-skilled and multi-tasking professionals.

Realizing the importance of reading, writing and debating culture amongst legal fraternity, the Institute under the guidance of Her Royal Highness Ashi Sonam Dechan Wangchuck, introduced Judges Book Club and *Bhutan Law Review*. The first session of Judges Book Club was conducted on 6th August 2011. Legal professions have to be the finest professionals and for that they are required to constantly update ideas and share information for better serving the justice. Thus, it requires reading, writing, and other

communication skills. With the introduction of the Judges Book Club, the Institute has been providing that platform for Judges as well as Judicial Personnel and other legal professionals on a voluntary basis. On every last Friday of the month the volunteers present books from leadership, management, law or any relevant genre to the audience. Until now the Institute has been able to conduct 72nd sessions of the Judges Book Club successfully.

The Institute scaled newer heights with not just the number and reach of educational and capacity-building programs for our stakeholders, but also instituted major judicial and dispute resolution programs in the country. The Institute has contributed in promoting and streamlining an age-old practice of mediation to a great extent. It played an active role in institutionalizing the *Court-Annexed Mediation Systems* (CAMS) by establishing *Court-Annexed Mediation Units* (CAMU) in all courts across the country. This is expected to further enhance access to justice by affording option of choice to the litigants coming before the courts of law. This is a significant development for the *Gross National Happiness* country, where *Community Vitality* is one pillar of *Gross National Happiness*. All courts across the country are manned with adequate human resources, with adequate knowledge and skills on mediation.

The School Law Club was instituted on 21st February 2012, coinciding with the 32nd Royal Birth Anniversary of His Majesty the King Jigme Khesar Namgyel Wangchuck. In order to groom youths and to transform them into good citizens of the country, they are informed about legal system of the country. Further, in order to prevent the cases of children coming in conflict with law, the Institute conducts legal sensitization, guest lectures and other programs to create awareness on important socio-legal issues. The School Law Clubs provides an opportunity to understand the basic legal principles and values that concerns youths.

The Institute has been coordinating Post-Graduate Diploma in National Law (PGDNL) Course at the Royal Institute of Management (RIM), Simtokha. It includes arranging lecturers from the Institute and Judiciary to deliver units in the Post-Graduate Diploma in National Law Course. It also conducts Moot Court simulation and provides training on Alternative Dispute Resolution (ADR) particularly mediation to PGDNL trainees. The Moot Court for the PGDNL trainees was introduced on 22 June 2012,

and it is intended to bring positive changes in legal practice in Bhutan. It is still continued and it will remain as an important part of PGDNL Course.

As the only training arm, the Institute has to meet the demand of increasing resource for specific trainings and skills. With the increasing demand for its services the Institute will require more resources, governmental and political will to continuously support the Institute. It is sometimes challenging to meet resources to introduce necessary reforms within the Institute. The Institute is not spared from challenges of COVID-19 pandemic. In order to respond to such challenges at present and in future, the Institute is preparing to leverage technology. This will help in conducting virtual trainings, workshops, conferences and dissemination programmes. The Institute introduced several reforms that are aligned with the Institute's vision, mission and core values. The internal institutional reforms were one of the important achievements of the Institute. The Institute carried out reforms such as developing master plan for human resource, structuring the Office to facilitate proper functioning and achieving optimum results. The logo signifies independent identity of an Institute and enhances independence in its operation, linkages, and mobilization of resources. The Institute also received its permanent office space at the Supreme Court Complex in 2020. Without these internal reforms it would not have been possible to realize our lager goal as a training wing of the Judiciary.

Drangpon Pema Needup who served as the Judge at the Punakha Dzonkhag Court joined as the third Director General of the Institute. The two former Director Generals, Drangpon Pema Wangchuk and Drangpon Lobzang Rinzin Yargay were elevated as the Justices of the High Court. The Institute also witnessed appointments of legal officers of the Institute as District Judges by His Majesty the King. The current Judge of the Chhukha Dzongkhag Court, Drangpon Tenzin was appointed as the Drangpon of Pema Gatshel Dzongkhag Court in 2019. The Judge of the Gasa Dzongkhag Court, Drangpon Sangay Chedup was appointed as a Drangpon in 2020.

On 17 December 2014, during the occasion of 107th National Day, His Majesty the King has said that, *"We must continue to exert formidable effort to achieve all our National Goals. With changing times, we will confront new challenges, but if we pledge to work together in an intelligent, resourceful manner, like our ancestors have before us, we will overcome every difficulty."* His Majesty the King is the bastion of support for people hit severely by the

pandemic. The government of the day also made a pledge to protect every citizen from the COVID-19 pandemic. The maintenance of zero death rate is laudable. Further, every citizen played a role at his or her own capacity and available resources. Many responded to the call of nation by sacrificing their time and energy as frontline volunteers. This was an opportunity to pay back to the country as citizens initiate various mechanisms to contribute towards financial aid of the government in combating the virus. They exhibited sense of duty towards the nation and truly acted upon and fulfilled one of the *Fundamental Duties* as a citizen that, *"A person shall have the responsibility to provide help, to the greatest possible extent, to victims of accidents and in times of natural calamity."*

The culmination of the year 2020 brought continued hopes for humanity. We shall never forget it was support from our benevolent Institution of Monarchy, dedicated hard work of our political leaders, and our collective blessings of all the Bhutanese that saved us from the pandemic. We hope that the New Year will be kind to us and it is time for us to move on and look ahead towards even brighter future. In our part, the Institute strives to contribute for better future of the country and its people. The Institute carries out research, training and dissemination of socio-legal information. In this regard, the Institute publishes the *Bhutan Law Review,* as one of the prime activities. This is the Kingdom's first law journal. It is the brainchild of Her Royal Highness Ashi Sonam Dechan Wangchuck, the Hon. President of the Institute. It is born out of the desire to promote and nurture the culture of reading, writing, and legal research and incubates legal acumen among the Bhutanese legal fraternity. The journal provides the platform to the Judges, lawyers, and other writers to engage in intellectual discourses on current emerging socio-legal issues in the country. The journal is published biannually commemorating the occasion of Royal birth anniversaries of His Majesty the King and His Majesty the Fourth *Druk Gyalpo*. While continuing with the biannual publication of the journal, it is our pleasure to bring this 15th volume of the *Bhutan Law Review*, coinciding with the 41st Royal Birth Anniversary of His Majesty the King Jigme Khesar Namgyel Wangchuck.

The Institute welcomes Justices, Judges, lawyers and others to participate and be part of this important achievement by contributing Articles. Like every profession, legal profession is also an art, which requires various skills of reading, writing, research among other important professional skills. A

platform like this is intended to honing these skills of advocacy. Before writing there are tremendous amount of hard work and time invested in research. Thus, this exercise helps all legal professionals and others to develop such skills irrespective of the work they do. With no limitation and conditions attached to it we encourage authors to advocate a unique perspective of law and topic of their choice which will help in forming the whole set of a journal combined together.

The Articles in this volume explores various socio-legal issues, addressing issues such as the pandemic and its impact on medico-legal, economic, contractual, social and so on. It would be interesting to come up with specific themes for each volume of the journal. However, it is difficult to make decision as to what should be the theme. That is why we present various issues encouraging diversity of views on multiple issues. In the current volume we can see an encouraging signs as there is an increasing number of participation from diverse professional background. This truly proves the fact that law is multidisciplinary and reminds us about His Majesty the King's address in the National Judicial Conference, 2010 that, *"Law is not confined to the courts or the legislatures that draft them, …"*. A single subject or a topic can be studied and examined from the viewpoint of more than one discipline. For example, a number of teachers have shared their expert opinion on the quality of education by including the legal perspective on the subject. It also helps in reaching the message of the Institute to different individuals besides legal fraternities.

The emergence of the Bhutanese legal system dates back to the 16th century whereby Zhabdrung Ngawang Namgyel promulgated the first set of Bhutanese laws. Even in the 21st century it is still developing with changing waves of socio-economic and technological development. Thus, this law journal is also intended to provide the platform for sharing opinions on emerging socio-legal matters such as the COVID-19 pandemic. The pandemic has affected several sectors including socio-economic and political life. With this there are several legal issues arising out of the pandemic and its impact on social, economic, legal and political field. The Articles contributed by Tshering Dago Wangmo and Thinley Choden explores the possibility of incorporating the doctrine of *force majeure*, *doctrine of frustration and impossibility* in times of the pandemic. Whether COVID-19 and its ramifications shall qualify to justify the non-performance based on the doctrine of *frustration and impossibility* of the contracts? The crux of the

discussion is as to how these doctrines create exceptional measures for those contracts where the parties have failed to fulfil their contractual obligations.

Different authors have adopted various ways of writing in terms of the style they have adopted. Some of them have adopted the empirical study method based on the statistics and data on the subject. Particularly the Article titled ***"The Effect of Self-Instructional Materials (SIM) vis-à-vis the Right to Education"*** is purely empirical Research Study. An Article by Langa Tenzin on ***"Economic Analysis of Negligence under the Law of Torts"*** has adopted the story-based writing. As said by Philip N. Meyer, author and a lawyer that storytelling skills for lawyers is crucial, the author in this Article developed his own stories, which are presented in the form of hypothetical case scenarios. Such parable and short stories are developed to draw attention of the readers and also such form of writing is relatively easier to comprehend. Others share their opinions on particular subject based on the literature review and in-depth study of legislations, rules, regulations and policy documents.

Through the process of solicitation of Articles we were aware that all the authors have dedicated a great deal of time and effort to facilitate this discourse. Therefore, the Institute is highly indebted to all those who have contributed for this volume and in the past as well. We hope that the writings contributed by our authors help to bring perspectives and positive impact. Finally, the Institute solicits everyone to keep writing and contribute to the growth of our society and your personal growth as well.

The Institute wishes all the valued readers a happy reading!

TASHI DELEK!

Article 8: Fundamental Duties

The Exposition of Constitutional Kuthangs

Bhutan as a nation has come a long way and its existence during the start of the century and current state are very different. Today, Bhutan has become a stronger nation for our children in terms of systemic reforms. The *Constitution of Bhutan* is a reflection of a great responsibility and envisioning of a dream for Bhutan. Through His Majesty's political thought and deep understanding of the people's needs and hopes, the *Constitution of Bhutan* infused new ideas into Bhutanese society and into the minds of the Bhutanese people. With profound thought and reflection, His Majesty the Fourth *Druk Gyalpo* determined the best polity and governance for Bhutan. The *Constitution* is a sacred document that paves a "path" for Bhutan to look ahead, with clear objectives for the future. It was a reform that will benefit the nation and the people to meet the collective aspirations.

The *Constitution* is a most profound achievement of our generations of endeavour and service. It calls for wise and judicious use of powers, and the unconditional fulfilment of the responsibilities. It is said that only in the understanding of our duties will the exercise of our powers be fruitful. It reflects the simplicity of our Majesties and how our government exists to strive to better the lives of people. It secures and carves out important directions for the future of our nation. It is a sacred and a unifying document that acts as a guide for a peaceful existence and progress as a nation.

It expresses the identity and values of Bhutan as a nation. As the nation building instrument, it delineates basic values as a democratic and open society. The *Constitution* is at the intersection of legal, social and political life. As a legal document, it "marries power with justice." *Constitutionalism* is the crowning achievement of human civilization. *The Constitution of Bhutan* is the genesis for scientific and technological progress, economic power, cultural development and human wellbeing. The *Constitution* inherently has answers to many questions that will arise, and lay guidelines for us as a nation. It is a reflection of the wisdom and desire of our forefathers to secure a sovereign, secure and stable future for Bhutan.

A *Constitution* provides the basis for a fair and impartial exercise of power, creates an orderly and peaceful society that protects the rights of individuals and communities and promotes sustainable development. The *Constitution of Bhutan* is the expression of our sovereignty, and the constitutional power of the people. Woodrow Wilson, in a book called *New Freedom*, he noted that the society is a living organism and must obey the laws of life, not of mechanics; it must develop. All that progressives ask or desire is permission – in an era when "development," "evolution," is the scientific word – to interpret the *Constitution* according to the Darwinian principle; all they ask is recognition of the fact that a nation is a living thing and not a machine. This recalls that the Bhutanese *Constitution* is a heritage bequeathed by our Monarchs; making the people of Bhutan as the custodians of the values. The *Constitution* is way of life. As a tribute to His Majesty the Fourth *Druk Gyalpo* on His 60th glorious birth anniversary, the Supreme Court of Bhutan and the Bhutan National Legal Institute, under the noble guidance of Her Royal Highness Princess Sonam Dechan Wangchuck initiated the paintings of 34 *Kuthangs* corresponding to the 34 Articles of the *Constitution*. Each *Kuthang* captures the essence of the Article, its significance, and purpose. The *Bhutan Law Review* aspires to embrace and emulate such profound representations of wisdom and methods in its successive volumes as a continued tribute to His Majesty the King, His Majesty the Fourth *Druk Gyalpo* and the *Tsa- Wa- Sum.*

1. A Bhutanese citizen shall preserve, protect and defend the sovereignty, territorial integrity, security and unity of Bhutan and render national service when called upon to do so by Parliament.

2. A Bhutanese citizen shall have the duty to preserve, protect and respect the environment, culture and heritage of the nation.

3. A Bhutanese citizen shall foster tolerance, mutual respect and spirit of brotherhood amongst all the people of Bhutan transcending religious, linguistic, regional or sectional diversities.

4. A person shall respect the National Flag and the National Anthem.

5. A person shall not tolerate or participate in acts of injury, torture or killing of another person, terrorism, abuse of women, children or any other person and shall take necessary steps to prevent such acts.

6. A person shall have the responsibility to provide help, to the greatest possible extent, to victims of accidents and in times of natural calamity.

7. A person shall have the responsibility to safeguard public property.

8. A person shall have the responsibility to pay taxes in accordance with the law.

9. Every person shall have the duty to uphold justice and to act against corruption.

10. Every person shall have the duty to act in aid of the law.

11. Every person shall have the duty and responsibility to respect and abide by the provisions of this *Constitution*.

Fundamental Duties are founded on principle of love and respect, as citizens to each other and to the country. It reflects the basic moralistic duties as an individual, as a member of the community and as a citizen of the country. There are many duties that the government has to its citizens and to the country. With duty comes the responsibility. To enjoy rights, we should be able to shoulder the responsibility as a part of the society and a larger community. It is said that freedom without acceptance of responsibility can destroy the freedom itself. Rights and responsibilities must be balanced to enhance freedom. Therefore, *Fundamental Duties* must be popularized and made effective. Rights are only protected when duties are done. In this matter, Mahatma Gandhi said that the true source of rights is duty. If we all discharge our duties, right will not be far to seek. If leaving duties unperformed we run after rights, they escape us like a will-o'-the-wisp. The more we pursue them, the farther they fly.

According to *Bodhidharma*, he says, "All know the way; few actually walk it." Fundamentally, as a principle of law, and legitimate exercise of power, rights go with responsibilities and '*Fundamental Duties*' demands the citizens to foster tolerance, mutual respect transcending religious, linguistic, regional or sectional diversities. One of the distinct natures of Bhutanese is our ability and willingness to help any person or other sentient beings in distress. Moreover, the *Constitution* provides us with a duty to help victims of accidents and natural calamity. These reinforce and perpetuate basic

Bhutanese and Buddhist values of love, compassion, unity and the spirit of brotherhood. The *Constitution* also confers the duty to uphold justice and 'act against the vices of corruption' and other corruptive practices. This will ensure that every Bhutanese citizen is responsible to fight corruption and eliminate it from the bureaucracy and governance structures. All citizens are expected to act in the spirit of justice and fairness.

The *Fundamental Duties* in the *Constitution of Bhutan* are based on Buddhist values, intertwined with western philosophies such as Hohfeld's analysis of rights and duties. The *Fundamental Duties* are reflected in the *Constitution* on the beliefs that conscious duties make a responsible human being. The *Fundamental Duties* in the Bhutanese *Constitution* consists of moral and legal obligations, which are possibly performed through the spirit of service, kindness, understanding, and love. These are basic ethics and values ingrained in the ideals of Buddhism, humanity and mankind. It is not an obligation of the laws but is the reinforced natural duties as citizens and compatriots. When a person has a right enforceable against the state, it also counterpoises questions if that person has equitable and same duties to the society and the nation. Unless we have the laws above us, people may be ruled by lawlessness and anarchy. Compassions are only provoked, when we have impelling duties and with no duties, human may merely loose themselves into thoughts, and moral commotions.

Hence, the need to incorporate *Fundamental Duties* under the *Constitution* is necessary. Amartya Sen rightly noted that since we are enormously more powerful than other species, we have some responsibility towards them that links with this asymmetry of power. The Buddhist theory states that each person has certain hereditary functions to perform by virtue of his birth called "one's own duty" or *svadharma*. While John Locke said that in the state of nature, "there is freedom and reciprocity." *Lord Buddha* said:

> *Let no one forget his own duty for the sake of another's, however great; let a man, after he has discerned his own duty, be always attentive to his duty.*

To ensure that our laws are morally right and constitutionally correct, the *Constitution* should incorporate all of these basic principles. Every person should bear a moral duty to the other; and the *Buddha*'s doctrine of love

and compassion between human beings is reflected in the domestic and social ethics, which recognizes the basic human values and dignity. These expressions of *Fundamental Duties* should kindle the spirit of fellow-feeling, the noble spirit of justice, the spirit of togetherness and unique identity as a Bhutanese citizen. As aspired by His Majesty the Kings, our democracies and rights enshrined in the *Constitution* are founded on values of ethics, morality, traditions and culture. Although laws are universal, the customs, culture and values as a nation should guide our laws so that the laws are product of our own values, which uphold and enrich values we share as Bhutanese.

Fundamental Duties are necessary to ensure co-existence and respect. Like in the *French Declaration*, it states that liberty consist of enjoying one's rights, without injuring others; and our natural rights can be enjoyed only to the extent that our rights respects the rights of the other members of the society. In these challenging times, when the nation is ravaged by the pandemic, having incalculable consequences on the economy, health and the lives of the people, tolerance, mutual respect and spirit of brotherhood amongst the people are exceptionally important. It also calls us to provide help, respect women, and aid in the interest of the law. *Fundamental Duties* in the Bhutanese *Constitution* are ricocheted more than ever at such times when it is challenged by times tested by pandemic. Our duties to the nation have become relevant and owed in protecting the health of the people and securing the wellbeing of the people. The duties originating out of discipline and morality, sensibility and common purpose are more essential. The realization of the *Fundamental Duties* of the people to the nation is now.

The *Fundamental Duties* enumerated in this Article can be classified as duties towards self, duties concerning the environment, duties to society and duties towards the Nation. Thus, citizens are morally obliged by the *Constitution* to perform these duties. Laws are founded on moral, ethical and legal duties. It binds them as one member of the society, and enables them to reciprocate to fulfill the aspirations of the nation. Derelictions of duties enshrined under the laws are an offence; and hence the cost of liberty is responsibility and responsibility is the ultimate aim of the law. *Fundamental Duties* are concomitant with the rights; and it is the rights, that shadows up as duties. At such times, our *Fundamental Duties* should

engender good quality of life for the people, based on *rule of law* and create conditions for a healthy and compassionate society based on principles and values of morality, discipline and common purpose. *Fundamental Duties* are distilled into following Buddhist non-dualistic and primordial wisdom. *Tertoen* (Treasure Revealer) Pema Lingpa said:

> *The external, inanimate vessel-like world is enriched by the essence of power and energy of five elements aspects of earth, water, fire, air and the sky. It is enriched by good qualities of merit, fortune, power and richness.*

In the similar way, *Lho ljongs bde b'i smon lam* says:

Earthquakes, landslides, windstorms, drought and fire;

Let these catalyst of damage to the external world be contained.

Causes for untimely death, and sudden bad omens;

Let these harms to the all sentient beings be contained.

Fundamental Duties in the *Constitution of Bhutan* is based on *four immeasurables* of love, compassion, joy and impartiality. It can be compared to what Longchhenpa said:

> *A man has become a site for spiritual growth by having taken refuge;*
>
> *Will cultivate his mind for the welfare of beings;*
>
> *By letting the flower of compassion blossom in the soil of friendliness and*
>
> *Tending it with pure water of impartiality in the cool shade of joy.*

Earthquake, land erosions, windstorm, drought, and fire – Let this host of damage to the external world be contained. Causes of untimely deaths and sudden bad omens – Let these harms to the sentient beings be contained. Based on the principles stated above, sections in Article 8 require the Bhutanese citizens to preserve, protect and defend the sovereignty, territorial integrity, security and unity of Bhutan. The citizens holding hands around the country that is made up of the four natural elements depict this. The

Fundamental Duties is the expression of common views with solidarity, and common purpose. It is the expression of our innate natural duties, in the spirit of brotherhood that binds together as nation with an objective aim to fulfil the mandates of the laws and the *Constitution*.

Sustainable Management of Water Resources in Bhutan[1]

Introduction

Water is one of the essential needs for lives. It is very important for maintaining an adequate food supply and a productive environment for the all living organisms. Every year, human populations and economies expand exponentially, thereby increasing demand for fresh water resources. Like in other countries, Bhutan is witnessing increasing urbanization, impacts of *Climate Change* and changing weather patterns. Drying up water sources, spatial coverage of water to households are an engaging challenge. Our food supplies and the rich biodiversity are a result of good and clean water resources available across the country. With growing urbanization, changing lifestyles and increased demand for water for non-traditional use has reckoned for a sustainable use of water and water resources. Water scarcity threatens human habitation, sustainable food supplies, agricultural practices, and reduce biodiversity in both aquatic and terrestrial ecosystems.[2] Recalling the beauty that water begets to this world, the great Tibetan Yogi, Jetsun Milarepa in the song called *The Seven Adornments,*[3] he sung:

> *In midsummer, rainbows appear above the plain,*
> *Gently resting upon the hills.*
> *Of the plains and mountains,*
> *The rainbow is the beauty and adornment.*
> *In the west, when the rain falls in the cold ocean,*
> *Bushes and trees flourish on earth.*
> *To all creatures on the Continent,*
> *These are the beauty and adornment.*

In Bhutan, we accord enormous respect and care for the environment in all its aspects, including the elements of land, the water, the fire and

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1 Contributed by Justice Kuenlay Tshering.

2 Kilic, Z. (2020). The importance of water and conscious use of water, *International Journal of Hydrology, 4*(5).

3 Chang. G. (1962). *The Hundred Thousand Songs of Milarepa,* Shambala Publications, Boulder, Colorado, United States of America, p. 15.

the air which are found within the gambit of the four elements of nature traditionally conceived within the elements of *Sa, Chhu, Mey,* and *Lung* (Land, Water, Fire and Air elements). Further, water sources are venerated as the citadels of the local deities and spirits. It is ruled and owned by the beings unseen to the human eye. More than two third of the surface of the Earth is made up of oceans and another twentieth is composed of ice. The lakes, rivers, brooks, streams, canals, channels, ponds and other riverine forms takes up a considerable portion of the earth's surface.

Water is one of the main source and basis of life. Bhutan is blessed to have abundant water resources and the *Royal Government*[4] has continuously made it possible for all the Bhutanese to access safe and clean drinking water by improving safe and clean drinking water facilities by bringing piped water into the homes of the people. Nowadays, almost all the households in Bhutan are connected with piped water, enabling people to live an improved and enhanced lifestyles. Guided by the farsighted visions of our successive monarchs, Bhutan has made enormous strides in both passing legislations and ensuring strict compliance with both international and national laws. She has championed the conservation of the environment and achieved an image of her own. Bhutan is now known as the *champion of environment* in the world. It is described as a rare phenomenon, which prefers building forests instead of cities.[5] Bhutan's endeavours towards guarding the environment and the constant guidance and efforts on the part of our visionary Kings were acknowledged by the *World Environment Organization* when His Majesty the Fourth *Druk Gyalpo* Jigme Singye Wangchuck and the people of Bhutan were awarded the *'Champions of the Earth Award 2004-05.'* His Majesty the Fourth *Druk Gyalpo* was also awarded the prestigious *'J. Paul Getty Conservation Leadership Award, 2006'* by the *World Wild Life Fund*. These international awards are the testimonies of the recognition by the world community in what has been achieved at home.

Again, Bhutan won the 1st place in the *Earth Award* among the 2018 *Sustainable Destinations Top 100* awarded by the *International Tourism*

4 The Effective Implementation of the Five Year Plans of the Royal Government of Bhutan.

5 Bhutan, the champion of the environment, *IPA Journal.* Adhikari School of Thought. Retrieved from IPA JOURNAL - Adhikari School of Thought.

Bourse, Berlin, Germany on 7 March 2018. On legal protection, Bhutan has been able to make the conservation of the environment as a part of our historic document, the *Constitution of the Kingdom of Bhutan.*[6] The commitment and the political will at the highest level has been the constant source of wisdom, support and guidance for dedicating one whole *Article* to the environment.[7] *Article* 5(3) of the *Constitution of the Kingdom of Bhutan* imposes a huge mandate upon the Government to ensure a minimum of sixty percent of Bhutan's total land to be maintained under forest cover for all times. Among others, the *Parliament of Bhutan* has been mandated to declare *Critical Watersheds* and such other categories of nature conservation meriting protection.

Bhutan recognizes the threat from *Climate Change* in addition to increasing anthropogenic threats on water resources and watershed conservation even with the existing policy of sustainable management of natural resources. Every Bhutanese has been assured the access to adequate, safe and affordable water to enhance the quality of life. Bhutan is therefore, determined to protect the environment and human health through integrated water resources management in pursuit of *Gross National Happiness* and the age-old tradition of living in harmony with the nature. Bhutan realizes the need for a collective global effort to work towards water on earth. Irrigation enables us to achieve our long-term goal of food self-sufficiency and food security in the country. Food security is an important national goal, which depends on the effective management of water and water resources. A *National Integrated Water Resources Management*[8] *Plan* is formulated for coordinated development, management, conservation and efficient use of water resources. Communities are required to participate in the integrated management of water resources pursuant to this *Act*, and beneficiaries and stakeholders shall be consulted in the manner set out in this law. Under this scheme, people have to play a pivotal role in the conservation, protection and management of the water catchment areas.

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6 *The Constitution of the Kingdom of Bhutan* was adopted on 18 July 2008.

7 *The Constitution of the Kingdom of Bhutan,* Art. 5.

8 Section 23 of the *Water Act* has provisions on the *National Integrated Water Resource Management Plan*.

Polluter Pays Principle[9]

Under this principle, a person polluting water resources shall be responsible for the cost of containment, avoidance, abatement, mitigation, remediation, restoration and compensation for any loss, damage or injury. This will help to infuse a *model of re-thinking* amongst the users, so that they will use the resources efficiently, equitably and responsibly.

User Pays Principle

Abstraction or water users are required to pay a charge as prescribed by the *Water Act of Bhutan* and its *Regulations*. Users shall pay water supply service charges, waste water disposal service charges, and other service fees as prescribed. Incentives are provided for exemplary initiatives leading to sustainable use of water resources, reduction of water wastage, innovative projects, technologies and processes that support the purpose of this *Act*. It is not permissible by the law to develop or otherwise encroach upon the bed and banks of watercourses. The exception is only for the operation and implementation of activities with an *Environmental Clearance*. The law also envisages the creation of *River Basin Committee*, *Water User's Associations* or *Federation of Water Users' Associations* for proper coordination and efficient management.

Water Use Priorities

With expanding lifestyles, the usage of water has expanded manifold. The traditional use of water for drinking, cooking and irrigation, aside other household use has also increased drastically. In order ensure that use of water is prioritized, the *National Environment Commission* is mandated to observe the following order of priorities of water use as enshrined in the *Act*:

a. Water for drinking and sanitation;
b. Water for agriculture;
c. Water for energy;
d. Water for industry;

9 The universal principles such as *Polluter Pays Principle* and the *User Pays Principle* find significant places in the *Water Act*.

e. Water for tourism and recreation; and
f. Water for other uses.

The *Thrimzhung Chhenmo*,[10] *Land Act*[11] and the *Water Act*[12] are important laws in the country dealing with the management of water resources in Bhutan. The *National Environment Commission*[13] is entrusted with the responsibility to function as an important regulatory authority in the area of water use in Bhutan. Water uses are enumerated in the order of importance; drinking and sanitation are given the top priority followed by agriculture, energy including hydroelectricity, industry, tourism and recreation. The *National Environment Commission* is mandated to prioritize the water uses accordingly.[14] *Environmental Clearance* is issued by the *Competent Authorities* for abstraction of water in accordance to the *Environmental Assessment Act* of 2000.[15] The *Water Act* has comprehensive regulations for the management and protection of water resources in Bhutan like *National Integrated Water Resources Management Plan,*[16] *River Basins Management Plans,*[17] through the establishment of *River Basin Committees*[18] and constructions of water infrastructures[19] amongst others. Prevention and *Control of Water Pollution Effluent Discharge* are covered under the *Act.*

Irrigation Water

Irrigation plays an important role in the context of Bhutanese agriculture and food production practices. Irrigation is the mainstay of Bhutanese agriculture, and sustainable use of water for irrigation purposes is critical for unhindered agricultural works and food supply. The equitable distribution of water for irrigation depends on many factors such as the size of land holdings, the quantity of water available according to the geographical locations amongst other community related factors. Irrigation water plays

10 *Thrimzhung Chhenmo, 1959*.
11 *Land Act of Bhutan, 1979.*
12 *The Water Act of Bhutan, 2011*.
13 *The Water Act*, Chapter 3.
14 *The Water Act, 2001*, s. 38.
15 Ibid., s. 34.
16 Ibid., s. 23.
17 Ibid., s. 24.
18 Ibid., s. 27 & 28.
19 Ibid., s. 48.

a critical role in ensuring a livelihood for the rural communities, but also ensures a sustainable supply of food resources. Irrigation water supply is directly linked to food security and sustainable food growing practices in the community. *Water Resources in Forests*[20] can be used upon the issuance of an *Environmental Clearance* by the *National Environment Commission*.

Wetlands

Conservation and wise use of wetlands are given importance in line with the principles enshrined in the *Forest and Nature Conservation Act.*[21] The *Act* also provides for the designation of one or more wetlands of national and international importance for inclusion under the relevant multilateral environmental agreements to promote the conservation of wetlands in the country. The relevant government agencies are required to facilitate harvesting of ground water and other water resources[22] such as rain water, fog and any other sources to prevent local and seasonal water scarcity. The law stipulates clear provisions for the *Construction of Water Infrastructures*[23] to ensure an unhindered flow of water to the areas where they are needed. The competent government authorities are entrusted with the responsibility to alter or demolish dykes, embankments, levees, structures or other works, irrespective of their legal status, if they hinder water runoff or extend the flood plain with harmful results. In the overall interest of the country, the competent agencies have the responsibility to prohibit the activities that affects watercourse and any protective dykes, embankments or levees.

Safety of Dams and Other Water Infrastructures

The relevant government agencies in collaboration with the *National Environment Commission* can set necessary criteria for the safety of dams[24] or any other water infrastructures. Similarly, the authorities in consultation with the *National Environment Commission* can monitor the safety of dams and other water infrastructures in the country. The law has also enumerated provision on the risk factors. In the event of drought or serious water

20 *The Water Act, 2011*, s. 45.
21 *Forest and Nature Conservation Act of Bhutan, 1995*.
22 Ibid., s. 46.
23 Ibid., s. 48.
24 Ibid., s. 49.

scarcity, or other threats relating to water resource, the *National Environment Commission* may revoke, suspend or amend the terms and conditions of the *Environmental Clearance* to eliminate or reduce such threats.

International Coordination and Agreements

The *Competent Authority* requires consultation with the *National Environment Commission* before entering into any international agreements, contracts, obligations or other arrangements relating to water resources. International agreements relating to water resources are based upon the prior approval of the *Royal Government of Bhutan*.

Hydroelectric Power Projects in Bhutan

According to *Bhutan-Water Risk Scenarios and Opportunities for Resilient Development Report*, Bhutan is in possession of powerful economic resources of 30,000 megawatts (30 gigawatts) hydropower potential. Presently, only 1,616 megawatts of hydroelectricity are tapped.[25] As per *Power System Master Plan* (PSMP) *2003-2022*, 24,000 megawatts of hydropower potential which are technologically and economically feasible has been identified.[26] Today, hydropower revenues account for 40% of the national revenue, making it the single biggest source of revenue to the Bhutanese economy.[27]

1. **Rivers in Bhutan**

There are five major and five minor river systems (*hydrological* basins) in Bhutan. Five major river system and their basins in Bhutan are:[28]

a. *Amochhu, Wangchhu,* consisting of five tributaries namely *Haachhu, Parochhu, Tangochhu, Wangchhu,* and *Pipingchhu;*
b. *Punatsangchhu* consisting of eight tributaries namely *Dangchhu, Basochhu, Kamechhu, Digchhu, Harachhu, Changchechhu, Burichhu,* and *Dagachhu;*

25 Dorji, Y. (Ed.). (2016). *Water: Securing Bhutan's Future*, Asian Development Bank and National Environment Commission, p. 66.
26 Ibid.
27 WWF Living Himalayas Initiative, National Environment Commission, WWF Bhutan, WWF International (Water Stewardship) and PEGASYS. (2016). *Bhutan – Water Risk Scenarios and Opportunities for Resilient Development*, (2) 4.
28 Dorji, Y. (Ed.). (2016). p. 51-54.

c. *Mangdechhu* made up three tributaries namely *Nikachhu, Burgangchhu,* and *Chamkharchhu* including its tributary *Tangchhu*, and

d. *Drangmechhu* joined by seven tributaries namely *Kurichhu, Khomachhu, Kholongchhu, Sherichhu, Gongrichhu, Gamri,* and *Zhongarchhu.*

The rivers in Bhutan begin in the alpine regions of the north. The *Amochhu* and *Drangmechhu* originate from the *Tibetan Autonomous Region* of China and other in India. The rivers are mostly fed by rainfall, supplemented by an estimated 2-12% glacial melt and another 2% from snow melt.[29]

2. **Glaciers/Glacier Lakes/Lakes**

Glaciers are important source of fresh water in many countries. In Bhutan, 10% of the total surface area is covered by glaciers which are important sources of fresh water for the downstream riparian inhabitants.[30] It would be worthy to know that there are 110 *supra-snow lakes*,[31] 495 *supra-glacial lakes*[32] and 637 *glacial lakes*[33] with a total area of 5183.78 hectares.[34] The largest glacier in Bhutan with an area of 36 km^2 is in the *Punatsangchhu* basin.[35] Further, Bhutan has total of 1772 numbers of lakes[36] with the total area of 49,973,272 $m.^2$

3. **Concerns for Bhutan in Water**

Climate Change has been an unprecedented global phenomenon. It poses a serious concern for both the developed and the developing countries

29 National Environment Commission. (2016, March). *National Integrated Water Resources Management Plan,* p. 18.

30 Dorji, Y. (Ed.). (2016). p. 46-51-54.

31 It is any pond of liquid water on the top of glacier.

32 *Supra-glacial lake* is any pond of liquid water on the top of a glacier.

33 It is a lake with origins in a melted glacier.

34 National Environment Commission. (2016). *Bhutan State of the Environment Report,* p. 32.

35 National Environment Commission. (2016, March). *National Integrated Water Resources Management Plan,* p. 21-22.

36 A lake is an area filled with water, localized in a basin that is surrounded by land, apart from any river or other outlet that serves to feed or drain the lake.

alike. The world leaders have recognized the risks of *Climate Change* during the *Paris Agreement.*[37] It was also accepted that the *Climate Change* has far reaching negative impacts on the state of the world environment. On our part, in compliance with the *Constitution*, Bhutan's commitment towards conservation of environment will see concrete results as in the past. Likewise, Bhutan is no exception to the threats and challenges posed by the forces of *Climate Change* towards environment and water resources in particular. Some of the serious concerns for Bhutan on water are highlighted as below:

a. Climate Change and its Impact on Climate and Hydrology[38]

Some of the climatic and hydrological predictions resulting from *Climate Change* include increased precipitations, erratic rainfalls, early start of snowmelt, growing threat of *Glacial Lake Outburst Floods* (GLOFs)[39] and rising temperatures. Unless, there is a concerted global action on *Climate Change,* Bhutan is also susceptible to the results and influences of the *Climate Change*. Therefore, such changes would have serious impacts on the water resources of Bhutan.

b. Drinking Water

Bhutan generates 70,572 million cubic meters of fresh water in a year which is one of the highest *per capita* availability of water in the world.[40] Yet Bhutan has been witnessing the shortages in drinking water both in the rural and the urban areas. Water shortages are mainly attributed to drying up of streams and springs in certain locations due to over-abstraction, population pressure, ecological degradation due to *Climate Change*, not optimal maintenance of the watersheds,[41] and the issue of clean water. Increased agricultural productivity will create risks to fresh water resources

37 The *International Agreement* adopted in Paris on 12 December 2015 and entered into force on 4 November 2016.

38 Dorji, Y. (Ed.). (2016). p. 76.

39 WWF Living Himalayas Initiative, National Environment Commission, WWF Bhutan, WWF International (Water Stewardship) and PEGASYS. (2016). *Bhutan – Water Risk Scenarios and Opportunities for Resilient Development* (2) 67.

40 Dorji Y. (Ed.). (2016). p. 45.

41 WWF Living Himalayas Initiative, National Environment Commission, WWF Bhutan, WWF International (Water Stewardship) and PEGASYS. (2016). *Bhutan – Water Risk Scenarios and Opportunities for Resilient Development,* (2) 68.

in Bhutan due to increased demand for water for irrigation and farming purposes.[42]

Similarly, if hydropower is given impetus in the future as a main source of our national revenue, it might result in a major impact on the water resources in the country. So far, Bhutan has only tapped 1,616 megawatts from our full potential of 30,000 megawatts from the river systems in Bhutan.[43] The quality of water is considered to be the best in the region, but the steady growth of population and urbanization is becoming a major concern. The other area of concern is the fragile and rugged terrain of Bhutanese geological landscapes which is vulnerable to flooding during the heavy monsoon seasons, augmented by landslides heightening the risk of damage to properties and endangering the lives of the people. The human settlements in the valleys are at high risk of flash floods and *Glacial Lake Outburst Floods* (GLOF) triggered by the unstoppable forces of *Climate Change*. This happened in the State of Uttarakhand recently. Bhutan has been cautious and mindful in dealing with the environment. In addition to the existing institutional and legal frameworks concerning water resources, Bhutan has adopted various plans and strategies aimed at managing the water resources like the *Integrated Water Resources Management* (IWRM), *National IWRM Plan*, and *National Irrigation Master Plan*, the *River Basin Management Plan* to mention a few.[44]

Bhutan has put in place regulatory measures to ensure intergenerational equity in the use of water resources. We have protected and furthered our environment and water with the help of these measures. This has been possible due to the wise and farsighted leadership of our Kings for steering the socio-economic development while emphasizing and ensuring environmental conservation, for the country's long-term interest. Our inherent nature and friendly culture, gives the actions further impetus in the conservation process which in turn helps the global effort towards mitigating the causes of *Climate Change*. Despite the unequivocal rise in global temperature by the clock, Bhutan still is blessed with pristine water resources sufficient for our drinking, agriculture, and hydro-electric project requirements. However, we are also facing challenges in safeguarding uninterrupted water

42 Ibid., p. 69.
43 Dorji Y. (Ed.). (2016). p. 66.
44 Ibid., p. 92-96.

for irrigation and drinking needs. To a developing country which has to prioritize and strategize many competing areas in the allocation of our limited financial resources, the *Royal Declaration* reminding us to ensure that our rich water sources reach the cultivation fields and communities more vigorously served a timely blessing. Furthermore, gearing up *De-suup*s with training in the technical know-how of water supply shows action and care on the part of the Throne, to ensure useful engagement and productive employment of the talents and skills of these young *De-suup*s already deployed in various water projects in service of the *Tsa-Wa-Sum*. The unity of His Majesty's visions[45] coupled with the unyielding support of its people exemplified by these young people in action, complemented by the country's rich water sources protected under the aegis of various institutional and legal mandates, shows that Bhutan can continue to tread the path to our national goal of clean and safe water, food self-sufficiency and economic self-reliance.

Conclusion

Water, according to the *Water Act of Bhutan*, *2011* is one of the most important natural resources of the country. Important provisions on environment are enshrined in the *Constitution of the Kingdom of Bhutan*. The *Act* has identified the seasonal and local scarcity of water for drinking and agricultural purposes, despite the country being endowed with abundant water resources. The *Parliament* was mindful of the rapid socio-economic development taking place in the country which impacts and exerts pressure on the existing water resources. The *Act* is the legal instrument to protect the water resources and for the efficient management of water resources

45 There are five Projects namely:

1. *Jajab Menchu* Water Supply Pilot Project, Guma Gewog, Punakha
   *De-suup*s – 75 (Male 54, Female 21).
2. Dangreygang Water Supply Pilot Project, Semjong Gewog, Tsirang.
   *De-suup*s – 45 (Male 29, Female 16).
3. Kalapang Water Supply Pilot Project, Saling Gewog, Mongar
   *De-suup*s – 66 (Male 42, Female 24).
4. Dangdung Water Supply Pilot Project, Langthel Gewog, Trongsa
   *De-suup*s – 44 (Male 30, Female 14).
5. Bura – Kamji Water Supply Pilot Project, Gelling Gewog, Chhukha
   *De-suup*s – 47 (Male 30, Female 17).

Total *De-suup*s engaged (so far): 277 *De-suup*s

for every Bhutanese to have access to adequate, clean, safe and affordable water to enhance the quality of lives for the realization of the aspirations and goals of *Gross National Happiness.*[46] With the guidance and farsighted leadership of His Majesty the King and dedicated service of the public servants and the people at large, Bhutan will have adequate, safe and clean drinking water for the future generations as well.

46 *Gross National Happiness Commission* (GNHC) is an Institution that promotes an enabling environment for all Bhutanese to be happy. Their mission is to steer national development towards promotion of happiness for all Bhutanese guided by the philosophy of GNH.

Sportsmanship, Ethics and Wellbeing in the Context of Archery in Bhutan[1]

Introduction

Sports, especially, archery is played with fervour and is steeped in Bhutanese culture and spirit. It is a game of entertainment and joviality. The game is played with pure excitement as if the world is always a fair game. The participants engage in merrymaking, and it is a time of social gathering. In most games, participants in the games dance to celebrate, shout to defend or deflect the arrows of their rivals. The merriment is mostly accompanied by customary practices of drinking and feasting. Unlike in the past, in which the game of archery was played with bamboo bows and arrows, today archery is a flamboyant and an ostensible game. The participants are richly dressed, educated and well spoken. Archery is a progressive game. However, it is a game of unity, a celebration of Bhutanese culture, our ways of lives, and more importantly, it marks important occasions on the Bhutanese calendar. It is a game of unity and friendship. As the *Bhutan Olympic Committee* would put it, archery is seen as a "celebration of the Bhutanese way of life."[2] Therefore, archery is a national paradigm to show the spirit of unity, joviality, and peace. It mirrors the social landscape of an integrated and closely knitted society like ours.

A more sensitive look at how our national game is played reveals that this idyllic picture is misleading. More than any other sports, this game brings in the issue of safety and other concerns to the general public. For instance, people being hit by strayed arrows are becoming more frequent.[3] The

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1 Contributed by Sangay Chedup.

2 World Traditional Archery Organisation (WTAO), *'Bhutan Archery Culture.'* Retrieved from http://www.wtao.org/Bhutan.

3 Tshedup, Y. (n.d.). *'Archery: a dangerous national pastime?'* Retrieved from https://kuenselonline.com/archery-a-dangerous-national-pastime/. The report writes "On November 14, a 36-year-old man was hit by an arrow on the head during a friendly archery tournament in Doongna, Chukha. The man succumbed to his injuries two days later. Mishap in archery tournaments is all too frequent." The same was covered in its opinion column, 'Archery Once Again'. Retrieved from https://kuenselonline.

necessary safety measures in our national sport are neglected or overlooked, and the numerous reports published by the different media houses have little impact on educating about the menaces of the game. For example, the *Kuensel* writes that "every time someone gets hit by an arrow at an archery range, there is a call for more safety rules. There is an outpouring of support, the media writes about it and then, it is all forgotten."[4]

However, hopes surfaced when *Bhutan Indigenous Games and Sports Association* (BIGSA) developed the *Traditional Archery Rules and Regulations* in late 2014, and the *Archery Safety Rules and Regulations*. In 2015, BIGSA found that the archery ranges in most of the *Dzongkhag*s were not built as per the safety measures provisioned in the *Traditional Archery Rules and Regulations*.[5] It was observed, "most of the archery ranges are constructed close to residential areas, at the junction of the roads, and near the highways."[6] To ensure safety measures, BIGSA has conducted training on archery safety measure and inspection in 2015. Despite this effort by the BIGSA, the issue of safety and wellbeing in the archery tournaments and competitions are still substantial.

This Article, therefore, is an attempt to conduct a systemic review and analysis of ethical aspects of Bhutan's national game: the archery. The author contemplates that like any other traditional games in Bhutan,[7] archery is tolerant and unmonitored. Our experience tells us the game is played

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com/on-archery-again/. Subba, A. B. 'Safety on the archery ground,' *The Bhutanese.* Retrieved from https://thebhutanese.bt/safety-on-the-archery-ground/.

4 *'Archery Once Again.' Kuensel*. Retrieved from https://kuenselonline.com/on-archery-again/.

5 Choden, S. *'BIGSA finds archery ranges in the country not safe.'* Retrieved from http://www.bbs.bt/news/?p=114334. Nima, 'Inspection finds most archery ranges not safe'. Retrieved from https://kuenselonline.com/inspection-finds-most-archery-ranges-not-safe/.

6 Ibid. According to BIGSA's *rules and regulations*, the dimension of archery field should include a minimum of 20 metres safe distance behind each target area excluding the space for spectators. The present archery field are constructed within the range of human residential areas, roads, and highways, which is not within the provision of this safety measure.

7 *Khuru* (dart), for example, is a traditional game of Bhutan, which is played widely by both men and women. This game, like archery, does not need festive reason, but play as and when people think are convenient. But this sport is not regulated, but played in any empty field. People dance, sing, shout, and most notoriously, they drink worryingly endangering the nearby people and households.

throughout the country without proper monitoring and supervision; it has resulted in tremendous pain and anguish to families of the injured and the deceased. Sometimes the endings of the games are dismal and tragic. It has been one of the accepted sources of domestic violence, divorce, alcohol abuse and combat.[8] The game is a contestation of skills, wealth, human prowess, and agility. Unless the game is monitored and promoted as safe, the sportspersonship in game might lose itself to other values of the game. The game is not seen, especially in the urban areas, as the portrayal of our values, but an overt contestation of modern values associated with it. Its long-term implication would be more lethal, endangering its identity, lustre and popularity.

The need for monitoring archery tournament was intensified more recently. On the 20 December 2020, Bhutan announced its second *Lockdown* in Thimphu after a case of community transmission of coronavirus (COVID -19) was detected in Thimphu. An aggressive contact tracing was conducted, and subsequently, on 22 December 2020, Bhutan announced the *Second National Lockdown*. Unexpectedly, the number of positive cases, especially from the community drastically increased, with an increased occupancy rate of the isolation facilities in Thimphu and Paro. The *Ministry of Health* has, from time to time, informed the public that the out-of-hand spread of virus in Thimphu and Paro was primarily due to archery competitions held at Dechencholing, Thimphu. This has raised many questions; *inter alia,* a question of safety, *sportsmanship*, ethics, integrity, and wellbeing of the people and the archers.

There was a call for accountability and diligence for the sportspersons. The purpose of this Article however is not to investigate the accountability of those archers and organizers of the sport during this pandemic. The objective of this Article is to explore and examine the existing ethical safeguards and legal instruments that regulate the archery and its large-scale tournaments. This Article does not intent to call to stop the game or end it, but it is to focus on how the roles of supervision, proper management and monitoring would ensure safety for both the players and people on the field, as well as to the society at large. The author would like to imagine that with proper regulation and monitoring in place, it is going to help upholding the *sportsmanship*, ethics and integrity of the sport.

8 Subba, A. B. 'Safety on the archery ground,' *The Bhutanese.*

Sportsmanship and Ethics

While sports were played since pre-historic times, it is a relatively new subject of systematic ethical and moral enquiry. People believe sports and ethics are incongruent or contradictory, thus calling the sport ethics as an oxymoron.[9] However, examples from sport are now used in an engaging way to teach ethics in the context of a business or sports law course.[10] It is claimed that there is no greater way of learning ethics than from sports.[11] Ethics is an important part of all the games that are played internationally. The games are an exhibition of values, and ethics as a person as well as sports. Similarly, an adequate exploration of *sportsmanship* is yet to be achieved. The consensus is that the *sportsmanship* model is built on the idea that sports demonstrate and encourage character development both at the personal and the broader community level. Rightly so, at a time when many of world athletic super stars in professional and big-time college sports have become models of good character and *sportsmanship*. Therefore, in any discussion of sports and ethics, *sportsmanship* becomes a crucial or pivotal point.

Let us first begin to examine the meaning of *sportsmanship*. In the language of the classical tradition, *sportsmanship* is defined as the quintessential sporting virtue.[12] Then the question of what exactly is virtue also arises. Long ago, *Socratics* argued that we should be most concerned about virtue, and exhorted his fellow *Athenians* to make themselves as good and as wise as possible.[13] For the *Socratics*, virtue therefore, is becoming a good and wise

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9 Lumpkin, A. (2017). *Modern Sport Ethics: A Reference Handbook* (2nd ed.), ABC-CLIO.

10 Epstein, A. & Osborne, B. (2018). 'Teaching Ethics with Sports: Recent Developments' *Marq Sports L. Rev.* 301. Epstein, A. & Niland, B. (2011). *Exploring Ethical Issues and Examples by Using Sport,* 13 *ATLANTIC L. J. 19.*

11 Camus, A. (1957). Noble prizewinner for literature said that, "it was from sports that he learned all that he knew about ethics." Camus, A. (1973). *Resistance, Rebellion and Death* (Alfred A. Knopf 1961), p. 242. Keating, J. & Williams, G. (1973). *'The Ethics of Competition and its Relation to Some Moral Problems in Athletes.'* 4 (1) 15, *Philosophic Exchange.*

12 Devine, William, J. & Frias, F. J. L. (2020). 'Philosophy of Sport' *The Stanford Encyclopedia of Philosophy.* Retrieved from https://plato.stanford.edu/archives/fall2020/entries/sport/.

13 Reshotko, N. (2006). *Socratic Virtue - Study Temple-All kinds of Study Material.* (1st Ed.). Cambridge University Press.

human being. In 1993, when William Bennett published, *The Book of Virtues*, he defined the classical notion of virtue as *excellence of character*.[14] This will further require us to scrutinize the elements of an excellent character. We may instantly think of a series of traits, which are central to human excellent character of wisdom, courage, self-control, justice, honesty, autonomy, humility, benevolence, love, authenticity, compassion, responsibility, and respectfulness amongst many other qualities.[15] What is clear, though, is that sport requires and shapes character traits.[16] *Sportsmanship* therefore can be conceptually defined as a general attitude of humankind toward certain sport behaviours.[17]

The term *sportsmanship* is not defined in any Bhutanese text and literature. *The Traditional Archery Rules* of BIGSA mentions about "showing true spirit of *sportsmanship* on and off the ground"[18] without defining what *sportsmanship* would entail. Subsequent provision of the *Rules* states, "refrain from any *unsportsmanlike* behaviour such as using foul language, disrespect to the game, officials, players and spectators."[19] Merriam Webster dictionary defines *unsportsmanlike* as "not characteristic of or exhibiting good *sportsmanship*." Other words used to describe includes the words like "not fair, not respectful, and not polite" toward other players when participating in a sport. It includes the positive conduct of athletes, coaches, administrators, officials and stakeholders both on and off the field as well as sports performances that are fair and honest. Therefore, *unsportsmanlike* is not displaying the qualities or behaviour befitting a good sport. *Sportsmanship* therefore is refraining from any *unsportsmanlike* behaviour, to exhibit a virtuous character, conduct within the ethical guidelines, and respect for the spirit of the sport. In precise, it can be understood as that

14 Bennett, W. J. (1996). *The Book of Virtues* (1st Ed.).

15 Clifford, C., Feezell, M. R., & Edward, C. (2010). *Sport and Character of Sportsmanship,* Human Kinetics, Inc. The list of cardinal virtues for classical Greek civilization included wisdom, self-control, courage, and justice.

16 Ibid.

17 Jane, H. M. (1959). *A Problem-Solving Test of Sportsmanship*. The Ohio State University. Robert, J. et. al., (1996). 'Multidimensional Definition of Sportsmanship,' *Journal of Applied Sport Psychology,* p. 8, 89-101.

18 *BIGSA Traditional Archery Rules,* Art. XIV (4). Retrieved from http://www.bigsa.bt/?page_id=18.

19 *BIGSA Traditional Archery Rules,* Art. XIV (5).

characters which obeys the precepts of what should and should not be done or, of what is good or bad.[20]

This general description of *sportsmanship* in terms of human virtue and moral character is neither conclusive nor exhaustive. An adequate definition of *sportsmanship* has yet to be achieved. Haskins (1959) stated that unless the psychological dimensions of *sportsmanship* could be satisfactorily identified, the formal study of *sportsmanship* ideals and practices would be very difficult.[21] However, on the premise that *sportsmanship* is defined in terms of sporting behaviours and good moral traits, we can examine the context of modern Bhutanese archery and *sportsmanship* in light of these sporting values.

Code of Conduct

There hardly any studies done on our national sport and sportsmanship. Nor are there any legislation outlaying the traits of sportsmanship. However, BIGSA *Traditional Archery Rules* outlines *Players' Code of Conduct*. Article XIV of the *Rules* states that players should respect the game of archery as part of our rich tradition and unique cultural heritage. More importantly, it states that players should respect and uphold the *rules and regulations* of the game at all times.[22] It also obliges the players to treat officials and other players and spectators with respect and dignity.[23] By respecting *rules and regulation*, it would mean practising sportsmanship by practising an attitude of respect towards game and other opponents. Respect is an attitude of positive evaluation, recognition of something, some reality that merits understanding and attentiveness. To respect something is to value it and treat it as worthy in its own right.

Article XIV: *Players' Code of Conduct*

1. Respect the game of archery as part of our rich tradition and unique cultural heritage;

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20 Murthy, A. M., Dwyer, J. & Bosco, J. A. (2012). *'Ethics in Sports Medicine'* Bull. NYU Retrieved from http://presentationgrafix.com/_dev/cake/files/archive/pdfs/180.pdf.

21 Lata, J. (2006). *'An Analysis of Goal Achievement Orientation and Sport Morality Levels of Division I-A Non-Revenue Collegiate Athletes,'* Florida State University Libraries.

22 *BIGSA Traditional Archery Rules*, Art. XIV (2). Retrieved from http://www.bigsa.bt/?page_id=18.

23 *BIGSA Traditional Archery Rules,* Article XIV (3).

2. Respect and uphold the rules and regulations of the game at all times;

3. Treat officials, other players and spectators with respect and dignity;

4. Show true spirit of sportsmanship on and off the ground;

5. Refrain from any unsportsmanlike behavior such as using foul language, disrespect to the game, officials, players and spectators;

6. Refrain from drinking and smoking in the public arena; and

7. Foster patriotism, team spirit and mutual respect.

The *Player's Code of Conduct* is virtuous, describing the moral and ethical guidelines of the players. As I will be describing about the poorly ethical practices adopted in sports, these *Code of Conduct* are mostly violated. Respecting the *Code of Conduct* is essential to respect the sport in itself.

Poor Ethical Practices

Theoretically, or perhaps practically in some instances, all sporting behaviours are regulated by *Ethical Codes of Conduct* that should be followed by any sportspersons, as well as by those involved in management, administration, marketing, business, and spectators.[24] However, a frequently observed situation is that the players undergo not only physical, but also psychological injuries. The *Code of Conduct*, safety measures, and ethical standards as stipulated in BIGSA *Traditional Archery Rules* need strict implementation, adherence, and monitoring. In this part, we shall look at some of the poorly practiced ethical standards in the game of archery.

i) **Use of Alcohol**

Bhutan's socio-cultural, religious and traditional practices encourage the use of alcohol in all spectrum of life.[25] The spirit of alcohol is a forerunner of any

24 Vargas-Mendoza, N. et al. (2018). *'Ethical Concerns in Sport: When the Will to Win Exceed the Spirit of Sport.'*

25 Dorji, C. (n.d). *'The Myth Behind Alcohol Happiness.'* Retrieved from http://www.

important event, ceremony or an occasion. Bhutanese begin any important event or an occasion by the wine oblation ceremony traditionally called as the *Marchhang* Ceremony. Similarly, archery tournaments in Bhutan are also begun by observing silence, unassumingly quiet as it formally begins with the offerings of *Marchhang* to the local deities. Sometimes, archers and spectators offer *Ara* (locally brewed wine), beer, milk, or water to appease the local deities.[26] The spirits or milk are strewn or poured to invoke the holy spirits and the protector guardian deities. The offerings are mostly aimed at winning and safety. Temples and deities are much sought during tournaments, or even during friendly matches. Therefore, BIGSA while formulating the *Traditional Archery Rules* have incorporated this customary practice of offering, and thus, made lawful to offer *Marchhang* at the beginning of the match, and also to offer *Chhang-phued*[27] before and after the match.[28] The use of alcohol in archery is more so significant even today, as people ridicules the unsuccessful archers by saying *'ja-zay tum,'* meaning 'hit the barrel' if one does not succeed in hitting the target even once.

Our unique way of starting the occasions with wine offerings are an extraordinary and unique traditional heritage. "Alcohol and archery go hand in hand" the Research and Development Officer with the BIGSA was quoted in *World is One News.*[29] Likewise, the Article captioned, *'Bhutan's Alcohol-Fueled Archery: It is Absolutely Nothing Such as Olympics'* has gone viral, which says that "it is incredibly traditional and cultural to drink alcohol through matches."[30] *The World Traditional Archery Organisation*

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gpiatlantic.org/conference/papers/dorji.pdf.

26 Yangphel Archery, *'Marchang Ceremony during Archery Tournaments.'* Retrieved from http://www.bhutanarchery.com/new/?p=270.

27 The word *"Chhang"* means 'locally brewed wine' and "*phued"* means 'the first drop of the wine.'

28 *BIGSA Traditional Archery Rules,* Art. X (1) (i) and (ii).

29 *WION*, (2018, October 8). 'Living by the bow and arrow in Bhutan.' Retrieved from https://www.wionews.com/south-asia/living-by-the-bow-and-arrow-in-bhutan-170113.

30 National Public Radio. (2018). 'Bhutan's Alcohol-Fuelled Archery: It's Nothing Like the Olympics,' *National Public Radio*. Retrieved from https://www.npr.org/sections/parallels/2018/02/11/584542136/bhutans-alcohol-fueled-archery-it-s-nothing-like-the-olympics.

(WTAO) also reports that 'alcoholic beverages can be consumed on the morning of competitions.[31]

However, the WTAO has banned the use of alcohol during archery matches.[32] The WTAO *rules* states that 'no person on the field of play shall consume alcohol or be under the influence of alcohol as prohibited.'[33] It states that the ban on alcohol is based on the same principles as other banned substances under the *World Anti-Doping Code*, and that of strict liability. This means that it is the athlete's responsibility to ensure they are free of alcohol at any time of the competition; that they could be tested during a competition. The WTAO claims that the spirit of sport is the celebration of the human spirit, body and mind, and that, it is the essence of *Olympism* that is reflected in the values of how true we play. Doping is fundamentally contrary to the spirit of sports.[34]

BIGSA *Traditional Archery Rules* also follow this standard measure of the WTAO, and therefore, alcohol is a banned substance in the game of Bhutanese archery. Article XI (7) of the BIGSA *Traditional Archery Rules* stipulates that 'smoking and drinking is strictly prohibited in the play area.' So too, Article XIV of the BIGSA *Rules* on traditional archery obliges players to 'refrain from drinking and smoking in the public arena.'[35] The use of alcohol and excessive consumption of it has been worrying sight for last few decades. The WTAO reports that 'the popularity of archery has raised questions of Bhutan's susceptibility to doping, including alcoholism in the sport.'[36]

One of the foremost reasons for the practice of ingestion of alcohol during archery tournaments is to improve confidence, aiming and shooting skills.

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31 World Traditional Archery Organization. Retrieved from http://www.wtao.org/Bhutan.

32 World Traditional Archery Organization. *'World Archery Constitution and Procedures'* 1(2) 2.3.4. Retrieved from https://rulebook.worldarchery.org/PDF/Official/2021-01-01/EN-Book1.pdf.

33 Ibid.

34 World Traditional Archery Organization. *'Anti-Doping Rules.'* 6. Retrieved from https://rulebook.worldarchery.org/PDF/Official/2021-01-01/EN-Book6.pdf.

35 *BIGSA Traditional Archery Rules,* Art. XIV (6).

36 World Traditional Archery Organization.

This assertion is proven flawed in many Studies. For example, in 1985 Thomas Reilly and Fraser Halliday conducted a Study on the influence of alcohol ingestion on the tasks related to archery.[37] In their analysis, several trends were noticeable with most relevant general trends being that, firstly under the alcohol treatments, players holding time prior to loose was extended significantly.[38] This would be of no benefit to the archer and it may denote a poorer concentration during the aim.[39] Secondly, a clearer loose was observed at the low alcohol level, which would have a value as it promote a smoother release.[40] This was supplemented by a tendency towards a reduced tremor with alcohol treatments.[41] Together these effects would indicate greater muscle relaxation, the tremor being usually associated with a snatched loose.[42]

The use of alcohol substance, in any manner whatsoever in the field of sport, contravenes the BIGSA *Rules,* and it invites liability. However, as I shall show subsequently, this *Rule* has no legal basis, and it has no parent legislation to seek refuge and rely, and therefore, this *Rule* itself has little legal sanctioning power to compel obedience or punish the offenders. As we shall see, this Article will attempt to propose to provide enough power or support of authority to this *Rule*.

i) Women Cheering and Jeering

It has been heard saying that archery is a way of socialization, communication, and development of relations between people. More so, archery tournament is even seen as more exciting, as men and women come together to celebrate the events. Although archery is mostly played by men, women in Bhutan are traditionally active participants in the archery competitions. While men and husbands play, women and wives come to the playfield with their best dishes and drinks. During the matches, women cheer their husbands and favourite team with heavily symbolic songs and gestures. What seems interesting to many, that are seemingly awful to me, is the

37 Reilly, T. & Halliday, F. (1985). *'Influence of Alcohol Ingestion on the Tasks Related to Archery.'*
38 Ibid.
39 Ibid.
40 Ibid.
41 Ibid.
42 Ibid.

practice of women cheering and jeering during the matches. Women mock with distracting gesticulations and humorous insults. "Whose forehead is bulging and swollen like a wine-serving spoon, in aimless fight his shaft will drift to hit the mark not even once. *Ah kha kha thu lu lu*"[43] - humorous insult of this kind might be so distracting to the players.

Cheering and jeering might add excitement and glamour to the game, but in the real sense, it can be presumably claimed that women are being misused by male dominated sport. It can also be presumed that not all women are participating with free will to cheer and jeer. It can be assumed as morally compulsive to participate in such tribulations. This may not be wise, intelligent, and good sight for many. Women cheering and jeering in archery matches are to the extent, equivalent to that of a cheerleader industry in other sports. These in some jurisdictions can be construed as an unfair interplay between the two sexes. The BIGSA *Traditional Archery Rules* does not mention any word on women cheering and jeering in archery tournaments. However, it does mention that "any kind of physical contact purported to distract the archer during shooting" is prohibited.

This is quite intriguing in a way that women jeering group hang a scarf or a piece of cloths from their neck, and they hurl these scarfs/clothes to the archers before and during the occasions of shooting, thus making a physical contact. It is purported to distract the archer thus violating the prescribed *Rules*. These behaviours, although is customary traditional practice, passed on from ages, it requires to be reformed in light of the changing times in keeping with the ethical standards.

ii) Invocation of Local Deities

In any sport, wining may not be everything, but it is the ultimate aim of the game.[44] Given the overwhelming evidence that winners are richly rewarded, it is easy to understand why pressures to win increase. Evidence has it that winners in archery tournaments are generously rewarded, including that of smart television sets, refrigerators, power tillers, bike, among other invaluable gifts. Therefore, players can do anything, to the extent of disturbing and invoking the local deities, to aide their sides to win the match.

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43 Pedey, K. (2008). 'The Metaphorical World of Archery' in Frank Rennie and Robin Mason (Eds.), *Bhutan: Ways of Knowing*, pp. 95–103.

44 Lumpkin, A. (2017) *Modern Sport Ethics: A Reference Handbook.*

The practice of invocation of the local deities to win a tournament is not a myth. It is believed and said that when a team invokes the aide of the local deities, some sort of uncalculated and unexpected calamities takes place. It transpires into hurt or other adversarial misfortunes. Therefore, the BIGSA *Traditional Archery Rules* prohibited any activity of bringing religious items such as images, *Dhar*,[45] *Tsendar* and other religious objects to the archery playground.[46] The *Rules* also prohibits the carrying or bringing of any kind of *Dhar*.[47] Thus, this belief system was prohibited by the BIGSA to ensure safety and other unintended consequences.

In some instances, astrologers are also invited into the play grounds. These tasks are performed to increase the chances of winning the game. The BIGSA *Rules* now prohibits from such practices in the interest of the larger good.[48] Sometimes, people also invite few monks at home and perform prayers and rituals throughout the day while the tournament is simultaneously played. While there is no scientific evidence to show its effectiveness and success, but certainly, there is a psychological impact for everyone on the ground. Sometimes, we hear people say that invoking deities and performing rituals at home brings rainfall, wind, and bad weather causing the opponent to lose the match. The emphasis on winning at any cost can lead to increase in unethical and *unsportsmanlike* behaviours. We need to make essential differentiation between winning and seeking to win while playing ethically.

iii) Safety and Wellbeing

One of the essential components of sports is its intrinsic values, frequently called the 'spirit of sports,' the *Olympic Spirit*, the essence of *Olympus*, the pursuit of human excellence through perfecting a person's natural talents.[49] According to the *World Anti-Doping Code 2021*, the 'spirit of sports' is

45 The word *"Dhar"* connotes scarf in Bhutanese national language. Usually during archery tournaments, or in any tournaments in Bhutan, participants go to the nearby temples or monasteries where local deities live in, pray for the local deities therein, and get a scarf *(Dhar)* after making a prayers and offerings. Usually, archers say the simplest short cut to victory is appeasing the protectors and carrying to the game a piece of anything blessed by the deities.

46 *BIGSA Traditional Archery Rules,* Art. X (2) (iv).

47 *BIGSA Traditional Archery Rules,* Art. X (2) (v).

48 *BIGSA Traditional Archery Rules,* Art. X (2) (vi).

49 Vargas-Mendoza, N. et al., (2018). *Ethical Concerns in Sport: When the Will to Win Exceed the Spirit of Sport.*

the celebration of the spirit, body, and mind.[50] The essence of *Olympism* is reflected in the values we find in and through sport, including health, ethics, fair play and honesty, excellence in performance, character and education, fun, joy, teamwork, dedication and commitment, respect for rules and laws, respect for self and other players, and community and solidarity.[51] A careful look at this *Olympic Spirit* in sports show health and wellbeing of participants and anyone involved in sports as integral and fundamental rationale for the world sports. Therefore, this part of the Article will illustrate safety measures and wellbeing of the people. BIGSA as the technical authority on archery has developed the *Archery Safety Rules and Regulations*[52] to regulate the safety measures of the participants as well as the spectators. Concerned with increasing incidents of people getting hit by strayed arrows during archery matches, BIGSA *Rules* intends to safeguard the general public as well as archers from getting hit by strayed arrows in the surroundings of an archery range.[53]

The *Archery Safety Rules and Regulations* provide criteria for the construction of *'Bacho'* (Archery Range), registration of *Bachos*, and other important safety measures. For instance, the *Rules* provide that 'drink shooting' shall not be allowed at any archery range. The concerned officials, archery range caretakers, owners and team captains will be responsible for enforcing this *Rule*.[54] This provision provides obligation to certain category of the people involved, however, there is no accountability to enforce against these individuals if this *Rule* is violated. Similarly, the *Rule* provides that 'if an archer or a person gets hit outside the prescribed shooting area, the archer concerned shall be fully liable for the consequences. Such archers can also be banned from playing archery.'[55] It also states that an archer involved in fatal accidents shall be banned for life.[56] This is an intriguing provision because it is yet to ascertain how many archers were made liable and banned from playing archery.

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50 World Anti-Doping Agency Play True, *World Anti-Doping Code 2021*. Retrieved from https://www.wada-ama.org/sites/default/files/resources/files/2021_wada_code.pdf.

51 Ibid.

52 BIGSA, *'Archery Safety Rules and Regulations.'* Retrieved from http://www.bigsa.bt/?page_id=40.

53 *Preamble* of the *Archery Safety Rules and Regulation*.

54 Ibid.

55 Ibid.

56 Ibid.

This safety measures adopted by the BIGSA is not exhaustive. It outlined limited safety measures focusing on the archery range, registration, and precautionary measures to avoid getting hit by arrows. It has not covered the safety measures such as avoid playing at night, avoid playing during the pandemic, precautionary measures from spreading the diseases, among others. These measures might not have been foreseen during the making of this *Rules and Regulations* by the BIGSA. However, even if the *Rules* does not encompass these safety measures for the purpose of public health and safety, the concerned authority ought to be cautious about the emerging situations and changing dynamics of the game. Sport like archery, in real Bhutanese sense, is a manifestation of ethics and values which promote community confidence, reputation, solidarity, and wellbeing. We need to preserve the standard required by this national game.

More so, the BIGSA *Rules and Regulations* cannot be enforced in the court of law. The rule making power of any independent administrative agencies, also called 'quasi autonomous governmental or non-governmental organizations' is limited to the powers conferred upon by the primary authority.[57] To put it simply, from a traditional perspective, control is linked to the separation of powers. The *Parliament* fulfils an important task of controlling the activities of the *Executive.*[58] More specifically, as the *Parliament* is the appropriate wing of the government to bring legal reforms, and one of the means for the *Executive* to implement the laws is its regulatory power, it seems logical that the *Parliament* controls the use of this regulatory power, as well the other activities of the government.[59]

Nevertheless, one of the advances in the realm of administrative process is that apart from pure administrative function, the *Executive* performs the legislative function as well. However, *Regulations, Rules,* and any bylaws enacted by the administrative authority should be within the power conferred by *Principal Act* or *Parent Act*.[60] In other words, the *Legislature*

57 Marique, Y. (2017). The Rule-Making Powers of Independent Administrative Agencies ('UQANGOs'), *'Electronic Journal of Comparative Law,'* 11(3). Retrieved from https://www.ejcl.org/113/article113-30.pdf.

58 Ibid.

59 Ibid.

60 O'Regan, C. (1993). 'Rules for Rule-Making: Administrative Law and Subordinate Legislation'. Keefe, E. J. (1939). 'Administrative Rule-Making and the Courts'.

first set broad policy mandates by passing statutes, then agencies create more detailed *Regulations* through rulemaking. The legitimate rulemaking power of the BIGSA is therefore questionable. In the absence of legitimate authority and irrespective of these nuances, rulemaking in this case would imply a decision made by the BIGSA in order to make some choices, even if it is only within a very narrow margin. This decision can shape an individual position or have a wider scope through the setting of standards, guidelines, good practices, policy recommendations, advice, and initiatives. However, those may not have legal sanction as that of a *Rule* made under delegated authority.

Conclusion

Bhutanese traditional adage says *"Yesheypai Dha, Chapsa Methong, Phosa Thong"* – which can be loosely translated as *"The Divine Arrow can be seen only when it hits, not when it is shot."* This beautiful Bhutanese epithet must have several hidden and intended meanings, but for many, archery actually is the *Yesheypai Dha*. Many people fail to see when it is shot, but only realizes when it turns into tragic accidents. The safety measures of archery need to be urgently be regulated by way of legislations or through some legal force. Models of best practices and guidelines need to be developed based on the international best practices on safety. The BIGSA's efforts to secure the safety through measures should not go in vain. The *Rules and Regulations* framed by the BIGSA provide certain provisions that regulate the unethical practices in archery tournaments. The archers must follow and respect this decision diligently.

On the other hand, BIGSA must monitor and evaluate each and every game, and implement the *Rules and Regulations* in the interest of safety and wellbeing. If this is not adequate, they may move the *Parliament* for statutory intervention as the way forward. The game of archery is regarded as an intrinsically valuable sport which each Bhutanese must value and respect. Archery is not only sport or national game, but also our identity. It is the portrayal of our culture, and national values. It represents Bhutan and Bhutanese way of life. Therefore, the name of the game should be secured through adequate safety nets; unless safety measures are not put in place, dangerous results of the game may continue, with the game becoming the

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primary victim, not the archers who perpetuates the mistakes. We must ensure that archery live its purity and virtue. We must ensure that archers need to be professional sportsmen and follow the ethical and moral codes and conducts. Ultimately, our safety and wellbeing are integral part of our existence. Neither the game can resuscitate a life lost nor can a misadventure be tolerated in the name of the game.

Decline in the Quality of Education in Bhutan: An Analysis of Reasons and Perspectives[1]

Introduction

Bhutan has always been a sovereign democratic nation. It was a hallowed place for saints and refuge to many fleeing persons. Freedom flourished and security prevailed in the Kingdom of Bhutan.[2] Education in Bhutan had been the gift to the citizens of the country. It became the foundational pillars for positive social change and growth. The education system in Bhutan produced the Bhutanese leaders, Judges, lawyers, engineers, architectures, specialists and experts in many fields. Students toiled with their studies, the Bhutanese education system nurtured very young children, grew them in the four corners of the classrooms, fed them with meals in the school, built their characters, knowledge and a future for them. Bhutanese education co-parented all children in the schools, teaching them various aspects of subjects, morals, philosophies and overall nurturing innocent groups of children and blessing them as educated and qualified men and women. They moulded them with values, and if all of us recall, it was more than any other institution, that schools had been the growing grounds for all. The miracles of transformation of men and future of Bhutan were in the schools and in the classrooms. Classrooms were the playing fields of knowledge, information and more importantly future building. Classrooms has been the emblematic temples of knowledge, equality of learning, building of competence and sustained possibilities. From the single alphabets to dictionary like books, all the abilities to read, learn and study happened in the schools.

Presently, education has been recognized as the cornerstone for realizing *Gross National Happiness*. Education, on all aspects of development had been the founding tool for opening Bhutan to the outside world. It was the ability to "read and write" that enhanced our spectrum of views of the society. Education system in Bhutan, if we analyze historically, helped build a respectable section of society based on knowledge and the ability

1 Contributed by Pema Norbu.

2 Tobgye, S. (n.d.) *Education System in Bhutan- Past, Present and Future, A Reflection,* Judiciary of Bhutan.

to read and write. Comparatively, like in the western countries, education had also been an important tool for social uplift in Bhutan. Primarily, the education system in Bhutan has systematically progressed preparing Bhutan for what lay ahead. From an earlier era students, who were matured and duty bound, today students are soon transforming into a right bearing citizens, who demand education to be corrective and adaptive. If we analyze the writing styles and the handwriting of students who passed out few decades ago, there is a tremendous gap in "every set of skill." Over the years, many positive qualities have eroded, resulting in the diminishing abilities of our students to interpret, understand, analyze and be situational based learners. The diminishing quality of education can be assessed from the way students dress, speak, interact and, more importantly, how they act in the society. The role of education as motivators and positive role modelling is, slowly replaced by modernism of superior outlook and style with depraved mentalities. Education is indirectly an innate lesson that teaches students about task handling, competence, good behaviour and positive morality. It teaches them to use knowledge as a weapon of modernization, attitude as a parcel for present times, and good mannerisms as a gift to the parents and the society. It teaches them to think, behave and act with morale and social responsibilities, starting from the classrooms to their homes they live in. The approach is holistic and wholesome. On one hand, a few laws can correct the "science of mind," our thinking process, which is the deductive source of our abilities and characters. We are losing at the "mental landscape," "dutiful citizenry" and the "leadership of the self" to individually guide by themselves. The education system has to restore the "morality of the self" for many, which may require tremendous effort in changing the ways we see things and behave. Modernization has altered the science of rightful thought processes and control over it.

The 'history of education' is the development of systematic methods of teaching and learning. Education provides literacy, professional skills, pleasure, duty, liberation and transcendental wisdom for human goals. Teachers are the main agents of change in students' behaviour through instructions, and imparting values that equips them as competent members of the society. Access to basic education has become an inalienable right of all the Bhutanese; and is the key to achieving the national aspirations and our national goals. Our future strategies for basic education must be further

refined and developed.[3] It is reflected that priorities for future education policies must be defined to improve the quality and relevance of education. The document provides an invaluable guideline to ensure that education must be guided by a holistic concept based upon total development of a child and the need to ensure that the innate potential of each and every child is fully realized.[4] Education is recognized as one of the important pillar for human development. It also expounds that education must prepare for the world of work; and instill the acceptance of "dignity of labour." It entails the teachers to be not only highly qualified professionals, in their approach to education, but they are equally motivated and dedicated to their profession.

The Constitution of Bhutan states that the State shall endeavour to provide education for the purpose of improving and increasing knowledge, values and skills of the entire population with education being directed towards full development of human personality.[5] Constitutionally, education encapsulates the development of values, skills and knowledge. Moreover, our education system should motivate our learners to adopt systemic and innovative approaches in the way that makes them self-reliant and are able to secure a life of their own. In the similar way, the *Child Care and Protection Act of Bhutan, 2011* also aspires for the full development of human personality and promote conditions that are conducive to the "best interest of the child." It endeavours to provide basic rights provided under the *Constitution* and other laws.[6] Further, it delegates the educational institutions to enhance "academic and social image" of children.[7] These sections of the law only provide duties to the educational and academic institutions to foster positive growth in our students. As written by the former *Chief Justice of Bhutan*[8] that we sometimes loose our achievements in the routine of daily responsibilities and our efforts to strive towards the next higher goal of learning. The *Ministry of Education* is tasked with a huge responsibility to develop a generation, and shape the future of our citizens

3 Bhutan 2020: A Vision for Peace, Prosperity and Happiness, Royal Government of Bhutan.

4 Ibid., p. 52.

5 *The Constitution of Bhutan*, Art. 9(15).

6 *The Child Care and Protection Act of Bhutan, 2011,* s. 15 (d).

7 Ibid., s. 26 (b).

8 Lyonpo Sonam Tobgye.

through the textbooks and curriculum. First, the genesis of development is the structuring of our values, priorities and necessities for the nation. We cannot educate the children of today, subjects that are redundant, non-relevant and contextually inappropriate in their lives. In short, the contents must be electrifying and alluring. They must enhance growth in knowledge and improve language and skills. In this, let us analyze the relevant laws and policies in place that structures around "quality education."

National Education Policy[9]

National Education Policy of Bhutan envisions for an educated and enlightened society of *Gross National Happiness*, built and sustained on the unique Bhutanese values of *"Tha-Dam-Tshig Ley Gyu-Drey."*[10] It also states that the purpose of education is to develop citizens that value Bhutan's unique national identity, ancient wisdom and culture, prepared for right livelihood, and practice contemplative learning. It is to develop individuals who are lifelong learners, who have a holistic understanding of the world and a genuine care for others and nature. It should also develop citizens' competency to deal effectively with the contemporary world, which are critical, creative, informed and engaged in civic affairs.[11] It enumerates various policy statements aimed at enhancing the education of our students.

Rules and Regulations for the Establishment of Colleges

These *Rules and Regulations* have been developed to guide and oversee the establishment of colleges in Bhutan. This *Rules and Regulations*, approved by the *Tertiary Education Board* will be the definitive instrument to ensure that proper standards are met in terms of physical infrastructure, faculty development, student services, secretariat services, and others. Further, the procedures and requirements laid out in the document shall support the prospective promoter to obtain approval for the establishment of colleges. This document also facilitates the effective implementation of the *Tertiary Education Policy* to be able to promote the tertiary education system in the

9 *National Education Policy*. (2018). Ministry of Education, Thimphu.

10 *Ley Gyu-Drey* are basic natural human values that anchors around karmic cycle of human behaviorism that "good begets good" and "bad begets bad." On the other hand *Tha-Dam-Tshig* is the ability to maintain the purified streams of relationships, recognizing the innate human values consisting of respect for the elders, parents, country and others.

11 Ibid., p.3.

country. It is aimed at moving to create an enlightened citizenry thereby achieving the ultimate goal of developing Bhutan into a knowledge-based society.[12]

Tertiary Education Policy 2013

Tertiary Education Policy amongst others, makes ground for Bhutan's tertiary education institutions to focus on developing productive, socially responsible, culturally grounded, ecologically sensitive, and spiritually aware citizens equipped to lead Bhutan into a knowledge society. Further, it endeavours to provide every graduate with broad capabilities in all basic-life skills including analytics, writing, and communication amongst other skills. It also aims at providing strong leadership skills so that our graduates create opportunities for themselves and others, who are able to work for the twenty-first century demands. It further aims at creating a pool of highly trained graduates and professionals of critical size, which shall form the national resource.[13] It also outlines various strategies to achieve these educational aspirations to infuse and use *Gross National Happiness* values and principles as a foundation for all institutions.[14]

National Youth Policy 2011

The *National Youth Policy* is aimed at instilling the young Bhutanese an abiding awareness, to the principles and values enshrined in the *Constitution*, and in short, aims to develop best qualities in our citizens, that are unique to Bhutanese. It fosters a sense of identity, respect and other qualities. This policy sets a fertile path for positive growth of the youths. Education is one of the critical policy components where young people can develop livelihood values, skills and attitudes that will prepare them to successfully engage with the changing global environment and contribute to national development and prosperity.[15] Aside this compendium of policies and strategies, education system in Bhutan is guided by the philosophies *of Gross National Happiness* and other universal human values. As the education system and

12 *Rules and Regulations for the Establishment of Colleges, 2017*, Higher Education Planning Division, Department of Adult and Higher Education, Ministry of Education, Thimphu.

13 *Tertiary Education Policy of the Kingdom of Bhutan, 2010,* Tertiary Education Division, Department of Adult and Higher Education, Ministry of Education.

14 Ibid.

15 *National Youth Policy, 2011*.

other areas of development is competed by the notion of "the survival of the fittest," our education system, both on legal and other aspects, have to ensure that it imparts value education, understanding a human being, basically development of emotional quotient, and other valuable aspects of development to ensure that we strike a balance between progressive development and accommodating those changes with epistemologies of modernity.[16] On 17 December 2020, His Majesty the King in His *Royal Address* to the Nation commanded that:

> *Bhutanese do not have to look further than our youth today to foresee the future that lies ahead. The basic task of preparing for future begins in the classrooms and schools. For years the country's focused has been mainly on increasing the number of schools, teachers and students at the expense of the standard of education.*

His Majesty pointed out that immediate step must be taken to address this shortcoming. His Majesty further commanded:

> *We should not be satisfied by comparing the present achievements with the past or by being able to match other countries. If Bhutan is to have a progressive and prosperous future, Bhutanese need to become more capable and exceed the standards of other countries given the limitations of size, population and resources. The country risks being left behind, if it does not prepare adequately for a future which is defined by complex and constant change, underpinned by technological innovations and advancements.*

A Royal *Kasho*[17] was issued to the *Ministry of Education* to initiate appropriate reforms in the education system. More overtly, it called for quality and responsive education so that our students in the schools and colleges are not only educated, but they have knowledge, skills, values and attitudes to become socio-economically productive members of the society. Moreover, education should be responsive to the individual interest and changing socio-economic needs of the country in achieving country's

16 Robles, C. M. (2018). *Considering Teachers as Mediators of Traditional and Modern Knowledges,* Buddhism, Culture and Society in Bhutan, Vajra Books, Kathmandu, Nepal, p. 187.

17 A *Royal Kasho* is a *"Royal Decree"* or *"Royal Edict."*

aspirations of *Gross National Happiness*. Seven years ago in 2014, His Majesty commanded that:[18]

> *As I serve my country, I have a number of priorities. Number one on my list is education. Education is empowering- it's a social equalizer and it facilitates self-discovery, which leads to realizing one's full potential. Good education gives you confidence, good judgment, virtuous disposition, and the tools to achieve happiness successfully. A good school gives a child a fair shot at success and ensures that a person's achievement in life will not be predetermined by his or her race, parentage and social connections.*

Furthermore, His Majesty the King shared His concerns during the 14th *Royal University of Bhutan Convocation*[19] which reiterated the concerns of dramatic changes brought about by technological advancements such as Artificial Intelligence, Quantum Computing, Block-chain, Machine Learning, Big Data, IoT (the Internet of Things), Virtual Reality and Augmented Reality, amongst other things. The *Royal Address* captured the complete pictures of our education system, its problems, and the need to restructure and reform it to meet the challenges and demands of the time. This may call for both legal and socio-legal approach and other education based methods so that we are able to balance our strategies to accommodate the changes responsively. Although the *Bhutan Law Review* is a forum for legal professionals, to stimulate discussions on matters of law, it is of great importance that we analyze our education system from legal and social perspectives to capture our national priorities. The analysis rests on the primacy that education in Bhutan, like the laws drafted in the country, is intended to improve the lives of our people, and enhance their living.

The Impact of Policies and Laws and the Z Generation Effect

Positive discipline is an integral part of personality development. Disciplines or *"DigThrim"* instills a sense of discipline and decorum, so that we are respectful to our own values we grew with. *Drig Thrim* is a personal law of behaviour, moral attitudes and is least concerned about how we look as a person, but how we exhibit as a person of values and integrity. This resembles the natural values of respect and the ability to

18 *National Education Policy*.

19 The 14th *Royal University of Bhutan Convocation* took place on 24 May 2019.

tread in the society with dignity and social grace. It establishes morals, which are a fundamental principle for rational thinking, ethical acquisition of knowledge, intelligence, wit and judgment.[20] It is said that morality and ethics invigorates the talents of the mind through perseverance, courage and positive temperament. It is the basis for character building, which in short, presupposes the positive development in the children.

Access to education in Bhutan, based on universal human values, is unrestricted and free. Education in Bhutan is cheap; equitably accessible; and people have become complacent about the expenses incurred for education. Few can decipher the real motives behind free education in Bhutan, thereby losing the essential nature of educational values. Positive development of children and the constitutional role of promoting the full development of the human personality in the children are left to the works of teachers; and most parents fail to educate their children in the four corners of their home walls. "Parental education," which basically underscores values, morality, ethics and integrity are left to the schools. Parental advice, guidance and support are characteristically pertinent to guide the students towards adventures of positivity and productivity. In many instances, schools have been the second home for the students, and emotionally and morally, parents and teachers have to coexist as mutually dependent societies.

Children of today are called as the *"Z Generation."* The way the children of today think, speak, dress and eat, are a drastic change on the way. Most children, although Bhutan is fertile ground for positive developments, looks and mirrors the characters and traits of the outside world, which in many aspects are detrimental. They, in many aspects, have become the ambassadors of external values, uniquely different to Bhutan, our goals, and aspirations as a nation. Every nation has their own inherent values that guide its development approaches, ways people live, the laws they draft, guiding them in many aspects of social intercourse. Although, learning about outside culture is good, as it opens up to the external global changes, however, it should not be tipped into losing our own values, cultures and national mental orientations. The generation of today, are overtly technical, behaviourally misunderstood and complex.

20 Kant, I. (2009). *Fundamentals Principles of the Metaphysics of Morals*, Merchant Books, Watchmaker Publishing, United States of America.

With the intense and unrelenting spread of Information and Communication Technology (ICT) makes these problems an international one, not only for Bhutan. Clearly, it seems to be a two-way mechanism of action; in the world of ICT, young people transform the known society and the digital world is changing them. They feel and live the time, they spend their leisure time differently, have different conceptions about relationships, contacts, conversations and learning. They are influenced by concept of membership, and shared beliefs and behavioural forms. Studies show that, the *Z Generation* cannot live without the Internet, they prefer global connectivity, they are very skilled at handling devices; they are multi-tasking and quick decision-makers. However, they are emotionally incompetent.[21] When laws and policies on education are made into the education system, it is not shared, the society does not assess on the impacts, and changes it may bring to the children of Bhutan.

These backdrops bring varied negative impacts in our learners. *The Child Care and Protection Act of Bhutan, 2011* is a legislation which principally aims at protecting the basic rights of our children so that we uphold the "best interests of the child." The rights of children evolve with time, and international norms and standards have been pivotal in securing their hopes and aspirations. The dichotomy of the law has reinforced a "rights based society" which believes in their rights more than duties. This has thinned the line between "responsibility and right." A picturesque scenario would be the change in the dynamics of power between the students and the teachers. To simply describe, students have become more like teachers, while the teachers have taken the place of students. These narrations of facts are based on personal experiences and fact-exposition of the ground realities of the education system today. Students are flamboyant and empowered. The slightest of scolding and sticks are more than enough to point fingers at the teachers and initiate legal proceedings against them. This tightens the positions of the teachers and they become a mute spectator to the unwarranted changes brought in by our laws and social changes.

It is said that affection spoils the children. This rightly brings us to contemplate the timeless values and words like *"spare the rod and spoil the child."* Parents, with the reinforced social changes, have also become individualistic and self-centred. Few are able to recollect that "rights encompass duty"

21 Csobanka, Z.E. (2016). The Z Generation, *Acta Technologica Dubnicae*, *6* (2).

and morality has to be learnt based on objective principles. As societies progress, one of the leading results, is the development of self-identified personal views, which are constructed over the nature of blame game and finger pointing. Contemplation and analysis of the abilities of the students are also critical to ensure that they perform and excel academically and grow positively. Our education system has become, on one point, a place to score marks, and if otherwise, the teacher, at the other end of the table is considered as incompetent and professionally unsound. The growth of future's citizens is sometimes a shared burden between parents and teachers. A positive reinforcement through a partnered growth is an essential strategy to ensure that our children's education is holistic. The quality of education is the global concern and it requires a wholesome and honest concern and efforts. The absence of it will directly contribute towards teacher attrition in the schools. As said in Buddhism, the path towards enlightenment is uneasy; and hard works of the students are critical to assist the education system to improve and excel. Education is the top priority and it deserves commitment, concern, cooperation and consistency from the policy makers, teachers, parents and the students. It is a concerted game of stabilizing a heavy golden pillar, where the efforts of all sectors are equally important lest the golden pillar falls.

A Need for Systemic Reforms

It is shared opinion, that remunerations of the teachers have increased manifold. While it was a welcome gesture for many, it may be a wrong view to equate "money" with "quality." The theory of direct proportionality has little bearings and causality. Academic modules and the mandates of the curriculum guide teachers in Bhutan. On the other hand, the assessments are done based on what teachers teach, and what the students learnt. To typically point out the teaching curricula, text books have become the bible of the students and the teachers both. Students learn, memorize, and reproduce what is in the textbooks. This creates "a palace in the pond" and hypnotic sense of "intelligentsia superiority," which basically is the reproduction of the memories.

This creates an education system based on memories and not on understandings and comprehension. This poses us with a serious question, "Where does our education system fail?" In brief, our education system has to be responsive, and relevant. In the name of English, we cannot

teach our students, ancient English literature. As a developing country, our education system has to be aligned with the present working modalities in our government machineries, and equip them to face the world of work. If the education system needs to change, we recommend that the education policy should change to embrace change. These policies should regulate, supervise and rectify the mistakes, so that we build a corrective education for our children.

The Impacts of the Individual Work Plan (IWP)

The *Individual Work Plan* was initiated by the *Royal Civil Service Commission* to ensure excellence in management. *The Managing for Excellence Manual* of 2018[22] provides alignment, accountability and differentiation. It was strategized to ensure evaluation of the performance, build organizational targets and achieve the annual and Five Year Plan objectives of the institution.[23] However, it has generated an uncomfortable and unenergetic ambience in the education system. This has loosened the relationships between the teachers and the principal and created mistrust among the teachers.

The objectives of the IWP had been excellent; and it has enabled an assessment of progress. The bottlenecks of the IWP lie in its process and operation. Practically, the IWP requires a system of rating, where the immediate supervisor rates the employees of their organizations. Like the practice before the courts of law, any incompetence, require documentary or soft copy evidences as an evidence of performance. This is a tribunal of the law of its own. It becomes the court to prove excellence, merits and work products. If not for the evidences, where the works of the teachers are rubbed off as soon as the blackboards are cleaned, it may have huge consequences on career and professional growth of the teachers. The annual rating category of "needs to improvement" is detrimental to positive enhancement in employment. In such cases, the rating diverts the teachers more towards the collection of evidences. Every person is aware that a teacher has a thick textbook to teach with a limited time.

However, as mandated by the authority, it dictates the teachers to collect evidences, where most of the time may be wasted unreasonably. This results

22 *Managing for Excellence Manual* (2018). Royal Civil Service Commission, Thimphu.
23 Ibid., p.3.

in voluntary works of teachers in the communities, leaving behind their prime responsibility of teaching; and although, they are out of the teaching sessions, they have the most points as evidence in the final hearing. Thus, this promotes an indirect sense of injustice and prejudice nurturing a corrupt practice. This result in matrix of less work with more talks; beauty over quality, and community over school. This invigorates negative energy in the schools, and creates a sense of unhealthy competition and victimization. This may be a reason for high teacher attrition rates in the schools. There is no grievance redressal mechanism, which constricts the idea of fairness and reason. There is also a sense of complacency amongst the students. Marks based on merit are carried away and compromised. These on most, rests on their notions of "My teachers will promote me even if I get zero out of 100." These complacent and self-satisfied attitudes do not commit them to learn and strive for the best at their personal level.

Trial and Error based Reforms in Bhutan

In Bhutan, reforms are an experiment and systemic reforms are experimental. If it works, the institutions adopt it, and if it does not, the practices are discarded, thereby failing to be consistent and methodical. Our curriculums, especially in science domains, are designed looking at developed nations, which have well-furnished science laboratories. In Bhutan, we do not have teachers who can handle the curriculum, as the curriculums are adapted to western and more developed scientific theories that are impractical and irrelevant to the students. When policies and implementations get stable, few of them are castoff; and they do not continue with the previous designed policies. If any new policies and mechanisms are put, it requires time, expertise and implementation to be stable. For that reason, everything has to start from the beginning, and this annihilates the chain of continuity in service and knowledge.

Obsolete Curriculum

An adaptive education system requires a curriculum that resounds and reflects the current situations of the world. The progress of technology and development is taking place at a breakneck speed. It is relentless and unforgiving. Adapting our children so that they are able to correspond to the modern changes is prerequisite for any education system. In adaptive education, these are mostly done through change in curriculums and its contents so that children are adaptive and responsive to these changes. On

the contrary, the curriculum in the Bhutanese education system remains the same, irrespective of the changing situations of the world. The world is changing at a very fast rate; computers have become the rulers of our society. However, the methods of education demand the children to memorize. The success of student is dependent on their ability to memorize; which exterminates their analytical power. Learning through memory is non-adaptive and unresponsive to the present challenges.

The curriculum demands the children to sustain their lives through a government job; and it does not teach the students to sustain their life through agriculture works and other entrepreneurial jobs. This narrows the views of the students and it neither teaches them about business modules nor the decision-making skills, and it fails to instill them with leadership skills, public speaking skills, problem solving skills and the ability to regulate the mind. Students do not have the set of plans; let us call it, **Plan A**, **B**, and **C** if they are unable to secure a job in the government service. Neither the curriculum teaches these skills. The education system does not open their mind to works of entrepreneurship, with adequate skills and mindsets. The curriculum is able to meet only few learning objectives and captures only countable learning abilities of the students. Students are intelligent and creative in the following ways. They possess:

a) Logical –Mathematical Intelligence
b) Existential Intelligence
c) Linguistic Intelligence
d) Spatial Intelligence
e) Musical Intelligence
f) Bodily –Kinesthetic Intelligence
g) Intrapersonal Intelligence
h) Naturalistic Intelligence
i) Interpersonal Intelligence

The curriculum fails to capture and include these learning abilities and attributes of our students. The curriculum must be designed based on the interest and ability of the students. Nonetheless, our education policies and strategies should align with the demands of the fast changing world. It

should not only profess quality, but also adaptability, so that students are able to take up alternative jobs.

Education Infrastructure

It is great to experience that the policy makers and the curriculum developers are trying to adapt and emphasize on the curriculum of the well-developed countries. But, they fail to study whether the country has predetermined infrastructure to welcome the curriculum into the country. The curriculum demands the well-structured, spacious and conducive classrooms. But, our country has shortage of these facilities. Bhutan has made commendable progress in the infrastructures of the education, so that education in Bhutan is a ground for learning and building of positive characters. The infrastructure of the education system has to be aligned towards incubating more scientific ideas.

Professional Development Programmes

Learning is a continuous process and progress. Learning requires teachers to study and imbibe skills required with the time. For better and quality teaching, the skills and knowledge of the teachers are essential. Modern teaching skills necessitate the teachers to be informed, and their lessons are updated with current information. In practice, teachers are glued to the same textbooks and the same content year after year. There is less or no scope for professional growth of the teachers; with hardly any platform for teachers to upgrade and update their knowledge. They lack research skills; and researching is essential as a teacher, to ensure that they are adaptive. There should be parameters for professional development of the teachers.

Revision of the Teaching Modules

Teaching methods and pedagogies in the schools are replicated from the lessons of the colleges. The pedagogy in the colleges mostly concentrates on teaching from textbooks, with few interactive methods. Our pedagogy has to be changed so that, teaching imbibes a learner-centric method that centers on the wholesome development of the children. Practical based teachings through the use of computers and computer use orientations are also essential. Unless our teaching methods and pedagogies are changed and replaced, such symptoms may be transferred and carried on to our future generations.

Refining the Method of Selection of the Teachers

Teacher selection methods are a critical gateway. This streamlines who joins the service, and it is a test of skills, knowledge and aptitudes. Education consists of vast fields of knowledge in differing subjects. Every subject is essential and each subject is a field of expertise of its own. The recruitment and selection method into the teaching service does not recognize these patent and latent skills, in all categories of the teaching profession. General gateways, including "common sets of questions" for all teachers can be best exemplified when a Mathematics Teacher is given with an English Question; and the English Teacher is asked up with a *Dzongkha* question. The question here is not about the questions that are set in, but the rationale and the methods of assessing the competence of the teachers. The best example would be an English teacher would not be able to compete with a *Dzongkha* teacher, in the field of *Dzongkha* and otherwise. This catapults the objectives of the examination into disarray; with many competent teachers becoming contract teachers. This is a disincentive for the teaching profession as well as to the education system as a whole.

Conclusion

Education in Bhutan has been a pillar of progress and human development. The education system of our country has created the best bureaucrats and leaders in the country. It has nurtured Bhutanese ingenuity, our culture and exposed Bhutan to the outside world. Our education system had been the mirror through which every Bhutanese sees it as a testament of time, growth and national progress. We owe our ability to read and write and communicate to the education system in Bhutan. Dynamically, education system is contested with ever-changing demands, dictated by national, regional and global development scenarios. The children of Bhutan are inquisitive and ready to learn. We are confronted with a demand to change, adapt and renew our approaches, so that education not only reflects the past and the present, but more aptly, it prepares the children of Bhutan to face the future they know best. The best response to a good education is through reforming the approaches, and invigorating the sense of change in the minds of our students, so that, they expect less and learn more; they are steadfast in their objectives for building a better Bhutan. Our education system is more like a law; it should be amended looking at the needs and aspirations of the society. In the progressive society, change is the only way forward to the systemic flaws.

Ambiguities in the Criminal Justice: The Gold Smuggling Case[1]

Introduction

The foundations of the Bhutanese *Criminal Justice System* owe its sources to the Buddhist natural laws derived from pure divination of laws and Justice. In Bhutan, criminal justice is a quintessential reflection of rich Buddhist ethos that mirrors both traditional and modern aspect of administration of Justice. Today, our shelves are filled with literature on the *Criminal Justice System* that continues to define and foster what criminal justice really is. There is an expansion of scientific knowledge, which replaces subjective impressions and emotional reactions in criminal justice policies. Criminal justice is a specific field of research that can provide new programs, suggest new approaches to combat crime and deal with people in conflict with the law. It was expounded that an effective *Criminal Justice System*s can only be developed based on the *rule of law* and the *rule of law per se* requires the protection of effective criminal justice measures.[2]

Criminal justice research is necessary to decide what the major problems are, to orient existing knowledge to those problems in a way that makes their dimensions as clear as possible, and to devise methods of acquiring such additional knowledge as is required to form an adequate basis for their solutions. There should also be expanding researches on the process by which criminal justice is administered. There has to be a sustained interest, in legal scholarship, in the administrative aspects of the criminal law. Taken literally, this would require the intensive study of scientific crime detection, pathology, social work, psychiatry, personnel management and the many other specialized fields which are integral parts of the total process by which criminal justice is administered.[3] Criminal law is an evolving science of human psychiatry, medical, legal and physical science. We are forced to

1 Contributed by Sonam Thaye.

2 United Nations Office of Drugs and Crime. (2006). *Criminal Justice Assessment Toolkit*, United Nations, New York.

3 Remington, J. F. (1960). Criminal Justice Research, *Journal of Criminal Law and Criminology* 51(1).

resolve a conflict between fundamental interests of society; its interest in prompt and efficient law enforcement, and its interest in protecting the rights of its individual members from being abrogated by unconstitutional methods of law enforcement.[4] His Majesty the King while reflecting some of the deepest beliefs of His Majesty the Fourth *Druk Gyalpo* on 11 November 2015, shared to the nation that:[5]

> *His Majesty has always emphasized on the establishment of the rule of law. It is said that the failure of justice persecutes an individual, but the lack of adherence to rule of law persecutes an entire nation.*

Rule of law brings about discipline in people and order in society. If there is an order in society, there will be peace and trust amongst the people. His Majesty has always maintained that if there is peace and trust amongst people, the nation will achieve untold prosperity.[6] The *right to counsel* is fundamental to the *Criminal Justice System.* In simple, it is the balance of rights and consequences. Legal battles are contest between the opposing adversaries. The counsel helps to promote balanced contest by equalizing the adversaries. Counsel brings legal expertise, knowledge of the system, tactical and strategic savvy, and a commitment to the defence of the accused against state efforts to impose a criminal penalty.[7] In all criminal prosecutions, the accused shall have the *assistance of counsel* for their defence. This puts to the heart of the doctrine of the *right to counsel* jurisprudence. It underlies the prominent legal values of fairness by forcing a defendant untrained in the law to defend himself against the power and legal acumen of the State. Fairness requires rough equality between adversarial opponents.[8] Article 7 Section 21 of the *Constitution of Bhutan* guarantees:

> *All persons shall have the right to consult and be represented by a Bhutanese Jabmi of their choice.*

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4 Ibid.

5 His Majesty the King's Royal Address to the Nation on 11 November 2015.

6 Ibid.

7 Gardner, M. R. (2000). The Sixth Amendment Right to Counsel and Its Underlying Values: Defining the Scope of Privacy Protection, *Journal for Criminal Law & Criminology,* North Western School of Law, United Sates, (90)(2).

8 Ibid.

As per the *Jabmi (Amendment) Act of Bhutan 2016, Jabmi*s are professional legal practitioners who are enrolled in the list of the *Bar Council of Bhutan.* Unlike the matters in the civil dispute, criminal prosecutions have a drastic and direct impact on the life and liberty of the suspect. From the very beginning, Bhutan has laid great emphasis on procedural and substantive safeguards designed to afford fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. The suspect is unfamiliar with the rules of evidence. The person lacks both the skill and knowledge adequately to prepare his defence, even though he may have a perfect one. A person requires the guiding hand of a counsel in every stage of the proceedings against him. He may fail to establish his innocence, even if he is not guilty. This may lead to a gross miscarriage of justice.[9] The *right to counsel* attaches criminal defendants with the assistance of a counsel during critical stages of prosecution. These critical stages include arraignments, post-indictment interrogations, post-indictment lineups, and the entry of *guilty plea* as plea negations have become central to the administration of the justice system, because they frequently determine who goes to jail and for how long, making them potentially the only stage when *legal aid* and advice would help them.

However, there were no *Jabmi*s in the Bhutanese legal system until recently. Trials were public; decisions were made on the facts of each case as presented by the litigants. The concept of *Jabmi* emerged after the then High Court of Bhutan started the first batch of *Jabmi*s(para legals). They trained some individuals who had some knowledge of court and cases. They were made to undergo a few days of training on few preliminary legal subjects including judicial procedures. They were then certified to represent the litigants. The formal governing law for the *Jabmi* was promulgated in 2003 and amended in 2016. The *Jabmi*s play a very critical role. They

9 Ibid.

spare the defendant from the inherent harm prejudiced to the defendant. They are professionally sound in law, and some in legal research, and the art of legal defence. Unlike, the *pro se* litigants, they are able to use tactical rules of interpretation and the application of laws. For many, legal research and criminological jurisprudential research is an important arm of defence. They are able to imbibe beyond the literal interpretation and meanings of the offence through an in-depth research matter in varying jurisdictions, laws and the defences altogether. In the process, they act as positive agents in development of criminal jurisprudence and the development of law. In this Article, the author will explore the contradicting opinion on *Gold Smuggling Case*. The author will elaborate focusing on the definition of "smuggling" under the *Penal Code of Bhutan, 2004* and the *Customs Act, 2017*.

Dynamic Criminal Justice System

Criminal Justice System in Bhutan has progressed tremendously. It is much more relying when we have seen the changes through our own eyes. It was the fortuitous chance to get an opportunity to work as a Public Prosecutor at the *Office of the Attorney General* that put me in a better position to assess the changing nature of criminal justice in the country. I started my legal profession at the *Office of the Attorney General*, which is one of the pillars of *Criminal Justice System* in the country. Previously, the *Office of the Attorney General* prosecuted cases which now fall in the domains of the Royal Bhutan Police. After the enactment of the *Royal Bhutan Police Act 2009*, the offences, which fell within the misdemeanour and below under the *Penal Code of Bhutan 2004*, were prosecuted by the prosecuting division under the Royal Bhutan Police.

In the initial stage of the office, when the office was newly established, the *Office of the Attorney General* received plethora of criminal dockets, especially from the *Royal Bhutan Police*. The increasing number of police cases in the office was both burdening and challenging. Although the *Police Act* was enacted, it required adequate professional human resources to prosecute and handle the cases that were coming before them. The *Office of the Attorney General* was primarily concerned about the rising dockets. As a growing institution, the *Office of the Attorney General* was not adequately human resourced with qualified prosecutors consisting of attorneys. It has a countable number of prosecutors including a few paralegals. As an

institution, the office had to restructure many procedures with a standard format of charge sheet, prosecution manual among other relevant guiding documents. Therefore, the office has to initiate many immediate prosecution reforms and practices through trial and error phases. Commitment was an essential component of service. When everyone worked committedly, to deal with the cases were not as difficult as it seemed in the initial stages. Despite being an inexperienced legal professional, with little experiences on our hands, prosecutions before the courts of law were not apparently difficult legal battle. Basically, obtaining convictions of the defendants were not relatively hard; they rarely posed any challenge to the charges put by the prosecution. While there is no hard evidence, the successes in prosecutions are hugely attributed to absence of the defence counsels and also due to the infancy of the judiciary system.

With the emergence of private legal firms and the evolving concept of *right to counsel,* the appointment of competent and qualified judges at the critical seats of the *Judiciary*, the dynamics in the judicial system, the hearing of the cases, and the prosecution has dramatically changed. Today, lawyers not only talk on the sections and science of the law, they debate on various other elements of law and justice. Professional lawyers today have become competing grounds for competence, skills and legal proficiency. It is a developing art of survival and competition. They rival in the courts on matters of law, dignity, proficiency, rights and other competing interests of the litigants and the society. The picture is completely different from how our justice system has evolved and transformed to the present day. I personally narrate the changes I see in the *Criminal Justice System* through the lense of a Public Prosecutor.

For me the notion of criminal justice has changed fundamentally. Criminal defence lawyers today requires hard work, competency, accuracy, pertinent professionalism in all aspects of their works to protect the rights of the defendants. They have to be progressive in their study in law, legal defence and the art of persuasion amongst other relevant skills and expertise as a modern defence lawyer. The role of defence lawyers has become critically relevant and important. They have become "gate keepers" who oversees the legal safety of their defendants and "active managers" of the case that demonstrates the interests of the defendants. It requires a shift in individual occupational cultures so that they legitimize their roles as positive and

successful interveners. There is no scope for naivety in the area and task of a defence lawyer. The role of defence lawyers, either in the court or in the public domain, rests with their ability to defend, and garner the confidence of the defendants and the people around.

As a private legal practitioner, hard work is a paramount quantum for professional and personal success. Our interpretation of the laws need to be applied to the given facts and circumstances with high moral, ethical and social principles so that we promote a society of professionals based on just etiquette and conduct. Through professional experience as a defence counsel, and through practice of law, one confronts various judicial and legal anomalies, which results in difference in interpretation, application and result. Medical profession and the legal professional are undisputedly similar. A wrong medicine and prescription may irreparably damage the health of the patient, and a singular misinterpretation of a single letter of the law, may endanger the economic situation of the defendant, ruin his rights as a person, with a cascading effect on families, and the society, for generations to come. The "scars of the law" can perpetuate as personal, social and institutional memories. Similarly, a "wrong dose" of medicine from a physician can severely maim a patient. In many aspects, justice is the embodiment of "clarity," antithesis to legal confusion staked with superior legal and jurisprudential reasons. An error in interpretation of the law will lead to wrong charges and wrong punishments. It has domino effect like consequences. Let us discuss this issue in the light of the application of section 279 of the *Penal Code of Bhutan, 2004* for the offence of smuggling in the classic *"Gold Smuggling Case"* in light of applications of the provisions of the *Penal Code* and the *Customs Act of Bhutan, 2017*.

The *Civil and Criminal Procedure Code 2001*[10] only provides what a charge should contain and does not provide a clear definition of what a charge is. The charge may be defined as a "formal accusation in writing for the commission of offence" or an "accusation of a crime by a formal complaint, information or indictment." Under the Bhutanese legal system, the charge must contain such particulars as are reasonably sufficient to give the accused notice of the matter with which he or she is charged. Therefore, the charge is a notice conveying to the suspect why he or she is being arrested and is liable for the prosecution in the court of law. However, going by the contents of the charge the *Civil and Criminal Procedure Code* states,[11]

10 *Civil and Criminal Procedure Code of Bhutan, 2001*, s.187.
11 *Civil and Criminal Procedure Code of Bhutan, 2001*, s.187.1 (a).

> *If the law which creates the offence does not give any specific name, definition/description of the offence must be stated so as to give the accused notice of the matter with which he/she is charged.*

The *Generalia Specialibus Non Derogant* Rule

There are two basic components that need to be addressed while framing charges against the defendant. First, it is critical to look into the specific name of an offence that is given by the law, which creates such action as an offence. Even in the rule of application of laws, there may create a situation of conflict of laws between the specific law[12] and the general law.[13] However, the doctrinal legal principle that specific law overrides the general law is relevant. In this regard, it is important to note the application and meaning of the *Latin* maxim and legal principle of *"generalia specialibus non derogant"* which states that the provisions of a general statute must give yield to the specific law. Therefore, by the rule of statutory interpretation and application of the laws, the specific law that relates to the offence must be taken into consideration, and only in absence of such provisions, and laws, that it should go by description or definition of the offence in other general laws.

In the example of a *"Gold Smuggling Case,"* it was observed that some deviation from that legal principle had taken place. The offence of smuggling ཁྲིགས་ཚོང་ as per the general law, as stated in the *Penal Code of Bhutan* is provided as ཁེག་ཚོང་ under the *Customs Act of Bhutan,* a specific law in this matter. Therefore, the defence lawyer contests the charges of the prosecution and accordingly appeals before the court to order the prosecution to change the charges as per the *Customs Act*, which is specific and directly relevant to the case. Further, the courts are requested to consider such rule while deciding the criminality of the offences charged.

The *Customs Act of Bhutan, 2017* states,[14]

> *A person who commits the following offence shall be a criminal offence and be liable as per Penal Code of Bhutan.*

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12 Statute that deals with the specific subjects or field of law. For example, Family Law and the *Loan Act*.

13 Statute that covers the specific subjects or field of law which are not covered by the specific *Act*s. For example, *Evidence Act of Bhutan*.

14 *Customs Act of Bhutan, 2017*, s. 146.

The above-cited act falls under section 146(2), which state that *"Smuggling of prohibited or restricted goods."* This, in the *Dzongkha* version of the section reads ཁ་བཏགས་ཅན་ ཡང་ན་ བཏགདམ་ཅན་གྱི་ཅདོམ་ཚུ་ནང་ཚུད་འཐབ་ནི། In this case, the prosecution claims that the suspect must be liable for offence of smuggling ཁ་སྐྱོག་ཚོད་ under the *Penal Code of Bhutan*, while defence argues that since the *Dzongkha* version of the section provides as ཁ་ནག་ཚོད་ the suspect must be charged under section 146(2) of the *Customs Act* and not punished under ཁ་ནག་ཚོད་ grading under the *Penal Code*, as the offence defined under the said law which creates the offence is ཁ་ནག་ཚོད་ and not ཁ་སྐྱོག་ཚོད་ as stated under section 279 of the *Penal Code*. Further, although in both the sections the term ཁ་སྐྱོག་ཚོད་ under *Penal Code* and term ཁ་ནག་ཚོད་ under *Customs Act* are termed as Smuggling in the English version of the section. However, the *Dzongkha* version of the text has the overriding effect in our laws. Thus, while encountering such controversies in the interpretation and application of the law, the *Dzongkha* version of the law must be considered as an authoritative text, whereby giving importance to ཁ་ནག་ཚོད་ and not replace it by the ཁ་སྐྱོག་ཚོད་ as claimed by the prosecution. The description and the contents of term "smuggling" given under two different legislations are defined differently. Under the definition clause of the *Customs Act,* it is defined as "smuggling" ཁ་ནག་ཚོད་ means *"conveying of goods secretly and illegally in contravention to this Act or any other laws in force"*[15] and under the *Penal Code* it is provided as *"import or export of restricted and prohibited goods secretly and illegally"* which actually describes the act of the suspect, yet, the specific law that creates this offence provides it as ཁ་ནག་ཚོད་ and so long as the specific name is there, the rule says a person has to be charged by that offence. Therefore, the suspect in such case cannot be charged and penalized for the offence of smuggling under the *Penal Code of Bhutan*, but must be charged under section 146(2) of the *Customs Act* and penalized under section 403 of the *Penal Code*, which is actually the grading of ཁ་ནག་ཚོད་ under *Penal Code of Bhutan*.[16]

However, the courts admit cases as charged by the prosecution and convict the suspect and later justifies that due consideration is given to defence arguments and directing concerned authorities to amend the law, which in

15 *Customs Act of Bhutan, 2017,* s. 190 (45).

16 However, under the English Text of the provision it reads is provided as the "grading of Black-marketing." The *Penal Code* provides that the *Dzongkha* text shall be the authoritative text, if there exists any difference in meaning between the *Dzongkha* and the English text.

itself is a controversial decision. When the court directs the prosecution for amendment, the ongoing cases should be benefited under the principle of 'non-retrospective' effect of the law. The common reasons reflected in the judgment of such cases pertain to, posing threat to country's economy, the suspect not fearing the law despite witnessing prior convictions, among other penal sanctions. As dutiful citizens that abide by the principles, letter and the spirit of the laws of the country, it is a sacred duty to protect our national security, national economy and national interests. It neither denies the right not to be convicted against the fundamental premises of equal protection of the law enshrined in the *Constitution.*[17] It is agreed that there is a law which prohibits the importing such items beyond the permissible limit. Section 7 (a) of the *Foreign Exchange Rules and Regulation 2018* states:

> *Any import of gold and silver in the form of coin, bar, or bullion, including jewelry in excess of the duty-free baggage allowance prescribed by the Ministry of Finance shall not be made except with the prior approval of the Royal Monetary Authority.*

And under Chapter XI of the same *Regulation*, section 55(b) states that:

> *The goods involved in contravention under Section 7(a) shall be confiscated and maybe prosecuted by the relevant agencies if the act is deemed to be an offence under the laws of kingdom of Bhutan.*

While these *Regulations* and section 146(2) of the *Customs Act of Bhutan,* authorizes the prosecution agency to prosecute such crimes, the rule applied for the charge does not change. An offence of ཁེགས་ཚོང་ cannot be charged under offence of ཁྲོག་ཚོང་ and in anyways, if it does, it would amount to amendment of law, a proactive law making, which could be done only by the *Parliament of Bhutan*.

Thus, often a time this kind of lacunae in the laws and disparity in interpretation of it, undermines the inherent spirit of the law, and weakens the *rule of law* framework in the justice system. The uniform application of the laws and *rule of law*, without any doubt, is the process of application of the laws which significantly overcomes the simple "put the facts under the legal provisions" mechanism. It opens numerous questions related to qualitative elements of the laws, the rule by the spirit of the *rule of law*

17 Art. 7 (15) "All persons are equal before law and entitles for equal and effective protection of law."

concept, usually interpreted through the supremacy of laws interpreted in the context and circumstances of the case.

The best explanation for the qualitative requirements of the written laws was given by Mr. Gustav Radbruch[18] famously known as the *Radbruch Formula*.[19] Analyzing the role and competence of the Judge in the cases he decides, in certain cases where there is a conflict between a statute and what he perceives as just, Radbruch argued that the conflict between justice and the reliability of the law should be solved in favour of the positive law. Even in cases where it is unjust in terms of content and purpose, except for cases where the discrepancy between the positive law and justice reaches a level so unbearable, the statute has to make way for justice because it has to be considered "erroneous law." He admitted that it is impossible to draw a sharper line of demarcation between cases of legal injustice and statutes that are applicable despite their erroneous content, but clearly stated that "where justice is not even strived for, where equality, which is the core of justice, is renounced in the process of legislation, there a statute is not just 'erroneous law,' in fact is not of legal nature at all." He concluded that positive law could not be defined otherwise as a rule that is precisely intended to serve justice. Based on *Radbruch Formula*, numerous modern authors attempted to find a balance between equality before law and justice. In interpretation of Fuller,[20] there are eight requirements of the *rule of law*.[21] They are:

i) Laws must be ***general*** (specifying rules prohibiting or permitting behavior of certain kinds).

ii) Laws must also be widely promulgated or ***publicly*** accessible, that ensures citizens know what the law requires.

iii) Laws should be ***prospective*** (specifying how individuals ought to behave in the future rather than prohibiting behaviour that occurred in the past).

iv) Laws must be ***clear*** in order to enable citizens to identify what the laws prohibit, permit, or require.

18 Gustav Radbruch was German legal scholar and the Minister of Justice of Germany.

19 Saliger, F. (2004). *Content and Practical Significance of Radbruch's Formula*, p. 68.

20 Lon Luvois Fuller was an American legal philosopher, who criticized legal positivism and defended a secular and procedural form of natural law theory.

21 Murphy, C. (2005). Lon Fuller and the Moral Value of the Rule of Law, *Law and Philosophy* 24: 239-262.

v) Laws must be ***non-contradictory*** among themselves.

vi) Laws must not ask the impossible; nor should laws change frequently.

vii) Finally, there should be ***congruence*** between what written statute declares and how officials enforce those statutes.

According to Fuller, law is "the enterprise of subjecting human conduct to the governance of rules."[22] When lawmakers respect the eight principles of the *rule of law*, their laws can influence the practical reasoning of citizens. Citizens can take legal requirements and prohibitions into consideration when deliberating about how to act. They can predict how judges will interpret and apply rules, enabling them to form reliable expectations of the treatment different actions are likely to provoke. Nevertheless, fulfillment of certain quality requirements of law is not an absolute guaranty that these laws will be uniformly applied as stated by Fuller, which will be a little naive anticipation.

Conclusion

For effective administration of justice, the *rule of law* is necessary and in order to uphold rights in criminal justice and the *rule of law*, the *Judiciary* and public prosecution institutions must exercise greater caution in the interpretation of the laws and review the charges. The error in making appropriate charges will wrongly criminalize and punish several defendants. Several rules on application and interpretation of laws, particularly the rule of *generalia specialibus non derogant* can guide us achieve the desired judicial outcomes of the interpretation and application of laws. Further, it will prevent us from rendering wrong sentences. Sometimes the differences in interpretation and application of laws are inherent in the law itself. As occurred in the *"Gold Smuggling Case"* the offence of smuggling is termed differently in two different legislations. One of this legislation is a general statute while other a specific law.

The author has argued that the defendant was wrongly charged under the provisions of the *Penal Code of Bhutan*. The defendant in that case should

22 Ibid.

be appropriately charged under the *Customs Act of Bhutan, 2017* which is a specific law. If that was the case then the defendant could have received lesser sentence under section 403 of the *Penal Code of Bhutan*, which is petty misdemeanour. On the other hand, the grading of smuggling under the *Penal Code* is value-based sentencing. Thus, it can be concluded that the defendant was wrongly sentenced by the mere dereliction of an inch of interpretation, which created a big gap in the sentence. The sentencing decision is the symbolic keystone of the criminal justice system: in it, the conflicts between the goals of equal justice under the law and individualized justice with punishment tailored to the offender are played out, and societies' moral principles and highest values of life and liberty are interpreted and applied.

Anomaly-Based Review on the System of Appeal[1]

Introduction

The right to appeal without obtaining prior court approval is nearly universal. Although the origins are neither constitutional nor ancient, the right has become in one word, sacrosanct. The basic right to appeal, has remained virtually untouched, giving it as the natural right of every litigant. The right to appeal within the due process guarantee of the *Constitution of Bhutan*, is fundamental element of procedural fairness. The appeal furthers the substantive goal of correct decision in every case. Simply bringing a dispute to an end and diffusing hostilities is not enough. No matter how much we value resolution *per se*, we also want to achieve the "right results." After all, had Solomon actually split the baby in half, he would have successfully terminated the dispute over its parentage. Instead, he merely threatened to bisect the child, not because he thought splitting the difference had a ring of fairness, but rather as a means of determining who the real mother was-of achieving the right result. The right is deeply ingrained in the process values, in a manner that assures that the litigants are, and feel, they are treated fairly. This allows the parties to afford equal opportunities to present their case and respond to the adversaries. For the injured party, the opportunity to thoughtfully vindicate his rights may be far greater reward than the money damages they may get. Appeal in other way, is the fundamental part of satisfaction that the litigants are allowed to derive from the judicial process.[2] In one case, Robert Leflar[3] observed that:[4]

> *Right to appeal is a protection against error, prejudice or human feelings in general… Justice and good laws are needed for little case as well as for big ones, even frivolousness is a matter of opinion.*

The appellate court arguably is in the best position to determine whether, where, when and how the law is in need of clarification or revision. It is

1 Contributed by Jamyang Tenzin.

2 Dalton, L. H. (1985). Taking the Right to Appeal (More or Less) Seriously, *The Yale Law Journal,* 95 (62).

3 Robert Allen Leflar was one of Arkansas's most renowned legal scholars, a champion of racial equality, longtime Dean at the University of Arkansas School of Law.

4 Dalton, L. H. (1985). Taking the Right to Appeal (More or Less) Seriously, p.169.

believed that the appellate judges scan the legal issue with more judicially experienced eye. The appeals, like in the trial courts, also determine the "rightful winner" and the "rightful loser." This posits on the fact that litigation is a contestation of legal issues and legal acumen. It deconstructs the facts, and explores the more dynamics of law through exposition of legal values, theories and doctrines and practical legal rights. It attests the legal stamina of the adversaries. In the past, appeal in the judicial system was matter of explorations of the cases through various determinate entry points. The parties used it as a weapon of harassment, dragging the other party to the courts in the country. While the symbolic sayings of the litigants to "bask in the sun" connotes the reprisal element of appeal, a tool used to equalize the "lose" with the "gain." The nature of appeal, as it is judicially structured, is a method of reviewing the judicial decisions of the lower courts by the appellate courts. It is structured as method of review and further judicial legal analysis. It affords an opportunity for the appellant to ensure that his case is studied and judicially analyzed at various stages of judicial processes and hierarchies of the courts, so that Justice percolates. Justice is a subjective legal phenomenon. It is the feeling of rightness, the feeling of right treatment and equality before the law. As easy as the appeals are, appeals provide a forum for a very careful case analysis. In many instances, the appeal to the higher courts is denominated by the fact that the rights of the appellant had been prejudiced at the lower courts. In such cases, the role of judges at the appellate courts, to secure the feeling of Justice, is both paramount and essential. Appeal is a competition for better legal ideals, and bettered judicial decisions. When the word "bettered" is escheated as "battered," it invites anomalies in Justice and erodes the confidence of the people.

The institution of the *Judiciary* is 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 and confidence and to enhance access to Justice.[5] The *Judiciary* is represented by the courts across the country, which provides Justice, secures the *rule of law* and propounds the commands of the laws. The sanctum of Justice pervades and rests in the house of the courts, the person of the Judge and the judicial personnel working in the courts. They are direct representations of Justice,

5 *The Constitution of the Kingdom of Bhutan*, Art. 21 (1).

which essentially is the aspirations of the common people, who look at the courts of law as givers of law and providers of Justice. Justice for them is securing their feeling of just treatment and just decisions, which is actually the branch of Justice. Justice is a larger dominion of fairness and equality, but underneath it lies the various other domains socially constructed by the feelings of the litigants.

The courts are the bastions and custodians of Justice, representations of fairness, and the subjective components of Justice. *The Draft Universal Declaration of Independence of Justice*[6] states that, Judges as individuals shall be free, and it shall be their duty, to decide matters before them impartially in accordance with their assessment of the facts and their understanding of law without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. In the decision-making process, Judges shall be independent vis-à-vis their judicial colleagues and superiors. Any hierarchical organization of the *Judiciary* and any difference in grade or rank shall, in no way, interfere with the right of the judge to pronounce his judgment freely. This is an enduring and valuable contribution to the legal doctrine on the independence of Justice, which is one of the primary prerequisites for an independent and impartial *Judiciary*. It also states the discipline of laws to preserve the dignity and responsibilities of their office and the impartiality and independence of the *Judiciary*.[7]

Further, the *Preamble* of the *Civil and Criminal Procedure Code of Bhutan, 2001* hereinafter called as the *Code*, describes Justice as heavenly, when it quotes "maintain the quality of an unimpaired flowing heavenly stream of justice." It also maintains that the various principles which further reinforces the duties of the courts to ensure impartiality, equal Justice under the law and open trial which are sacrosanct to uphold the independence of the *Judiciary*. The *Judiciary* is an institutional technology developed over thousands of years through human experimentation of *rule of law*, concepts of Justice, and the idea of fairness for one sole purpose to solve the disputes through the lenses of Justice and fairness. Today, courts have become the

6 *Draft Universal Declaration on the Independence of Justice* also called the *Singhvi Declaration*, Art. 2.

7 Ibid.

cornerstone for Justice that recognizes the natural qualities of humanity, inherent dignity and goodness.[8]

In the recent years, courts and court systems across the country have begun to redefine their roles in the administration of Justice, moving beyond the neutral arbitration of legal disputes to interventions in the individual and social problems that underlie them. They have done so primarily through the vehicle of specialized courts dedicated to the discrete problems such as domestic violence, *Justice for Children* and mental illness, issues that, if addressed by traditional methods of adjudication, are unlikely to achieve the complete components of Justice. These subjects of laws require, to considerable extent, non-legal and other social sciences. Justice in many aspects is the legal and moral conceptions of *just claims* and *entitlements*. It is the conception of rights within the framework of rules and rationality. Presently, the roles of courts have considerably expanded, with their mandates as social and judicial scientist that looks at the science of Justice, with varying philosophical assumptions. The legalization of the concepts of Justice has practically made Justice as an outcome, which is legally enforceable. This is based on legal positivist approach.

There is now a growing body of research to indicate that "collaborative Justice" or "problems solving courts" are very successful in improving the outcomes for the defendants and the communities, which furthers the spirit of Justice. The courts of law in any civilized society are primarily tasked with the administration of fair and impartial Justice. The concept of impartiality may be viewed subjectively based on different standard and parameters consisting of legal, philosophical, social, and judicial and more overtly the idea of Justice and rights. The courts today have become the "source of Justice" and besides upholding the *rule of law*. They are empowered to interpret the laws; and deviate from statutes by way of interpretations in the interest of Justice. Interpretation of laws is the judicial prerogative that is employed within the different interpretation theories and limits. It is governed different standards of interpretations, consisting of various rules. It basically allows the court to adjust within the theories of law, rights, fairness and other judicial ideals. Courts are likened to the temples of

8 Lauren, P.G. (n.d.) *The Foundations of Justice and Human Rights in Early Legal Texts and Thoughts,* p. 163.

Justice, with many similar ethical and moral considerations. From temples emanate the blessings, and from the courts, emanates the blessings of Justice. The judicial settings in Bhutan, is a basic reflection of theological and natural Buddhist laws. It bears a deep significance, reflecting a poignant atmosphere of truth.

Interpretation of Laws and Administration of Justice

The hermeneutics of law is intended at deliberating, adjudicating, reviewing, examining and judging with the ideological faculty of reason. Judges are the depository of the laws; the "living oracles," whose knowledge of the law of the land is derived from experience, study, and from being long personally accustomed to the judicial decisions of their predecessors.[9] And indeed their judicial decisions are "the principal and most authoritative evidence of Justice." Blackstone makes clear that the judges are expected not merely to make decisions and render judgments that, along with all the proceedings, "are carefully registered and preserved, under the name of records." The judges are also expected to explain their judgments, to offer an interpretation of the law and the facts that justifies the decision. Judges are the light houses of the law, which never fails, which never dims and most visible when its guide is urgently required.[10]

The idea of Justice are endeavoured and achieved through the tests of interpretation and application of laws. The courts, in execution of their tasks are empowered to interpret statutes not only *de lege lata*, but for Justice, *de lege ferenda*[11] which underscores the different rules of constructions to secure Justice. Unlike the roles of the prosecutors, whose mandate is to uphold the *rule of law* and plead the law as it is, courts are empowered to fill the gaps in the laws through various interpretation models; and can opine on what the law ought to be. While interpretations of laws are important to ensure that Justice is achieved, it would be a common fallacy if we were to accept the proposition that enforcement of statutes itself is administration of Justice.

9 Collier, W.C. (2000). *Laws as Interpretation*, University of Florida Levin College of Law, UF Law Faculty Publications, p. 799.

10 Ibid.

11 The interpretation of laws through the varying interpretation method including the literal and purposive construction rule. While *"de lege lata"* means laws as it is; *"de lege ferenda"* means the future law.

The statutes reflect the common conscience of the lawmakers and all laws are result of common experience, expectations and conscience. It may not literally encompass the "ideals of Justice" in its entirety. For example in the interpretation of the *Constitution*, Lord Marshall admonished:

> *We must never forget that it is the Constitution that we are expounding.*

It leaves the scope for "rationality review" and the "modern levels of scrutiny." This requires the intellectual energy of the Judges it should be directed at actual resolution of the cases and solving the difficult and complex with proper tests.[12]

Although the intention of the *Legislature* are to ensure that enactment of the laws are to dispense Justice, ground realities and experiences of people, who have come in contact with the laws, share different views, and opinions. Laws are legislated, and unless human intervenes with it, it remains as a desolate letters in the law books and statutes; and they experienced and felt only when the individual comes in conflict with the laws. The experience of the laws, although the intentions of the laws are to bring peace, security, and other social ideals in place, can be different. It depends on many other factors, on the unassailable conventional legal wisdom, the handling of rights, amongst others. In many instances, the mere doctrine of interpretation of laws as "harbingers of Justice" beguiles people. It is studied and researched that "mere interpretation of the laws" does not always ascertain Justice. Interpretation is the focal point for judicial conversation since it underlies the sacred and core function of the *Judiciary*. Part and parcel of its importance, however, interpretation lies at the heart of the most controversial aspects of the judicial function, whether it is the drawing of lines both horizontally and vertically by choosing "the interpretation which best serves the purpose for which the provision was made."[13] Apparently, it does not and may not always ascertain Justice. Laws are mere positive morals that dictate what and how human should behave and act. Laws cannot always "squarely fit" into the problems and issues that we encounter. Sometimes, laws are only directives, that guides on how

12 Collier, W.C. (2000). *Laws as Interpretation*, p. 813.

13 Lenaerts, K. (2007). Interpretation and the Court of Justice: A Basis for Comparative Reflection, *The International Lawyer,* (41)(4).

things should be resolved, leaving scope for "real human interventions." In their perspectives, statutes are merely a blueprint to Justice and courts are the final arbiters of laws, which should afford dynamism and give life to these laws by way of expounding the laws. Court must inevitably breathe life into the letter of the law and iron the creases. It is also for this reason why the courts interpret age-old statutes as if it were enacted in present time and not by its year of enactment.

As the "temples of Justice," courts are arranged into the tier systems to afford procedural safeguards to rights of appeal and *natural justice*. The multiplicity of stages of appeal processes are designed to accommodate diversity, enhance speedy and complete *access to Justice* with the fundamental ideal to achieve impartiality and certainty in the judicial decisions. In Bhutan, litigations in almost all cases, begins its judicial processes from the courts of first instances.[14] Unlike the judicial systems in other jurisdictions, in Bhutan, except for the constitutional cases, and cases registered at the Thimphu *Dzongkhag* Court, other courts in Bhutan are not bifurcated based on the subject matter or its competence to preside. For instance, in India, a *Magistrate Court* despite being the court of first instance cannot preside over criminal cases, which bear a sentence of more than seven years. The matters are referred to the *Sessions Court*.[15] Although Bhutan has advanced *access to Justice* with enhanced judicial apparatuses, cases are still, irrespective of the nature of crime and purported charges, so long as the offence is committed within the territorial jurisdiction of a particular court, the court within that territory has original jurisdiction to preside over it.[16] It is for these reasons that the courts of first instance in our context simulate critical importance.

14 The *Dungkhag* Courts in fifteen *Dungkhag*s are the courts of first instance, while in absence of these courts in some *Dzongkhag*s, the *Dzongkhag* Courts are courts of first instance.

15 Generally, the *Sessions Courts* are responsible for adjudicating matters related to criminal cases.

16 A *Dungkhag* Court shall exercise original jurisdictions in all cases where venue exists in its territorial jurisdiction and the original jurisdiction of the High Court and *Dzongkhag* Court does not apply. Similar it also applies to other courts.

Courts of first instances and trial courts have always assumed a larger role in the administration of Justice. In addition to its location and extent, proximity to time of incidence and examination, its capacity to hear cases over longer durations, trial courts are fact-finding courts. In their roles as adjudicators, they are able to review the evidences and examine witnesses more elaborately including the demeanour of the parties, their body language and the tones of the witnesses in their submissions. These are very subtle characteristics; and Judges are not only expected to know law, they have to possess adequate knowledge on psychology and human behaviour. The concept of fact findings, aside voluminous legal documents, also condenses to studying the behaviours of the parties. It can be surmised that judging is a trade of art and tactics, study of human psychology and conglomerate of human behaviours aside the laws. In the trial courts, determination of facts becomes the utmost important tasks of the courts. If facts are misinterpreted, it may lead to erroneous decisions, and may result in miscarriage of Justice inevitably. In a case where the parties and courts fail to determine facts and prove beyond reasonable doubt, the courts have naturally deferred such cases until such time as the fact conclusive evidence can be submitted.[17]

The Positive Judicial Positions of the Trial Courts

Trial courts are aptly tasked to examine witnesses and ascertain facts. Generally, the memories of the witnesses are fresh and the probability of determining facts is much higher as compared to the appellate courts. Once the cases had been appealed; and with lapse of time, it clouds the memories of the witnesses or the memories of the parties interested in the case or they have been exposed and acclimatized to manipulative designs. The appellate courts are not privy to these critical details. The appellate *Judicial Reviews* are mainly concentrated on the reviews of the fact determining the documents and interpretation of legal provisions. Upon a closer examination, we are able to study a blend of both approaches in the appeal courts. Both the courts adopt almost a similar "judicial methods" in all aspects of presiding and hearing the litigants, interpreting the statutes and adjudication.

17 Ibid., s. 156.

However, it is different in few judicial aspects including the frequency of the hearings, the frequency of submissions, jurisdictions, determination of facts and examination of evidences and witnesses, to note a few. These whole processes are time consuming and onerous on the Judges. As a matter of fact, any criminal case, remains registered at least for a month and courts are burdened with multitude of cases of varying degrees and natures. In light of these critical considerations, the roles of trial courts are acutely pertinent. The roles of the trial courts sometimes outdo the role of appeal courts as the primary givers of Justice. However, as a hindsight contradiction, the judgments of the trial courts are never final. The best judgments of the trial courts, once appealed, remains in an indeterminate state. The appeal systems in Bhutan are not rigour with different levels of checks and balances. Irrespective of the correctness of the judgment, the case can be appealed at the discretion of the parties. In most, the appealed cases are registered with the appellate courts.

Generally, through the right of appeal, the appellant seeks a mechanism of judicial review, designed to ensure uniformity and accurate application of the laws. The burden rests entirely upon the appellate courts to judiciously dispose of appeals. In most cases, owing to illiteracy of the laws, parties appeal to the higher courts to ensure that "their sacks of evidences" are emptied, and they get to throttle their voices to the fullest. Appeal can reflect vengeance and a sense of retribution, without established merits. In the letter of law, it would be reckless and ignorant for a litigant to assume upon appeal, the repetition of whole trial process with opportunities to advance new arguments and fresh evidences. It would be even more injudicious and arbitrary for the appellate courts to allow it without compelling reasons. Besides various legal presumptions and rules of practice adopted by appellate courts, the *Civil and Criminal Procedure Code*[18] acts as a beacon of light, when prudence enervates. It provides as a useful guide on this aspect.

The Process of Appellate Review

As a matter of fact and law, no appellant can introduce fresh evidence which were not submitted nor can they argue on issues and facts not recorded and contested before the trial courts. These provisions arrange for

18 Ibid., s. 110.1 and 110.4.

reliable checks against unscrupulous appeals, avert prejudice and save both costs and time for the parties as well as for the courts. Besides these, it also serves as a double-edged sword to discourage the manipulation of facts and incentivize vigilance. Appeals based on facts are subjected to the scrutiny under various provisions of the laws; the scope of *Appellate Review* is limited to only those decisions, which have properly preserved records.[19]An appeal petition beyond the scope of this section with new uncontested facts unless by reasonable circumstance; is liable for dismissal. However, there are exceptions to this rule; provided, an appellant introduces new evidence upon appeal and justifies to the satisfaction of the court as to why the evidence could not be produced before the trial court, the appellate court may allow it on record and either remand the case back to the trial court[20] or take *suo moto* cognizance thereof and proceed, or it may with written reasons omit admission. Upon remand by the appellate court, the trial court is to re-adjudicate on the issue in light of fresh evidence and subject it to objections and scrutiny and thereafter pronounce judgment.

While trial court hearings entail prolonged determination of facts, multiple rebuttals, examinations of witnesses and testimonies of experts, appellate courts conduct at the most two hearings without the aforementioned details. Upon appeal, the burden shifts on the appellant to convince and prove to the court on the reasons why the appeal should be admitted and the reasons the judgment of the lower court should be reversed. Unless by obvious and sheer technical error of the trial judge or compelling new evidence, the probability of upholding the judgment is much higher owing to certain practical reasons. Besides the presumption that trial courts are mandated by law and would have exercised due diligence in determining facts and application of the laws, various rules and procedures, appellate courts are innately guided by practical expediencies.

Firstly, it would be unrealistic in terms of time and resource for courts of appeal to instantaneously review and comprehend minute facts and details of every case on appeal and therefore must invariably presume facts as firmly established at trial and application of the laws to be correct. Consequentially, for this reason, *Appeal Reviews* ought to be concerted only on application and interpretation of laws on facts already established and

19 Ibid., s. 101.

20 Ibid., s. 109.4 and 110(b).

not on any new facts and evidence. Any new fact and evidence will distort the entire structure of the pending appeal and would derogate consistency and predictability of judicial character. It would amount to a trial *de novo*[21] before the appellate court. Besides driving certainty and uniformity of decisions, it has the benefit of reposing judicial trust and independence upon lower courts. In a system such as the *Judiciary*, where trust and compliance of the consumers of Justice and esteem amongst judges forms the major driving force behind the machinery of the administration of Justice, uniformity and consistency may aid a long way.

Secondly, appeals are often based on emotions and sentiments or with intent to delay or harass the other party, so *Appellate Reviews* ought to be precise and prompt to remedy this. If this is not diagnosed at the earliest stage, it may result in prejudice and injustice to the other party. In essence, cantankerous litigations beguile and defeat the purpose of Justice, and perpetuate injustice.

Thirdly, it is the devolution of judicial accountability; whereby, the judgments of the lower courts are subjected to reviews by the appellate courts for any errors in the judgment while the judgments of appellate courts act as precedents for the lower courts for reasons of certainty and uniformity. In practice, if a case were to exhaust all appellate processes, then we will have a situation wherein, the judgments of the lower court are subject to review by the appellate courts with a similar processes followed until, the case is finally decided by the *Supreme Court*. The *Supreme Court* is the guardian of the *Constitution* and the judgment of the *Supreme Court* is final. The *Constitution*[22] has rightly mirrored the *Supreme Court* as the court of record. In general, the understanding of the court of record primarily entail the recording of the three essential judicial processes:

a) The proceedings of the Courts;
b) The actions of the Courts; and
c) The Judgments rendered by the Courts.

These records are inscribed for perpetual memory and testimony; the records are presumed to be correct and binding and have legal efficacies upon the subordinate courts, any violation of it, may tantamount to the

21 Trial *de novo* means trial from the beginning.
22 *The Constitution of Bhutan,* Art. 21 (3).

contempt of judgment. Its decisions are subject to its own review and it is a basis for law making. For example, if the *Supreme Court* and other courts of appeal entertain any new facts and fresh evidences, except for the *Dzongkhag* Courts as the court of appeal, it will supersede the fact-finding roles of the trial courts, thereby reversing the course of the judicial processes of the courts. While this flexibility may afford certain benefits, the damage it could potentially cause, far outweighs the benefits. Besides being counter-productive to uniformity and certainty of the judicial decisions, it also upsets the trial court as fact-finders and renounces the confidence of the lower courts. Litigants could engage in forum shopping, potentially abusing the system and deliberately omitting to plead at trial and pleading new facts and fresh evidences on appeal. The system of the court and the consumers of Justice would lose perspective of the laws and the sense of direction. The role of the court of appeal as a court of record may become redundant and finality of judgments would lose the essence. Conversely, it is not to imply that appellate courts rarely overturn the judgments of the trial court and appeals are always based on questions of law. In practice, the appellate courts, in certain cases, reverses the judgments of the lower courts and admit appeals and delve into facts and other humanitarian grounds rather than on the questions of law. There are other more compelling reasons for it.

In Bhutan, due to lack of widespread legal literacy, most of our litigants are still *pro se* litigants with neither legal awareness nor regard to legal procedures, compounded by further lack of uniform practice or rules in the appellate courts. Trial court judgments, as in other countries, may be quick and unreasoned, with a conglomerate of facts and law. It may result in an obvious unpredictable application of laws with the same Bench often pronouncing inconsistent judgements on similar legal issues. Crafty litigants have often ingeniously used these judgments, citing it as a precedent, thereby abusing the lacunae; it appears to be well within their procedural rights. While the appellate courts have the mandate of *judicial review*, delving into new facts rather than questions of law warrants cautious pacing especially when the *judicial review*s at the appellate courts are limited to minimal hearings. To minimize the risk of errors, it would perhaps be precise to require; appeals be maintained only on questions of law.

Among the three organs of the State, the *Judiciary* is no doubt the feeblest, possessing neither control over finance, human resource and administration of the State nor the legitimacy of being elected by the popular sovereign. Without such institutional galore and fortification, rested with confidence and trust of the people, it is only bound to become subservient to the domains of the *Executive*, thus compromising the fundamental system of checks and balance and ushering way for a *trifecta*.[23] The independence of the *Judiciary* in many instances can be interpreted as independence in judicial making. In many aspects, it is interdependent with many forces of governance. The only weapon in the arsenal of the *Judiciary* is the trust and confidence reposed in it by the consumers of Justice. Sound and uniform administration of Justice through fearless and impartial judgments will have the effect of appealing to the trust of the citizens and soliciting the confidence of the lower courts, while *ipso facto* inconsistent, unreasoned, unfair judgments will erode confidence. Ultimately, the confidence and acknowledgement of the people in any State machinery has always been the key strength to its sustainability.

Conclusion

For the constitutional framework and the *rule of law* to work, we must accept the idea of ordered liberty. This means that citizens must agree to exercise their liberty within the *rule of law*, or the fair application of the law. The constant and perpetual desire of every legal system is to uphold the *rule of law* and to render each and every person his rights in accordance with the laws. It is the perpetual quest of the *Judiciary* to deliver the best quality judgment and to make courts user-friendly to enable the people to have equal and unimpeded access to legal services and dispense Justice swiftly, fairly and transparently.

Miscarriage of Justice is a broad term and may result from many factors. It is for this purpose that the appeal system is established and incorporated as legal and procedural right. The system of appeal to the higher court from the decisions of a subordinate court in any legal system is a method by which the system checks injustice, ensuring that Justice is accorded to the aggrieved party in accordance with the provisions of the laws. It is also a means to ensure that Justice is not to conceal human errors nor to be trampled by the powerful, so as to uphold the law and Justice for all. The

23 *Trifecta* means "group of three things."

noble objective of appeal system for Justice must be exalted and misuse of such process should be deplored. At the time of appeal, the court in order to avoid unnecessary appeal and undue delays has to consider personal grievances whether parties file the appeal on non- genuine grounds or to misuse the appeal process to settle personal scores by delaying cases and exhausting the resources of the other party. The appeal process should not be allowed to be misused to unduly harass the other party.

In Bhutan, after a competent Court has awarded the judgment, the parties have ten days time during which they may appeal to the next higher court. If, for any reason, the appeal could not be filed within the limitation period provided under the law, an application of delay must be filed, setting forth the facts on which the appellant relies to satisfy the court that he had sufficient cause for not preferring the appeal within such period. If the reasons detailed out for condoning the delay fails to satisfy the court, the appeal petition is dismissed as time barred. Good governance signifies the way an administration improves the standard of living of the members of its society by creating and making available the basic amenities of life; providing its people security and the opportunity to better their aspirations; instill hope in their heart for a promising future; providing, on an equal and equitable basis, access to opportunities for personal growth; affording participation and capacity to influence, in the decision-making in public affairs; sustaining a responsive judicial system which dispenses Justice on merits in a fair, unbiased and meaningful manner.

Democracy, liberty and the *rule of law* together represent the troika that is universally accepted now as the index of a civil society. The protection of individual liberties follows the notion of democracy as a natural corollary. This entails the espousal of a methodical configuration of laws by which society might be regulated and different conflicting interests can be harmonized to the fullest extent. This is why *"the rule of law"* is indispensable. Standards developed by the *Judiciary* have a significant beneficial effect of making the lives of people better and the accomplishment of the government's goals easier. In addition, these standards may ensure a better understanding of the relationship between the people and their government, on the one hand, and among the members of the international community, on the other. Justice is the realization of a good society, the ideal state of affairs, the fulfillment of man's hopes and dreams, the heaven on earth for which we should all work to achieve.

Economic Analysis of Negligence under the Law of Torts[1]

Introduction

Laws are a result of human ingenuity consisting of human aspirations, and their ultimate goal to secure a society on the foundations of *rule of law* and human values. Our laws reflect our values, and in part, the system of economy we follow. Laws are the architecture for human behaviour, and it necessitates concrete interventions, that entail human capital and financial support. These values are replicated into a systemic culture and behaviour to ensure that the laws safeguard the economic interests of the nation and fulfil the aspirations of the people through cost effective and economically efficient methods. Further, the *Constitution of Bhutan* does not allow the *Parliament* to enact laws that perpetuate monopoly except to safeguard the national security.[2] In the world, the economic analysis of the laws expanded into the more traditional areas of the law such as property, contracts, torts, criminal law and constitutional law in the early 1960s from its earlier limited exchanges in the areas of antitrust law, law and determination of monetary damages, especially in the United States.[3]

Law comprises of legal theories and principles, which are influenced by morality and ethics to a great extent. The application of legal principles and provisions are, more often than not, affected by individual moral principles and disposition. On the other hand, economics, as the most scientific of the social sciences,[4] is based on concrete theories which can be applied with the help of tangible statistics and data. Owing to this fact, economic theory of law or law and economics as an inter-disciplinary subject grew increasingly important. It came to be seen how economic theories and principles can be applied alongside the law to settle legal disputes. It also helps analyze the efficiency of the laws by predicting the effects of the laws

1 Contributed by Langa Tenzin.

2 *The Constitution of the Kingdom of Bhutan*, Art. 14 (16).

3 Cooter, R. & Ulen, T. (2004). *Law and Economics,* Eastern Book Company, pp. 2-3.

4 Fourcade, M., Ollion, E., & Algan, Y. (2015). The Superiority of Economists, *Journal of Economic Perspectives,* (29), pp. 89-114.

on the sanctioned behaviour.[5] While one might not have ever pondered and appreciated how economics plays important roles in the application of the laws and administration of justice. It is interesting to notice that theories of economics are present in most subject areas of the laws. Laws without economic justice would uproot the essence of justice and righteousness.

This Article will discuss how economics plays an important role in the area of tortious negligence. Tort, as it is known in the *Common Law System*, and *law of civil responsibility* in Europe,[6] is not a well-developed or defined area of law in Bhutan. However, as one can rightly assume, legal disputes of tortious nature between private persons are common in the Bhutanese courts. The Article will also discuss the dynamics of economics in the decisions of the courts on hypothetical case scenarios, emulating some case scenarios relevant and probable in the Bhutanese society.

Negligence in the Law of Torts

In Bhutan, there is no specific law such as *Law of Torts* as it is in other countries. Although the *Law of Torts* is absent in the Bhutanese jurisprudence, the rationalism of negligence is captured in various provisions of our laws and legal thoughts. We also approach laws from scientific positivist approach, which mirrors the interplay of science among our laws. The positivist approach says that a society is like an organism and it can progress only based on scientific principles. As laws are a product of sociological jurisprudence and engineering, laws have to fit into the contexts of the societies that we live, so that it is valued and secures the aspirations of the society. Negligence unlike in criminal laws resonate the duty of care and it centrifuges around it.

Generally, in periods, affected by an unprecedented scathe of the pandemic, the duty to "care" and the concept of "negligence" have become ever stronger, relevant and genuine. "Negligence" as a major area of tort law is very relevant in view of the ravaging pandemic, which is interpersonally transmitted. What distinguishes it from negligence in criminal law or a generic understanding of it, is the elements that are prerequisite to constitute a tort of negligence. The subjective theory of "negligence"[7] states

5 Ibid., p.1.

6 Ibid., p. 308.

7 Tripathi, M.(2006). *Jurisprudence and Legal Theory*, Allahabad Law Agency, p. 351.

that "negligence" is the "attitude of indifference." According to this theory, "negligence" essentially constitutes in the mental attitudes with undue indifference in respect to one's conduct and consequences. It demands a person to act with care so that he is able to comprehend and assess the risks that may follow.[8] Negligence under the torts has following essential normative ingredients:[9]

a) The person owes a "duty of care" to the other;
b) The person breached that duty; and
c) The other person suffered damage as a result of it.

Standard of Care

Negligence is acting "without care," when there is an "established duty to take care." Carelessness, unlike intention, is based on the degree of evil. The greater is the degree of carelessness when there is a greater evil or danger associated with it. Generally, the person who asserts that there is a "duty to care," has to prove that there is a breach, which resulted in the harm. "Duty" in this case refers to and means a "legal duty" rather than a mere moral, religious or social duty.[10] This essential requirement branches from our commonsense that if a person, say, **Mr. A** owes a duty to **Ms**. **B** to carry out an act or refrain from it. In general, this includes a positive duty to do and a negative duty to refrain. In the present example, **Mr. A**, who suffers from a transmissible disease, let us say from COVID-19, has a duty to **Mr. B, C, D** and others to ensure that he does not transmit the disease to them. This is a moral as well as a legal duty. The "standard of care" which the law desires from a person, say **Mr. A** is from a "reasonable man" or an "ordinary prudent man" would be expected to do. Basically, the concept of negligence is the omitting to do something that reasonable man would do or something, which a reasonable man would not do.[11] It is generally comparable and analogous to conscience of an ordinary person. This does not set extraordinary legal parameters, but only requires the act of a prudent man of average intelligence.

8 Ibid., p. 352.
9 Bangia, R. K. (2011). *Law of Torts,* Allahabad Law Agency, p. 279.
10 Ibid.
11 Tripathi, M. (2006).

Breach of Duty

The concept of "reasonableness" does not require the uniform and standard act in every case, but may vary according to the nature of the act. For example, the standard of care, that a sick person, suffering from a transmissible disease, has the reasonable care to use all adequate methods to ensure that it is not transmitted to the other person. He has to consider the objective standards. If the sick person has not taken adequate care, the reasonable standards set by the protocols of health and safety it may result in a breach. The proof of defendant committing a breach of duty is vital to establish the link of causation to the harm that the plaintiff has suffered. Duty as a person is an innate responsibility, which is reinforced by the law. A prudent man of conscience and thought, would set reasonable parameters of their own, without the dictates of the authorities, but by the use of conscience and personal principles. All persons, to a reasonable extent, knows what would cause a harm and otherwise. The "duty of care" and its "breach" are objective criteria.

Resultant Harm

The *"Objective Theory of Negligence"* states that "negligence" is an objective fact. It is not an attitude of mind or a form on *mens rea*, but it is a kind of conduct.[12] It requires a person to take reasonable care against the dangerous kind of conduct. Negligence is contrary to duty and diligence; and hence it is not a state of mind. This jurisprudence provides that in order for the defendant to be negligent, the act should have resulted in a tangible or real harm and not a mere threat or risk of it. In this, law does not provide a remedy or compensation to the plaintiff for being exposed to risk by another person. The realization of risk must actually take place. Besides, the person should adequately prove to the court that the harm or injury he suffered was caused by the breach of the duty by the defendant. If the plaintiff is not able to prove that the defendant's act or omission was the real cause of the harm he suffered, the court may view the cause as remote and not proximate. As a result, it will defeat the claim of the plaintiff against the defendant for the tort of negligence. These are the stands of law based on the concepts of objective and subjective theories.

12 Ibid., p. 355.

Economic Approach to Negligence

Negligence is a costly error. In the era, where the COVID-19 pandemic is sweeping across the nations, with so many resultant deaths, negligence in such matters is a very costly matter. It can devastate economies, bring cities to a standstill, minimalize profits, and bring in unprecedented economic loss. The results of negligence in such areas of public safety and health are categorically catastrophic to finance, human health and economies of the nation. It is an invincible enemy of its own; few can master it. The art of mastery of such pandemic besides proper health protocols is the diligence to act with care and an acute sense and duty of care for others. It may be condensed to the simple act of care to dissociate with the public and strictly abiding the health protocols put in place.

In Bhutan, the idea of negligence in such matters are adequately covered in the *Penal Code of Bhutan,* it would be judicious to categorically discuss these issues from the lenses of civil and torts laws. It is an established fact that criminal sanctions do not bar the institution of civil suits[13] in Bhutan. Typically, the *Law of Torts* normally deals with such obligations thereby benefiting the society and securing its interests.[14] The traditional economic analysis of the torts law employs the famous balancing test of the *Hand Formula* as the default rule to decide on the questions of liability.[15] The *Hand Formula* is a comparative analysis of the costs involved in an "act done without prudent care" and "care." It is analogous to flying a new aircraft in the rain, in low visibility; if the aircraft touches down, without following proper landing protocols and sufficient control, it may result in an improper landing risking the safety of the pilots and the very expensive aircraft. Therefore, it entails a range of duties as a pilot from handling the aircraft to safely bringing it to the terminal. The "duty to care" in such circumstances are enormous and errors as a result of negligence can be very expensive for the aircraft industry.

13 *The Civil and Criminal Procedure Code of Bhutan*, *2001,* s.154.

14 Gaebler, D. (1986).Negligence, Economic Loss, and the U.C.C. *Indiana Law Journal*, 2 (61) 4.

15 Keith N. H. (2006). Duty in Tort Law: An Economic Approach, 75 *Fordham Law. Review*, 15(01).

Upon applying this balancing test or formula, the court should hold a defendant liable if he has failed to care in a setting in which the burden of taking additional care or precaution is less than the expected injury cost which could have been avoided by that additional care. In other words, the cost, which could be any form or injury or loss to the victim, shall be greater than the burden of taking measures by the defendant to avoid the harm to the victim. This, in effect, means that the defendant would have benefited more by spending effort and money on additional care rather than by neglecting it because the amount of loss suffered as a result of the injury is much higher.

The next section will present a hypothetical Bhutanese case scenario and discuss the possible decisions that could be rendered by the courts of law. To capture a realistic case scenario, let us take the example of a COVID- 19 patient, who has breached the health protocols and started a community transmission of the disease in a place.[16] In other countries, there are lawsuits seeking compensation for COVID-19-related injuries. Some stakeholders have expressed concern that the risk of COVID-19-related lawsuits threatens a range of businesses and other entities with substantial financial losses. Some of the COVID-19-related lawsuits that plaintiffs have filed so far allege that the defendant caused the plaintiff to contract COVID-19 by failing to take reasonable steps to prevent the spread of the disease, such as requiring employees and customers to wear personal protective equipment and enforcing social distancing. These lawsuits generally raise state law tort causes of action, such as negligence or medical malpractice. While several federal and state laws and legal doctrines may limit some entities' exposure to COVID-19 related tort liability, some stakeholders maintain that existing legal provisions do not adequately protect the defendants.[17]

There are also concerns extending beyond work place safety.[18] Relatives of several people who allegedly contracted COVID-19 in the workplace have filed lawsuits alleging that the decedents' employers caused the decedents'

16 These example case scenarios are purely hypothetical and fictitious. Any resemblance of it to the actual cases, if any are intended only for academic purposes and discussions.

17 *COVID-19 Liability: Tort, Workplace Safety, and Securities Law*. (2020). Congressional Research Service, p. 10.

18 Ibid.

deaths by failing to implement appropriate workplace safety measures. Numerous cruise ship passengers have sued cruise lines for allegedly exposing them to the coronavirus or causing them to contract COVID-19 during the voyage. Several plaintiffs have sued assisted living facilities or nursing homes, alleging that their relatives died because these facilities negligently exposed them to the coronavirus and/or failed to timely and adequately diagnose and treat their coronavirus-related conditions.[19]

For example, **Mr. A** is in a bank. He had come to withdraw some cash. People were scurrying in the bank premises, some withdrawing their capital, engaged in various financial transactions. Few wore on their personal protective gears including face masks, while few of the persons visiting the banks had none of the protective gears; they complacently walked past other customers at the bank. Later, in few days, it was studied that **Mr. A**, who visited the bank, was a patient of COVID-19. On contact tracing of the persons who visited the bank on that day, **Mr. B,** who owns a business firm in the town, was one of the persons who visited the same bank at that time. After the transmission scare, he had to close his business, incurring a huge financial loss.

He was by nature litigious, and wanted to litigate with **Mr. A** for causing negligence, and exposing the disease. The lawsuits mainly revolved and evolved around seeking compensation and damages for [physical] injuries and loss at business resulting from exposure to the coronavirus or from a defendant's alleged failure to diagnose and treat COVID-19. The case was registered at the Civil Bench, Thimphu District Court. Unlike in the other cases, the decisions are not discussed hereto. To discuss these issues, we can take the example of these cases taking place in the United States. They say that the litigation landscape is continuously evolving, evoking a debate among the policy makers to limit such litigations through legislation or a policy to limit the COVID-19 related claims that plaintiffs may pursue. Some stakeholders maintain that COVID-19 litigation threatens businesses and other organizations with ruinous liability. Some maintain that these

19 Complaint- Civil Action, *Benjamin v JBS S.A.*, 2:20-cv-02594 [E.D. Pa. June 2, 2020], ECF No. 1-1 [hereinafter Benjamin]; Plaintiffs' First Amended Complaint, *Requena v Pilgrim's Pride Corp*., 9:20-cv-00147 [E.D. Tex. Aug. 13, 2020], ECF No. 14; Complaint at Law, *Evans v Walmart*, Inc.

COVID-19 lawsuits are generally meritless, and therefore serve primarily to benefit plaintiffs' lawyers rather than vindicate injured persons' legal rights.

Damage on a Plaintiff's House by the Collapsed Wall

In another scenario, let us take a hypothetical case scenario of **Mr. Karma** and **Mr. Kado** who are close neighbours in a village. For generations, they lived in a close community with their houses adjacent to each other; clustered in the central of the village. **Mr. Kado** to protect his house against the domestic animals, including the chicken fowls, horses and the cows, built an earth-rammed wall between his house and **Mr. Karma**'s house. He was relieved that, at least he could remain at peace from the marauding domestic animals entering both the premises at ease. After few years, due to agents of weather and dry climate at his village, the wall developed some cracks. He looked at it and talked to himself that his hard work would soon collapse to the ground. He was also worried that the wall might collapse and fall on his house and cause a severe damage. He informed this to his neighbour and he suggested him if he could either demolish it or reinforce it before it collapses. However, he comforted his neighbours that these cracks are of little worry for the neighbours; he will adeptly repair it. In order to ensure safety of the neighbours, who had many children playing around after the schools, **Mr. Karma** requested him to repair or demolish the wall. He also shared that the wall was risky; and it posed an imminent risk to the people around. When his neighbour failed to listen to their concerns, he informed the same through the village *Tshogpa* with a formal letter of complaint.[20]

One night, there was violent spells of rain accompanied by gusting hurricane like winds. Many villagers feared a substantial damage to their houses and crops from the weather. Unfortunately, pounded by the incessant downpour and quelled by the winds, the wall collapsed, a part of which fell on **Mr. Karma**'s house with considerable impact and damage. **Mr. Karma** shared that the impact even rattled his house, recounting it as a scary experience. The side of the house hit by the collapsed wall was rendered unsafe for residential or any other purpose. **Mr. Karma** lost his monthly rental income

20 *Tshogpa* is the village representative.

from the house when the shopkeeper, who was running a general shop on the ground floor of the house, had to vacate the house due to reasons of safety. Aggrieved by the incidental loss; and **Mr. Kado**'s refusal revamp or demolish the wall, **Mr. Karma**, deeply aggrieved, decided to file a suit against **Mr. Kado** praying for adequate damages, including his demand to safely restore the damaged portion of the building. It narrates and discusses the probable decisions of the courts.

Court Decision A

The court summoned the parties, **Mr. Karma**, the plaintiff and **Mr. Kado**, the defendant. The parties are made to present their case and arguments in number of court hearings. Since the *Law of Torts* is not particularly well-developed in Bhutan, and assuming the court finds it reasonable and convenient to be backed by codified laws and rules, the court ponders whether **Mr. Kado** could have done anything to prevent the incident which damaged the house of the plaintiff. The court concluded that while rainfall is generally associated with the monsoon season; it is very rare to receive that amount of rain capable of bringing down a wall. Based on these circumstantial reasoning, the court ruled that **Mr. Kado** could not have done anything to prevent an uncertain phenomenon of nature. It added that it was not in the capacity of a reasonable man to foresee that [rare] incident of nature compounded by torrential rain and wind. Thus, the court decided that **Mr. Kado** was not liable to pay reparative compensations. Next, the court inquired the plaintiff if he had insured his house. The plaintiff submitted that the house was insured, and had been paying the insurance premiums without fail. Since the harm suffered by the plaintiff was due to unforecastable events of nature and unpreventable natural phenomenon consisting of rain and wind, of what can be legally termed as *force majeure*, the court ordered **Mr. Karma** to claim the insurance of the damages from M/s. Druk Insurance Limited, a private insurance company where he had insured his house.

Court Decision B

In this case, the court is cognizant with the concepts of negligence and torts law. The court sympathized with the plaintiff on the damages and the loss suffered. Although the court *prima facie* was of the opinion that

the defendant had the responsibility to demolish or secure the wall, the court decided to apply the test of three essential requirements of negligence under the torts law. The court found that:

a) The plaintiff suffered a substantial harm, which not only resulted in the physical damage on the house by the collapsing wall, but also loss to the rental income;

b) There was genuine failure to act positively from the defendant, either to demolish or secure the wall;

c) The plaintiff had legally and formally informed the defendant about the risks; a copy of the complaint which was submitted before the court.

d) It was partly a "willful negligence" on the part of the defendant to leave the wall unattended, posing imminent risks to the people in the community.

However, futilely refuting the observations of the court, the defendant submitted that, he by no reason owes a "duty of care" to the plaintiff as the wall was within his residential compound. He has a freedom to take up any tasks within the boundary of his lands, including the construction of the boundary wall. The court welcomed his submissions, but intelligently refracted his legal and circumstantial arguments and observed:

a) The plaintiff and the defendant lived in close proximity of the community for a long periods of time as the member of the same community; and all of them had a latent duty to respect the rights of other members of the community which is sacrosanct to promote community harmony and live as convergent members of the same community;

b) The defendant failed to act diligently on the formal complaint ignoring the advice of the local authorities; and

c) The wall had collapsed resulting in substantial damage to the house of the plaintiff.

Therefore, the court held that the defendant failed to act diligently on the complaint raised by the plaintiff; that resulted in the collapse of the wall with huge damage to the house. It can be deducted that the court had a fairly good understanding of *economic analysis of negligence* in the torts law. The court not only took into considerations the legal aspects of the dispute, involving private properties and persons, but also weighed the economics involved in the dispute.

Guided by these principles of economics, the court best decided the most appropriate remedy for the plaintiff. It weighed the "scales of opportunity" called as the "opportunity cost" in economics which calculates what should be "given up" based on the available remedies in the discretion of the court. It had to establish a balance of proportion of the facts and circumstances to see which had been more consequential, either in cost in demolishing the wall or restructuring the wall with reinforcements or the amount of loss that is sustained through the damage. It had to scale the priorities of risks and the costs. The court computed the cost that would have been involved if the defendant demolished or refurbished the wall and the loss of income added to the cost of restoration of house that the plaintiff had to bear. The court established that the cost of taking additional care that should have been done by the defendant is less than cost of the injury caused by his failure to do so. The cost of restructuring the wall with reinforcements or total demolition and reconstruction of the wall would have costed the defendant less than the damage it had done onto the house of the plaintiff. In this, the court decided that the defendant is liable for damages as he was negligent. Besides that, it was also observed that since the collapse of wall was preventable, it could not be construed as an *act of God.* For this reason, the court decided that the plaintiff was not entitled for insurance.

Impacts of the Economic Analysis of Negligence

Negligence, if gauged on the scales of finance and economics, can be very costly non-interferential error. For example, if a driver is negligent to make a routine check to his car, including close inspection of the brakes and fluids in the engine, it can result in irreparable damage to the car. In the similar manner, negligence always come with significant risks, be it financially, economically or otherwise. In the similar manner, negligence under different aspects of law is legally consequential and financially precarious.

In the above case scenarios, neither decisions discussed in the preceding paragraphs can be wrong in the torts law, as long as it does not contradict a precedent in the *Common Law Systems*. However, as a matter of fact, it should visibly reflect *natural justice*, *economic loss rule*, an understanding of the nature of the responsibility and economic injuries of the parties.[21] It is important to assuage the courts with some discretionary powers, so that lacunas in the laws are repaired with jurisprudential and legal judgements. In the above case, the courts have certain discretions while deciding the civil disputes and tortious claims which offers a perfect example of cushioning the anomalies and empty spaces of the law by the courts. Laws should not restrict the courts and only justice should do that. More specifically, laws have become the bastions of justice and equity; which in every case may result in the miscarriage of justice. Laws cannot always equate to the ideal conceptions and theories of justice.

In analyzing the decisions of the court in the above fictional case scenarios, the first decision is definitely not legally wrong. The court used its discretion and reasonably justified that the defendant could not possibly foresee that the wall, which stood strong for many years, could give way into the rare intemperate weather. Thus the court decided that it was an *act of God*, which was appropriate for the plaintiff to claim for reparations from the insurance company. In other jurisdictions, the insurance company generally subrogates[22] from the person who caused the damage.

On the other hand, the second court not only explored the legal principles of the torts law to establish the liability of the defendant, but it also analyzed the scenarios of the dispute using the principles and theories of economics. A neutral person, who does not have any interest in the case, would find the **Court Decision A** as a fair and appropriate decision which is not prejudicial to the parties. However, if we look at the interests of the plaintiff, he has to restore his house so that he is able to generate incomes from it. More importantly, he has to ensure that the house is safe to live in. An insurance

21 Gaebler, D. (1986). *Negligence, Economic Loss, and the U.C.C.*

22 Subrogation is an equitable principle which allows an insurer to step into the shoes of the insured party and to enforce the insured party's rights and remedies against the person causing the loss. It is of two types: conventional, pertaining to an express subrogation as where the insurer and insured provide for subrogation in the insurance contract; and legal, which is effected or implied by operation of law.

company on the other hand, is a very prudent financial institution, which exist on the negotiations between profit and loss calculi. Although the relationship between the insurer and the insured are almost contractual,[23] the insurance company also sustains and abides by different yardsticks to assess, refurbish and compensate its clienteles. In these rigorous "stick and yard" assessment, the plaintiff may be prejudiced with insufficient amount even to restore his damaged house.

The other party [defendant] is at considerable gain, from the perspectives from both law and finances. The plaintiff suffered considerable financial loss due to non-leasing of his house besides the damage. Needless to say, at such times, as owner of the house, whose life was solely dependent on the house for living and earning an income for his family, he would be emotionally distraught and anguished. No law may be able to recompense it. To make good the loss **Mr. Karma** has suffered, compensation and damages are what he would spontaneously prefer. Therefore, a court decision with a fairly good economic analysis of the dispute would enable the plaintiff to restore his building. The harm here can be translated as "economic harm" irrespective of the emotional anguish the plaintiff has had suffered as a result of the damage. Legally, the conduct which interferes with the economic interests of the other is actionable when "improper."[24] It can be assumed that the negligent conduct lacks the social utility to merit protection. Therefore, the plaintiff would definitely prefer the **Court Decision B**.

A Bhutanese saying goes that law is the foundation of peace, which is the ultimate aspiration of the citizens. Laws are not simply arcane, technical arguments but are instruments for achieving important social goals.[25] Application of laws in practice, are the mediation of many competing priorities of the parties, which requires a very careful synthesis of reason and legal knowledge to paddle with justice. When laws are applied literally, it only duplicates the justice intended in the laws by the lawmakers, and incongruently fits to the expectations of the parties, thereby rendering

23 The relationship between an insurance company and the insurer are conditionally contractual. However, most insurance companies may refuse negligence related insurance claims.

24 Ibid., p. 611.

25 Ibid.

inequity and injustice. Laws are manifestations of human thoughts, the need for rules and justice; and it has to be applied with adequate human wisdoms. In applying laws to the above fictional scenario, laws has to withstand the need to balance community interests, future prospects of the people living in the close knit communities; and by far, it should engender a fair and win-win situation. Laws should enhance cohesion of the communities, and although laws cannot fit and solve all the social issues, it should as the representations of justice enable an atmosphere of justice and objectivity. No laws should bring injustice; and unjust laws can have no place in a just society like ours.

Peace and harmony are definitely among the important social goals. What economic analysis of tortious negligence does, as discussed earlier, is that it encourages the possible defaulters (the defendant) to take additional care of a duty he owes to others which is lower rather than the cost of expected harm suffered by the injured (plaintiff). A responsible citizenry does not only mean, it should obey the laws of the land, but also fulfil other expectations of the society. A society in a village, for that matter, is a very close-knit society, where every person depends on the other, in one way or the other. They are naturally interdependent and co-existent. Every villager stands as a singular pillar of social cohesion, unity and collectivity. A village is unit of a Bhutanese social fabric, failing which it may disturb the other patterns of the society. In that matter, laws should not only be right, but it should infuse values that are concomitant with our societies and recognize the ultimate aim of all people, to secure a society based on *rule of law* and strong social norms. Therefore, economic analysis of different areas of law such as *Law of Torts* is aimed at aiding the law to instil a behavioural and positive social changes, so that the harms are repaired; the people are reassured, justice is granted and community spirit is enhanced.

Conclusion

This Article explored a small area of law where economic analysis can play an important role. Some might feel that the defendant has to bear an unfairly huge cost in compensation and damages to the plaintiff for an incident which was not committed by him deliberately. Tort liability is an action involving unintentional but foreseeable harm. It is an established economic norm that people respond to higher prices by consuming less of

the more expensive good. In the context of the above hypothetical case, it would mean that people in similar positions of the defendant would rather demolish the cracked and weak rammed earth wall rather than paying a much higher compensation to the victims after its eventual collapse. In the similar way, people, who are infected or exposed to the COVID -19 disease, or Bhutanese people in general, in adherence to COVID-19 protocols issued by the Royal Government of Bhutan, will also have to approach with similar care and prudence so that the virus is not transmitted to others. It would be a legal scare, if such issues are fought before of the courts of law. Prudence, care and vigilance are acutely necessary so that we engineer a safe society based on mutual respect. Although no disputes of similar nature as narrated above may be incited into Bhutanese courts, but prudence through knowledge, skills and wisdom upholds the values of a safe, just and respectful society. Laws are best when kept at bay; implementation of the laws, in one sense is a start of a pain of the other.

Tragedy of the Contracts[1]

Introduction

The COVID-19 pandemic caused one of the broadest and deepest impacts on health and economy of any single non-war event. The virus and the government measures have become interwoven into a singular event that cannot be easily or simplistically disaggregated for legal purposes. The *World Health Organization* (WHO) declared the COVID-19, as a global pandemic on 11 March 2020. Since then, the onslaught of the virus has been unrelenting and fast. It created a direct public health threat, and disrupted the global economies. No country in the world was unscathed by the pandemic, and it continues to ravage the health of the peoples with ceaseless mortality rates.

The pandemic has wrecked the trajectories of commerce, and the baseline forecast envisions a 5.2 percent contraction in global *Gross Domestic Product.*[2] This crisis and the government's effort in containing it, has significantly impacted the commercial transactions and brought all the economic activities to a standstill. The general rule requires a contractual obligation to be enforced through the letter and spirit of the laws and, any breach of it, are equitably remedied. However, the question arises in addressing the liability of the parties where an individual is affected by the pandemic to fulfill the promise and to what extent the tenants are liable for the failure to pay the rents. It also invites another question of whether the construction agencies are liable for the failure of performance of contracts. These questions pose a legal and moral conundrum.

The pandemic COVID-19 is a new disease to the world, but the crises are not new to the field of law. The legal system has adopted different legal doctrines and hypotheses such as the doctrine of *impossibility of performance,* doctrine of *frustration* and principle of *force majeure* to mitigate the impairments. The Article attempts to examine the doctrine of *frustration* and *impossibility* and principle *force majeure* in light of the COVID-19

1 Contributed by Tshering Dago Wangmo.

2 World Bank. (2020 June). *The Global Economic outlook during the Covid-19 Pandemic: A Changed World.*

pandemic. Later section of the Article will probe further into the adoption of these concepts by other countries including Bhutan. And finally, it shall endeavour to study the future ramifications on the contract.

Force Majeure vis-à-vis Doctrine of Frustration and Impossibility

Contracts are agreements to perform a task. In Bhutan, a contract is defined as:[3]

> *An agreement which shall be enforceable at law if it is made with the free consent of competent parties for a lawful consideration and for a lawful object and is not declared to be void or illegal by this Act or by any other law in force in the Kingdom of Bhutan*.

Here, contracts can be reduced to an agreement or a promise, which is enforceable before the courts of law. It requires *"free consent"* of the competent parties and a *"lawful consideration"* for a *"lawful object."* In short, the obligation under the contract should be permitted by the law; and not declared *"void or illegal"* under the laws of the country. The legal question of *"performing or non-performing of a contract"* arises when the expectations agreed under the contracts are not fulfilled. Hence, in the eyes of the law, a contract is considered breached and holds the breaching party liable for damages or for specific performance of the contract. However, it would be erroneous to assume that the status of breached contract is automated. It is necessary and expedient in the interest of justice to examine the factors, which may frustrate the performance of a contract; and in response to this, the courts have adopted these set legal rules.

The doctrine of *force majeure* is often applied in lieu of the doctrine of *frustration* and *impossibility* and vice versa. The juxtaposition of these three principles is illustrated through the interchangeable use of the same according to the need. The doctrine of *force majeure* can only be invoked in agreements where there is an operative clause for suspension or variation of the contract in special circumstances. The events outside the agreement will not be covered. The doctrine of *impossibility*, on the other hand, has a broader scope. If a contract cannot be performed due to extraordinary and extrinsic circumstances and events, this legal doctrine will vindicate

3 *Contract Act of Bhutan, 2013*, s.16.

the party from performing or fulfilling the obligations under the contract and non-performance of the contract will not be counted as a breach of contract.[4]

The doctrine of *frustration* does not require the performance to be physically or legally impossible. But if the performance causes a fundamental change in the purpose of the agreement than the original anticipated outcome, the defence may be invoked to excuse the execution. However, there is a need to be wary of its application. An excessive application would lead to loss of trust and faith in the law to protect the parties from opportunistic agreements. The *Annual Judicial Report* indicated that there are significant number of disputes arising out of agreements and contracts.[5] The ongoing pandemic and its restrictions are going to further aggravate the situation. While the courts compose for upsurge in the number of cases registered, it is paramount to acknowledge that the low legal literacy rate of the people and capricious nature of the pandemic has left the parties seldom utilizing the *force majeure* clause in contracts. This raises the question whether COVID-19 and its ramifications shall qualify to justify the non-performance based on the doctrine of *frustration* and *impossibility* of the contracts, and on the other reasons of the pandemic.

Application of the Doctrine of Impossibility and Frustration in light of COVID-19

At an initial view, the doctrine of *impossibility* and *frustration* seem like a broader concept than the principle of *force majeure*. However, the purview is very strict and narrow. These two doctrines, which are often called as 'companion doctrines' differ in the effect of fortuitous supervening event.[6] The doctrine of *impossibility* can be invoked only when it has been proved that the event was unforeseeable and rendered the obligation physically or commercially impossible. On the other hand, it is important to highlight that in the doctrine of *frustration,* the performance [if possible] should produce a dramatically different result from what the parties anticipated when the contract was signed. In a leading Irish *Case*, it was stipulated that *there is a need for unforeseeable significant change in the nature of the contract*

4 *Contract Act of Bhutan, 2013*, s. 87.

5 Royal Court of Justice. (2019). *Annual Judicial Report.*

6 *Chase Precast Corp. v John J. Paonessa Co., Inc.*, [1991] 409 Mass. 371.

whereby it would be unjust to hold the parties liable to the obligation.[7] The 'foreseeability' is a tricky factor to weigh in *frustration*. It can be argued that all events are foreseeable yet not foreseen. The parties may not have foreseen the COVID-19 pandemic at the time of entering the contract, but now it is foreseeable that a pandemic may strike the world again. The only relevant matter is of the time. Similar can be said about the natural disasters. One cannot foresee when and where the lightening and flood may strike and occur, but it is foreseeable that such events may occur given the geographical landscaping and history.

In light of the COVID-19 pandemic, the world has witnessed many pandemics before, which resulted in similar catastrophic consequences. The *Spanish Flu*[8] was the most recent and terminal. Hence, it could be contended that the parties should have made provisions for this unforeseeable event[s] while entering into the contract. Recklessness and complacency cannot be admitted as an excuse to admit the defence of *impossibility* and *frustration*. Therefore, non-foreseeability cannot be trusted to stand alone to determine the applicability of the doctrines of *impossibility* and *frustration*.

This is when the *impossibility* of performance of the obligation becomes essential for doctrine of *impossibility.* When a construction agency undertakes to deliver a "finished product" by the end of the agreed time, it is bound to fulfil its obligations as agreed in the contract of construction. The failure to deliver the finished product will be deemed as a breach of the contract; and the party breaching the essence of the contract shall be held liable. However, if the agency could not physically, and legally, owing to the restrictions of COVID-19, procure the construction materials required for the construction; here the agency, based on the doctrine of *impossibility,* cannot be held liable.

It is significant to emphasize that the agency may not seek the defence of *impossibility of performance* on the ground that the pandemic has inflated the cost of the raw materials. A merely added difficulty and expenses will not excuse the party. The obligation shall remain legally possible and the parties may be held liable for breach. But what would be the considerations in the contract if the expenses and efforts become five more

7 *Neville & Sons. Ltd v Guardian Builders Ltd.*

8 The *Spanish Flu* of 1918.

times expensive and strenuous than the original plan? In such instances, the doctrine of *frustration* becomes relevant. The courts will be called to address these tough questions, which will pave the road for a clear and insightful conceptualization of the doctrine of *frustration*.

The COVID-19 pandemic is inexorable and natural. It is without a doubt that the consequence of the disease raises the questions of legal, social and health amongst others. However, the parameters [may] vary and the same will be with the legal consequences and remedies. It would be legally unjust and practically unsound to adopt and apply a blanket policy to excuse every breach of contract to reasons of *impossibility* and doctrine of *frustration* in view of the COVID-19 pandemic. The doctrine must be wielded with caution in light of detailed facts of individual cases with careful appraisal of the circumstances.

A National and International Perspectives of the Doctrines

Legal scholars in Bhutan claim that the Bhutanese legal system is combination of both legal systems. However, there is no legislation, which can support these propositions. Perhaps, it is a well-founded observation construed from the patterns of the legal mechanisms adopted in the country. This is a blessing especially in times like this where a party can beseech both the doctrine of *force majeure* and the doctrine of *frustration* and *impossibility* unlike in countries, which have put a strict legal separation. The *Civil Law System* exclusively defines and provides for the defence of the doctrine of *force majeure* under its general law. This acts as a supplementary relief to the parties where the contract has already made provisions for unforeseeable events. The parties rely heavily on the doctrine of *force majeure* and draw their legitimacy from the general law in events of occasions not covered in the contract. Under the *Common Law System*, there is no definition or provision of the doctrine of *force majeure*. It must be defined in the contract itself and in its absence; the parties may be only able to rely on the principle of *frustration* to avoid performing the contract.

The People's Republic of China, resembling the *Civil Law System* is one of the first countries to address the issue of the doctrine of *force majeure*. The courts have been bold with their opinions. The *Intermediate Court of Beijing* issued an opinion regarding the lease and rental obligation. It was set forth that,

> *It is necessary to consider whether the cessation of activities and the use of premises caused by the coronavirus outbreak are insurmountable. Concerning the commercial network, if the business resumes trading after a short period of time and suffers a decline in turnover ... this must be regarded as an ordinary commercial risk.*

Conversely,

> *If the business belongs to a sector severely damaged by the epidemic [...] there may be a risk of a long-term closure pending inspections or permanent closure. In this case, it is necessary to consider exempting the tenant from the fee due because of the impact of the epidemic*.

Further, the Shanghai High Court stated:[9]

> *If there has been an impact on the rental income due solely to the drop in turnover resulting from the coronavirus epidemic, the obligation to pay the rent persists*.

The Supreme People's Court issued a clear guidance to the lower courts on the subject of COVID-19 and *force majeure.* On the 16 April 2020, the Court affirmed the availability of the defence to the parties and laid down the obligations for claiming the same. The contracts, which were hampered by the pandemic but not necessarily impossible to perform, were presented with an opportunity to renegotiate the terms. A responsibility was imposed on the parties to mitigate the loss of non-performance among other things.[10]

The People's Court in China is commendable for its swift measures to contain the impacts on commercial transactions. However, the global world has yet to develop similar legal resolves on the issue. This is not to say that the other countries have not faced parallel adversaries. A licensed

9 *COVID-19, "Force Majeure" and Performance of Contractual Duties - Insights from Chinese High Courts*, Zunarelli Studio Legale Associato, International Comparative Legal Guides.

10 Lewis, K., Zhou, M., & Wang, E.Y. (2020). *Force Majeure Plus- The Use of Force Majeure Provisions in China during Covid-19*, Mayer Brown Publications.

nurse unfairly furloughed from her employment[11] due to financial strains as a result of by COVID-19, a therapist exploited on the ground of her testing positive[12] and a popular radio host terminated due to COVID-19 pandemic are few among the many cases registered in the United States of America.[13] Bhutan has not seen any breach of contracts arising out of the pandemic. The courts are silent on whether the pandemic should be admitted as a defence. However, a *Notification* issued by the *Department of National Properties*, *Ministry of Finance* on 8 April 2020 provides relief to the parties where it stated: [14]

> *All on-going construction activities and supplies that are affected by the COVID-19 are declared as force majeure with effect from 24 March 2020.*

These considerations come with stipulations and mechanisms are put in place to ensure that hindrance period is genuine. Nonetheless, it will be interesting to witness how the Bhutanese courts respond to such and similar case. The question of whether the courts will be sympathetic to the tenants who have failed to pay their rents on time, owing to loss of incomes can be debatable. It also poses questions if the courts would excuse the party for non-performance in view of the fact that the import has been banned. The questions if the courts would exonerate the parties who are unable to fulfil the obligations of the contracts due to circumstances that arose as a result of the pandemic? There is no right answer to these questions and the discussions on this matter will persist to be relevant.

Conclusion

The title of the Article suggests that the contract law has faced an adversity in the face of COVID-19 pandemic. But it would be not fair to say that such is my intention. The marvel of the pandemic has forced us to re-evaluate our stand on the relevant provisions of the laws on various issues. This Article has attempted to categorically study the sequel on the pivotal laws of contract as nations endeavour to address the national economic

11 *Rhonda Sternberg v Dermatology and Surgery of Southern Ohio Inc.*

12 *Melissa Rosintoski v Delta Healthcare Talent LLC dba Delta Healthcare Providers.*

13 *Flagg v Hubbard Radio Seattle, LLC (King County, WA)*

14 *Notification*, (MOF/DNP-14/2019-2020/1219) dated 8 April 2020.

issues. Bhutan has been exemplary in its effort to contain the pandemic and its effects on the health and economy of the people and the country. His Majesty the King has benevolently bestowed a *Kidu Fund* to cushion the economic impacts on the people. Many citizens exhibited compassion, benevolence and humanity through rent concessions; and the banks have also delayed the payment of loans in solidarity. Despite these measures, the commerce and economic health of the country has been greatly impaired. Now it would be the duty of the courts to balance many contractual legal issues in cases of failed contracts. This will compel and require tough, decisive and concrete judicial and legal solutions. This may just be the silver lining of the pandemic, a harbinger for a new history of legal reform in Contract Law.

The Incidences of Intimate Partner Violence during COVID-19 Pandemic[1]

Introduction

Violence against women is a direct assault on the person of women, her physical integrity and moral dignity. Violence against women in many countries is a public health priority. Violence against women has been described as perhaps the most shameful and pervasive. It is also a matter of peace and security. Violence, in close circles, tend to increase in any emergency, including in epidemics. Violence in many instances is the manifestations of frustrations, increased stress levels, and economic hardships. The measures taken to mitigate the impact of the COVID-19 including lockdowns has aggravated the coincidences and fertilized the grounds for intimate partner violence. "Domestic abuse," "domestic violence" or "intimate partner violence" are normally associated with broader inequalities in the society; is part of a range of behaviour constituting of male abuse of power that is linked to other forms of domestic conflicts. Domestic violence is mostly perpetrated by men against women and takes a number of specific and identifiable forms. The existence of violence against men is not denied nor the violence in same sex relationships.[2]

It is professed that social relationships in Bhutan between men and women are marked by gender equality unique to South Asia. Gender equality is a fascinating trait of the Bhutanese society.[3] However, modern realtionships are sometimes shakenly unstable, and as familiarity breeds contempt, squabbles and the resulting violence are inevitable, splitting relationships. In the *Passionate Pilgrim*[4] William Shakespeare[5] described domestic relationship between men and women as:

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1 Contributed by Nima Dolma Tamang.

2 *Guidance for Domestic Abuse and Alcohol and Drugs Services in Lanarkshire*, Lanarkshire Alcohol and Drug Partnership, Scotland, the United Kingdom.

3 Crins, R. (2004). *Religion and Gender Values in a Changing World*, The Centre for Bhutan Studies, p. 581.

4 *The Passionate Pilgrim*, a Collection of Poems by William Shakespeare.

5 William Shakespeare describes how relationships are built and how love and affection between the spouses are destroyed. He describes that "love" are built with much of swear, but sometimes, even if love is as shiny as glass or as clean as a glass, it is brittle.

Fair is my love, but not so fair as fickle;
Mild as dove, but neither true nor trusty;
Brighter than glass and yet, as glass is brittle;
Softer than wax, and yet like iron rusty.

He succinctly describes human relationships, especially family relationships as:

How many tales to please me hath she coined,
Dreading my love, the loss thereof still fearing!
Yet in the midst of all her pure protestings,
Her faith, her oaths, her tears and all were jestings.
She burn'd with love, as straw with fire flameth;
She burn'd out love as soon as straw outburneth.

Domestic violence which is categorically described as violence against women is, phenomenally an orchestration of differences in the family. While happy relationships be it in marriage or otherwise, are described as "cosmic union;" its failures are consequential. It devastates a family, deracinates the deep and long relationships built between the people linked through matrimony and close sanguinity. Domestic violence is the curse of matrimony, imperfect partnership and seed for divorce and matrimonial incongruence in many families. Families are the closest bond in human relationships. In many aspects, love defies logic, a natural expression of human bond. However, due to the yoke of inauspicious stars, marriages are sometimes, a futile bargain, with the presence of unreasonable noise and fury like a beast.[6] Domestic violence is an expression of dominance, incompatibility and disharmony. It is the interchange of words for needless actions. It is when man becomes a true man; and when love is measured in the bouts of anger, and exchanged in force, violence and dominance.

The COVID-19 pandemic is a test of human endurance. It has tested the healthcare systems, the economies of the countries and its leadership. At an individual level, it also tested personal immunities; and at a family level, it examined the strengths of our family relationships, love and trusts among

6 The *unreasonable fury of a beast* is a description of human anger.

and between the partners, husbands and wives. It broke both lives and relationships of the people; and for many families, the inveterate head of the pandemic, rattled the families, shaking them from their roots. It came through the expression of violence, hatred through dramatic enactment of everyday family lives. At closed corners, within the four comers of the walls, guarded by impending news of escalating virus in the communities, it is when men became men and women became women in their true identities as husband and wives.

The government and the health officials urge every citizen to remain inside and practice and abide by the health protocols if required to go out. However, for some, the fear of staying inside with one's family is more than coming out. Family is one of the most important units of the community, and the source for the closest bonds, for many people. Family is a security; it is where the minds of men and women rests, an ultimate source of motivation to an inspiring living, spirited by forces of love, care and benevolence. It is a "haven" which keeps people at peace; it is a retreat of solace, harmony and affection. It is enigmatic that these "havens" are sometimes the dark dens of violence, mistrust and caginess. Marriage at such times is a wasteland, with dwindling hopes, and dying aspirations. The best cemeteries of marriages are enclosed within intimate violence, when trust and love transpires into violence.

In Bhutan, the pandemic has posed a serious and extraordinary challenge. In short, the pandemic examined the country and its preparedness for the future. Bhutan, like any other country, underwent a convoluted time, in the recent days, with a surge in cases of virus infections, hurting the health of the individuals, communities, and nation. Although the infections were not prevalent in the society like elsewhere, it brought the nation to a grinding halt, bringing restrictions to both services and travel. As an immediate measure to stop the pandemic and break the chain of community transmissions, Bhutan engaged in a systemic lockdown, in different phases of the year. These lockdowns resulted in restricting people from travelling out of their family spaces, causing families to be together, sharing family spaces, personal natures and exchange of similarities and differences.

When people were bonded together, encapsulated by fears of the viruses; these trying times was a trial for many marriages as domestic violence became a bigger issue. The domestic violence became the "drama of the lockdown"

for many marriages. Domestic violence is described as a "pandemic within a pandemic" by some social scientists, which is perpetrated by human frailties and weak partnership bonds. With evolving legal scenarios, and the strengthening of various approach and legal apparatuses on domestic violence, domestic violence is becoming a hot seat for many institutions and families. Many families are educated on various sections of the laws on domestic violence, and the institutions that respond to such issues, profiling domestic violence as a serious threat to successful matrimony and the achievement of the aspirations of *Gross National Happiness*.

However, despite adequate information on the existence of domestic violence, we barely give a thought about it. It requires emphatic socio-legal approaches, and understandings of its root causes and the imbalance of powers between men and women. People in Bhutan, like in the countries in the west, are becoming individualistic; and few neighbours, in the same apartment, knows or talks to each other. With speedy progress at various dimensions, the legal concepts of privacy, has penetrated our social systems; creating a disjointed society and lifestyles. The idea of small society syndrome is dissipating slowly giving rise to untendered society, with very low considerations for other people. As in religious discourses, the concept of "I" is emboldened which is further obstructive to close social interactions and social interface. In the past, in the village communities, the matters of domestic violence were attended by the communities, or help was normally sought through various communication models adopted to seek interventions. With urbanized settings, and concretized family buildings coupled by the unempathetic neighbours, it has heightened the risks and results of domestic violence. In most cases, especially in urban settings, domestic violence is matter between the families, within the echoes of the walls. The ruins of unfettered anger can be orchestrated in many dangerous ways.

The questions of why domestic violence is a family matter are further perpetuated by the concepts of privacy and private matter. The weaknesses of economic development and progression are manifested by indifference; and people are least bothered about what happens to others. In western countries which have seen the peak of progress in every sphere of their lives, are encumbered by solitary lives that have only a dog to befriend them. Privacy for them is a matter of right and righteousness; and they are affected by notions of "I do not care about what my neighbours do." These

social trends exterminate compassion, unity and social cohesion. It directly annihilates the altruistic thinking. The growths of such social changes are increasingly visible in Bhutan; domestic violence has to be considered as a problem of a family, and a social issue, which requires the interventions from different stakeholders, including the people who live nearby. However, state intervention into the private sphere of family life and the regulatory techniques of family laws are designed to protect individual rights, equality and maintain harmony in the society.

While family violence is outlawed, the punishment as a *post facto* legal intervention may or may not help in reducing violence in the family. One of the study found that partner violence is strongly associated with *inter alia* a variety of mental illness.[7] This invites several other questions about the characteristic traits of the perpetrators of domestic violence, how to analyze and what to consider in domestic violence cases; and the possible legal interventions. The Article seeks to answer these socio-legal and scientific questions.

Silencing Domestic Violence

Domestic violence reflects social and national ills. It is the portrayal, especially to other countries, the indexes of protection of women and rights of women. Currently, the issues of rights of women and the need to uphold their rights and *gender justice* are the ideals of good governance and respectful leadership. In most jurisdictions, the perception of domestic violence is still presumed as "men to women directed violence." These are mostly viewed from the telescopic views of women rights' and gender. The *Preamble* of the *Domestic Violence Prevention Bill of Bhutan*, 2012 initially proposed,[8]

> *Recognizing that the domestic violence is a serious social evil…*

These resolutions reflect the significance of the issue. It is also paramount to understand that legal tools to combat domestic violence are also necessary to ensure that domestic violence is combatted through curative legal measures

7 Moffit, T. E., Caspi, A. & Silva, P. A. (n.d.) *Findings about Partner Violence,* Dunedin Multidisciplinary Health and Development Study on Legal Interventions in Family Violence: Research Findings and Policy Implications, p.37.

8 Proceedings and Resolutions (Translation) of the 10th Session of the *National Council of Bhutan*, p. 5.

and tools. It is a reality that domestic violence has become a serious social evil in a country that is guided by Buddhist values and philosophies of non-violence and peaceful coexistence. In rural communities, in the past and the present, the survivors of domestic violence are silenced to ensure the continuity of marriages and in the subsistence of best interest of their children.

In most cases, the issues of domestic violence were mutually settled through the interventions of the mediators, who transacted on the need to preserve the marriages, and protect the interests of their children, with an urge to not complicit in the future. This was a formal silencing approach, which innately reinforced the dominance of men over women, which further stereotyped domestic violence as a disagreement between two non-competing persons. Otherwise the perpetrator mostly acts a silencing agent, who threatens the victim, with further revengeful violence. In the rural areas, in contrast to urban backgrounds, alcohol had been the inherent cause of family disagreements. Whatever its cause, unless the violence resulted in serious injury, the circle of people in the family came in to aid the victim and rarely comes to the cognizance of the authorities. While in some cases, the survivor elapses into thinking the issue as normal phase of their lives, as in every family and spousal relationships. Unless the woman or the victim is educated and informed on various legal matters, she is normally prejudiced into considering it as their predestination or their "karmic fallouts." For years, such issues were punctuated by common belief that was a normal private affair. People who associated with the issue of domestic violence always accepted it as nothing more than an ordinary incident. However, with changing considerations of the laws, and the impetus received in support of women in general, it is no more a normal and private matter.[9] Although the issue of domestic violence are tackled institutionally by various agencies responding to survivors of domestic violence, which establish domestic abuse as a primary concern, most of the issues of domestic abuses or domestic violence for that matter, would have been dusted under the carpet.

9 *National Survey on Women's Health and Life Experiences, 2017*. Message from Dr. Tandin Dorji, Chairperson of the National Commission for Women and Children (NCWC).

The Incidences of Domestic Violence

The incidences of domestic violence is an illustration of irrationality of human behaviour, disrespect for individual rights and is the expression of domination and power imbalances in a family. Family violence or spousal violence is a culmination of spousal disagreement, personal and family differences that triggers a situation leading to violence. Internationally, there have been different perspectives on violence against women through various dimensions of criminal justice, public health and human dignity. Although our laws on domestic violence encapsulate all types of violence against women, including psychological abuse, economic deprivation, and physical harm, many, who are uninformed on the letters of the laws on domestic violence, may be unable to raise the issue.

Many people may still be unaware that domestic violence may include economic deprivations, which most people collate to the cruelty of the partners. They are only able to identify a perpetrator, if he violates the physical dignity of the victim. This inhibits identification of the perpetrators of domestic violence, although many people may allude economic deprivations as one form of cruelty exhibited in the family circles. Domestic abuse causes mental, emotional or psychological distress, not just physical injury. It upsets relationships, disturbs normalcy in the family, the lives of the children; disrupts the physical and emotional wellbeing of both the perpetrators and the victim. Domestic violence, in most cases are a result of outburst of emotions, unless it is a result of calculated stalking of revengeful emotions, over months and years, which later breaks the safety nets of the families. In many families, the sparks of violence are set alight by intemperate behaviour and inconsiderate attitudes. Violence is a reflection of an unsustainable matrimony; the source of violence, unless it is a predominant cause, may arise from different spectrum of family lives. Men are dominant human species; and women, with advancing lifestyles, and improved livelihoods, are also equally competent as aggressors and originators of violence.

Philosophically, violence is an origination of mind, and dictation of our mental faculties and emotional landscapes. The incidences of domestic violence are many, and sometimes, small things are calculable for violence, and as numerous our thoughts are, numerous violence are susceptible. In short, the incidences of domestic violence can be as many as our thoughts

and coincidences wanders to be. However, except in few occasional reports of violence in the family, many remains to hide it to the secrecy of their families. The matters of personal dignity, family relations, personal safety, and the interplay of other barriers restrict it from expanding into the public dominion. The pandemonium of the pandemic and the national lockdowns stretched the parochial position of domestic violence through increased instances of domestic violence, especially in families of low income households, who sustains their livelihood through the daily wages.[10] Most of these issues would not have come out in public today if it were not for pandemic and the national lockdown. While everybody is inside home avoiding contact with the virus, some of us may become the prisoners in our own homes.

With domestic violence on rise, Her Majesty *The Gyaltsuen* has commanded that all necessary measures be put in place to assist any person who is experiencing or feels at risk of domestic violence and abuse during the lockdown. The Royal directive include a team to respond immediately to any call for help, the provision for a secure and comfortable shelter for those who are faced with violence at home and counseling with the help and assistance of Respect, Educate, Nurture and Empower Women (RENEW). Few of the women, children and men have been placed in shelters in various *Dzongkhags*.[11] At this helpless time the shelters are of a great relief for those in need.

The Dilemma to Report

Domestic violence in many cases, results in gross violation of the physical and emotional integrity of the survivors. Bhutan has developed at a very fast pace. Presently, we have strengthened police force and special Units established for the purpose of women and children. While domestic violence is discussed, many take into the perspectives of urban surroundings, with localized helpline numbers, and accessible services. In contrast, let us take an example of a remote village, which is not connected by modern amenities and where lifestyles are rudimentary. While domestic violence can be accepted as an urban issue, its roots are far more serious in the rural areas. Incidental narratives would go rife in the locality that **Mr. Karma** has

10 *The Bhutanese* (2020 August 29).

11 *The Bhutanese* (2021 January 9).

battered **Mrs. Sonam**[12] the night before; and both were in an inebriated state. In many instances, communication between wife and husband are an expression of power and dominance. In the rural areas, men and women equally contribute to the progress of the family. For example, let us narrate an imagined and fictitious family life story, which for many may be coincidentally be true.

Mr. Karma is a farmer in a remote forested village, twenty kilometers from the nearest road. He is a self-sufficient village man, who relies on home grown agricultural produce. Occasionally, based on the seasons for his crops, he tills his land. As the nation was locked down over increasing COVID-19 cases in the country, he was very unsettled to keep his fields fallowed, with the time approaching for the cultivation of potatoes. With the local villages working as normal, even during lockdowns, as it normally does not interact with people away from its peripheries, **Mr. Karma** requests his wife **Mrs. Sonam** to assist him with the bulls to the field. Normally, woman in the village bravely handles bulls of most sorts, if they are unaggressive and passive. **Mrs. Sonam** unhesitatingly handles the bull as the bull is led to the field for the work of the day.

However, the bull, on the sight of another bull at the other side of the field is agitated and strays astray. **Mrs. Sonam** reins the bull with all her force, but unfortunately the bull strays into the nearby forest, leaving **Mrs. Sonam** pallidly calling for her husband about the news. **Mr. Karma** is infuriated at the news, retorts to her, spitting at her face, hitting her many times, in a fit of rage, leaving her deeply hurt and frightened. He threw curses on her inability and roared with anger as he left for the strayed bull. In such incidents, which we cannot say it cannot happen, this fictional story helps us to recall intimate partner violence in different perspective, aside the four corners of the wall. In such incidents, would **Mrs. Sonam** call the police or would she normalize with the incident as bad day with the bull?

In one of the studies carried out by the *U.S Department of Justice* concluded that domestic violence is associated with the ideation of suicide.[13] The

12 The names are fictitious and are intended to discuss issues faced in the villages currently or in the past.

13 Johnson, B., Li, D., & Websdale N. (n.d.) Executive Summary. *Florida Mortality Review Project.* Retrieved from https://www.ncjrs.gov/pdffiles/171666.pdf, pp. 40 - 41.

increasing number of domestic violence cases represents two views. It is studied that domestic violence cases have actually increased because the perpetrators are not deterred by the existence of the laws on the issue. One of the viewpoints supports that with increasing knowledge and awareness on the issues of domestic violence, people start to report about the issue. This can be lined to the positive results of advocacies and campaigns on domestic violence. The tasks taken by the National Commission for Women and Children (NCWC), the Royal Bhutan Police (RBP), (RENEW) and other agencies are a positive contribution to gender equality, gender justice, and educating people on domestic violence. Nevertheless, if we analyze the viewpoints of domestic violence, from horizontal and vertical dimensions, getting the perspective from women both in rural and urban areas would be a holistic approach. There can be victims of violence, who are unable to find appropriate methods to report the incidence, who lacks confidence to open up with the violence they face and report it to relevant authorities. Those victims automatically retreat into silent tolerance. Hence, there is more need to disseminate and educate people living in far flung areas across the country so that they learn and avoid outraging the dignity of women through the medium of violence.

Despite several dissemination programs, victims may not open up and report the issue. The victim may harbour a paramount amount of fear of the perpetrator, which may negatively affect the survivor to report the case. Although domestic violence is a crime under various provisions of the laws, which necessitate a mandatory reporting of the issue to lawful authorities, the dissemination programs should help people to understand and persuade them to report it. Persuasion is subtle art of balancing the dynamics of human understanding which requires educating people on its causes, effects and other social tribulations associated with the issues of domestic violence. However, the decision to report is generally not made by the victim and the perpetrator. Strong and bold steps are required to propel the victim to make these bold decisions; and the hard choice is generally made by victim ensconced by family and community compulsions. The decision to report itself is matter that requires indirect or direct persuasion; an interaction of varying degree of influence. In many instances, the perpetrator may try to stop the victim by persuasion, influence or threat to compel the victim from reporting. Thus, it repeats the vicious circle of violence.

The Courage to Report

In many cases, domestic violence is a portrayal of family disputes. Family disputes are an intermix of violence, that deduced to the model of victim on one side and perpetrator on the other. This also involves personal values, dignity and respect. It is easier said than done, it takes lot of courage to report anything that happens within the personal space. A wrong can never be right unless the victim reports and seeks help. Often reporting of violence is limited due to social stigma. It is studied that so many barriers stand in the way of women reporting violence during the pandemic, women are unlikely to immediately report incidents of violence. With the delay in opportunities to seek support, cultural and societal norms surrounding domestic violence may stop women from ever reporting pandemic violence, leading to long-term effects on women's economic empowerment. It is further studied that the reasons limiting women's ability to report incidents quickly may cause fewer women than usual to report the incidences of domestic violence. More so, with the COVID-19 pandemic has exacerbated the limits for reporting the domestic violence.[14] Without the required interventions a victim who is under immense gas lighting will not be able to distinguish right or wrong. Depending upon the gravity of abuse it might become a crime, so it is crucial we report. The law requires everyone to make necessary effort to inform the commission of crime. People not reporting will be punished for omission to report the crime. The kind of relationship that the perpetrator and the victim share may not make domestic violence a crime at first sight. However, the relationship does not qualify as a license to commit violence on family members. Nevertheless, the line has to be drawn by the victim as to what all merit reporting. The questions if simple quarrel and exchange of verbal abusive words can be qualified to be reported as domestic violence may vary from person to person depending upon the gravity of trauma experienced.

Unless the victim or other persons proactively reports the incidences of domestic violence, help may not come *suo moto*. With time, silence may be a beckon of acceptance and it may indirectly lead to increased spate of violence. In Bhutan the acceptance rate among Bhutanese women of domestic violence stood at as high as seventy eight percent.[15] On the other

14 Policy Paper- *The Covid-19 Pandemic and Violence Against Women in Asia and the Pacific,* Social Development Division, United Nations Economic and Social Commission for Asia and the Pacific (ESCAP).

15 Gevers A., Miyaoi K., Wangmo S. & Choden T. (2018). *Thimphu's new journey to reduce violence against women and children begins with innovation.*

hand, if the offence of domestic violence is reported in time, the victim may be able to receive a timely help. There are few alternatives, which may weigh between breaking the relationship by ending the marriage or ensuring that the offence does not take place again through socio-legal measures. Once the issue of domestic violence reaches relevant agencies, including the court of law, it may not offer further restorative opportunities. Reporting to relevant agencies may help to prevent further violence.

The Social Experiment

In other countries, there are minimum standards to respond to survivors of domestic violence. It is essential to provide a non-judgmental and safe environment which is conducive to discussing or disclosing domestic abuse and violence.[16] The minimum standards are documented to ensure that the services are professional and provide a protective environment. They also provide standards to respond to the perpetrators of domestic violence, so that the services are sensitive to the needs of the service users. Each person's experience of domestic violence is highly individual and it is important that services are provided holistically.[17] In normal circumstances, the question of how a person would react to a person, let us say the victim or the survivor of domestic violence, may differ, unless we are professionally educated to handle these sensitive and critical social issues, which require a specialization in each field.

On this, there are social experiments videos on how a person would react to the issue. The video tries to show what a pharmacist can do when a victim of domestic violence asks for "Mask-19."[18] The pharmacist is unaware of what is meant by "Mask-19" but the victim insists the pharmacist to see it online; the pharmacist immediately comprehends the conversation. *Harmony House*[19] initiated the idea of "Mask-19."[20] Upon using the code

16 *Guidance for Domestic Abuse and Alcohol and Drugs Services in Lanarkshire*, p. 39.

17 Ibid., p.43.

18 "Mask- 19" are code words used at the pharmacies to escape the domestic violence. It was practiced in France during the lockdowns, which has started telling victims to head to drugstores if they face any issues of domestic violence. If they cannot talk properly and openly in the store, they may simply say the code word "Mask-19" to the pharmacist behind the counter. "Mask-19" indicates that the person has a domestic violence issue.

19 *Harmony House* is the transition shelter in Ottawa, Canada, which acts as a domestic violence shelter, helps abused women find additional place of safety in incidences of domestic violence.

20 *Harmony House.* Retrieved from https://www.myharmonyhouse.org/wpcontent/

word, the pharmacist calls relevant agencies.[21] In that way, the victim is able to get appropriate service and assistance on the matter. Such experiments help to create awareness and understandings on the issue to the general public.

Legal Interventions

In 2018, the *Office of the Attorney General* prosecuted only one domestic violence case and it surfaced under the category-offences committed against women.[22] The report also provides that actual figure of domestic violence cannot be ascertained from this report because most of the domestic violence cases fall into the category of cases prosecuted by the Royal Bhutan Police. Other reports and the medical reports from the forensic department records of the Royal Bhutan Police reveal a greater number of cases.[23] The reporting in the preceding section may be interpreted as reporting to competent authorities. If the victim has no access to interventions and services, the information is channeled through friends, family and other persons, who may be in a position to help. After the formal reporting of the incidences, the competent authorities, be it the Royal Bhutan Police or the Royal Courts of Justice, should take appropriate action.

One of the ways to address such issues is through appropriate legal remedies. The laws in place necessitate a punitive or reformatory intervention from the state and the stakeholders. No state can remain as silent spectator protecting the concept of family autonomy. Rather, it requires an active intervention from the state in form of shelters, social security, and other dignified provisions. It also requires active legal interventions.

Back in the year 2009, the Report of the Committee on the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) urged Bhutan to enact legislation, including on domestic violence.[24] In pursuant to this mandate, the *Domestic Violence Prevention Act* (the Act) was enacted with an objective to prevent the domestic violence and maintain

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uploads/2020.

21 Video link: Retrieved from https://m.facebook.com/story.php?story_fbid=2058797612108841324147236228 14&id=.

22 Office of the Attorney General of Bhutan.(2018). Annual Report, p. 20.

23 Domestic violence leaves woman paralysed., *Kuensel.*

24 Concluding observations of the Committee on the Elimination of Discrimination Against Women: Bhutan, CEDAW/C/BTN/CO/7. p. 5.

harmony in the family life. With globalization, world has become a global village. It is more appropriate more so in the case of pandemic which is affecting countries across the globe. Like how international boundaries and distances across the globe has been reduced, the boundary between family and public domain should also be reduced so that domestic issues of the families are no more a private affair, but a national issue, if the incidences are of abuse and violence. In case of violence of any nature within the family sphere, support and interventions should be able to penetrate the sphere of family with an interventionist approach.

The above arguments are raised to ensure more importance is given to the problem than seeing it as a personal matter. Amongst others, the *Act* provides appropriate legal reliefs to the victim. The court both as an adjudicator and educator, at many instances should inform the victim or their legal representatives about the appropriate legal remedies and reliefs available under the laws. Mostly the reliefs come as a form of *Protection Orders*, including relevant and appropriate compensations with other legal and socio-legal supports including temporary or permanent shelter homes, legal aid, counseling (also for the defendant), medical facility for the victims and their dependents. Moreover, the Legal Officers at the *Dzongkhag*s are the *Gender* and *Child Focal Points* at the local level who act as the interim *Protection Officers* in the *Dzongkhag*s, where specialized *Protection Officers* are not appointed.[25]

The perpetrator of the domestic violence should be prosecuted for criminal offences, as is normally done in addition to civil remedies specified under the laws. Research has shown *Restraining Orders* act as workable and preferable alternative to criminal proceedings or as a useful tool in conjunction with criminal proceedings in domestic violence cases. However, they have been also criticized as ineffective or, worse, as providing false comfort to the victims who rely on them.[26] Moreover, when the *Protection Order* has not been promptly served or enforced effectively, it becomes ineffective. It is important to see the benefits and limitations of *Protection Orders* in reducing abusive behavior and the future risk of abuse. The studies have shown that the *Restraining Orders* can provide immediate relief from the violence and enhance victim's self-esteem. For the *Protection Orders* to be

25 Royal Government of Bhutan & The National Commission for Women and Children. (2019 June). National Review Report on the Implementation of Beijing Declaration and Platform for Action (June 2019).

26 U.S. Department of Justice, *Research on Legal Interventions in Domestic Violence Cases.*

effective in the long run, it has to be accompanied by safety planning and other community services. Many advocacy groups like the *American Bar Association Commission on Domestic Violence* recommended that safety planning should be conducted regularly with all victims of domestic violence.[27] As per the *Domestic Violence Prevention Act*, the *Protection Order* shall remain in force for a maximum period of nine months, which may be extended if required.

Conclusion

As public awareness about the prevalence and nature of domestic violence has increased, so did the demand that the justice system step in to stop the violence, rather than continue to treat it as private matter. By preventing domestic violence we can reduce the impact of the violence on children in terms of behaviour problems and social competence. There are children who witnessed or still witness violence in the family. Fight between parents will affect them beyond imagination. Growing up in such a toxic family is difficult. The outcome of children experiencing or witnessing domestic violence has long-term consequences for both individuals and for society. Therefore, even if the victim chooses not to report the occurrence of violence for himself/herself that is not good for the children. The silence of the parents may be unbearable for the children. Thus, the victim of domestic violence can range from one to multiple individuals. One's silence might silent everyone, which is dangerous. Law may or may not teach one to respect the rights of their family, but law surely does punish one for not respecting their rights. There are various legal interventions that one may avail in case of facing domestic violence. Those legal interventions are *post facto*, meaning they come in the picture once the violence has occurred. The law is not the only way to deal with issue of domestic violence. It has to be approached through other specialized fields of interventions. The issue is becoming more serious and unless we take holistic approach, law alone cannot prevent domestic violence. If we let go of this issue thinking it as private affair then we should be ready to face worse consequences in the larger community. Family is subset of the larger society that we live in. With due respect to the sanctity of the family affairs as private affair, it is no more normal and private when there is wrong done to fellow family.

27 U.S. Department of Justice. *Research on Legal Interventions in Domestic Violence Cases.*

The Law of Contract: An Examination of the Validity of Contractual Obligations During the Pandemic[1]

Introduction

Ever since the *World Health Organization* declared the COVID-19 outbreak as a pandemic in March 2020, the orderly nature of the world has irreversibly changed. The pandemic has resulted in a global death toll of more than two million peoples and it continues to claim lives affecting all sectors of health, the economy and the ways of lives of the peoples across the globe. The pandemic has created an unequivocal public health crisis, putting immeasurable pressures on the ways of lives of the peoples, changing every aspect of the life, speeding up the pre-existing trends in how people consume, work and travel. It has exacerbated geopolitical tensions, impoverished the nations, and has put human beings under intolerable burden of suffering and loss. More than the health crisis issue, it has also been an unprecedented socio-economic predicament, with devastating social, economic, political and legal effects. Every day people are losing jobs, incomes are cut; and travels are restricted leaving people in isolated economic hardships and struggle.

It remained as a global health crisis for 2020 and entered 2021 causing even more disruptions at an unrelenting pace. The COVID-19 pandemic is a challenge to science, technology, human race, innovation, and more importantly, the speedy development of reliable vaccine blue prints across the world. It has baffled the scientific community, contested the directions of development and scientific and legal advancements of the modern day. The COVID-19 pandemic has especially had and continues to have a huge economic impact on both national and global scale. With disruption in economic activities and business operations due to preventive measures such as lockdowns and movement restrictions, there is an ethical and legal quandary pertaining to contracts that were entered and executed before the pandemic. Although peoples across the globe has experienced contract frustrations through the events of war, flood, epidemics, and other

1 Contributed by Thinley Choden.

unavoidable circumstances, the COVID-19 is a relatively a new disease, untested in the scientific community, which irreparably upsets innumerable contracts over the years.[2]

In general, contracts are legally enforceable promises, and they remain enforceable even if the performance turns out to be more challenging than expected.[3] However, if the performance of the contract is intervened and interrupted making it impossible due to an extraordinary and exogenous event, the doctrine of *impossibility* may excuse the parties; and may not be considered as a breach.[4] In the same way, the rule applies if the performance of the contract suddenly becomes so much difficult and dangerous, than expected to be impractical, making it effectively impossible. This is based on the legal premise that a thing is impossible in legal contemplation when it is not practical, and a thing is impractical when it can be only done at an excessive and unreasonable cost.[5] It invokes the doctrines of *impossibility*, which is narrow in scope and rarely applied as it undermines the nature of legally enforceable contracts. This is based on the judicial recognition that the purpose of contract law is to allocate the risks that might affect the performance and that performance should be excused only on "extreme circumstances."[6]

These legal principles provide for defences as well as other legal challenges. The role of courts has preferential importance to determine the effect of the breach of contracts and the reasons of breaching the contracts, so that contractual justice is enhanced and delivered. The court also has to judicially examine if the person has made any 'reasonable efforts' to surmount obstacles to performance and performance is impossible despite the reasonable efforts put thereto. The questions of contracts may apparently look simple and straight forward; however, as in any other case before the courts of law, it is mostly circumstantial. It requires performance of a task, which depends on a variety of acceptable factors of work conditions that has to be examined

2 Scwartz, A. (2020). Contracts and COVID -19, *Stanford Law Review,* 48(2020).

3 If the party by himself charge with an obligation possible to be performed, he must take it good, *unless its performance is rendered impossible by the act of God…* in which the supervening event is beyond the control of the parties.

4 Scwartz, A. (2020). Contracts and COVID-19, p. 49.

5 Beach F. C. (2017). *A Treatise on the Modern Law of Contracts*, *Uniform Commercial Code*, Amsterdam Law Institute, the Netherlands.

6 Scwartz, A. (2020). Contracts and COVID-19, p. 49.

in the interest of Justice. As in any other aspects of dispensation of Justice, it necessitates 'reading through the lines' with utmost prudence. Justice is a balancing of priorities based on the letter and spirit of the law, and other conditions. A mere interpretation of the laws may only result in what is called as the *legal Justice*. It will be a mere restoration of fairness in the eyes of the law.

Generally, as per the principle of *pacta sunt servanda,*[7] the parties to a contract are expected to perform their respective promises. Though that may be the case, the question that arises with regard to contractual obligations in light of the persisting pandemic situation is, whether the pandemic would qualify as a defence of *force majeure* or other similar exceptions, upon which a party can avoid liability for their delayed performance or non-performance of the contractual obligations. This Article will examine the possibility of avoiding liability for delayed or non-performance of contractual obligations due to the impact of pandemic under three possible exceptions:

a) The doctrine of *force majeure*;

b) Impossibility of Performance; and

c) Frustration of Purpose.

Force Majeure

The doctrine of *force majeure* is a relevant subject in the area of contracts and contractual obligations. Across the globe, businesses are experiencing issues with productivity and low sales due to the risk of exposure to the COVID-19 pandemic and many facilities are shutting down in an attempt to slow or mitigate the transmission of the virus. In light of this, many businesses are now seeking to determine whether they are obligated to perform under their contracts, or whether they can invoke a *force majeure* clause to excuse the performance temporarily or even permanently.[8] A *force majeure* clause is a contractual provision which excuses one or both parties' performance obligations when circumstances arise which are beyond the parties'

7 It is the *Latin* term for "agreements must be kept." It is mostly used in the international contractual agreements, treaties and bilateral agreements, and Understandings.

8 Rochefort, P. L., Boland, M.K., & Roskey, E. M. (2020). *The Corona Virus and Force Majeure Clauses in Contracts*, Akerman Practice Update, Akerman LLP, Akerman Nevada LLP.

control and make performance of the contract impractical or impossible. The *Contract Act of Bhutan 2013* indirectly talks about "impossibility of performance." It states that if after a contract is entered into, performance of a promise made under the contract becomes unlawful or impossible by reason of some event which is not within the control of the promisor, the contract shall become void when such performance becomes unlawful or impossible, and such a contract need not be performed.[9] Although the doctrine of *force majeure* requires an intensive inquiry and in-depth judicial analysis, it depends on the specific language.[10] The literal translation of the term *force majeure* means *"a superior force"* in French. It refers to:[11]

> *An event or effect that can be neither anticipated nor controlled; especially an unexpected event that prevents someone from doing or completing something that he or she had agreed or officially planned to do.*

To put it simply, the doctrine of *force majeure* refers to an event that is unanticipated and beyond the control of the parties, and that renders performance of contractual obligations impossible. It can be natural as well as man-made such as war, hurricanes, and unexpected legislations like the Farms Laws in India.[12] It generated huge uproar and protests by the farmers, resulting in death and injuries disrupting *Republic Day* celebrations in Delhi and other parts of northern India.[13]

The *force majeure* clauses are one of the primary mechanisms by which parties in the contract address on how to allocate the risk of loss in the face of potential uncertainties. Given the situation brought in by the COVID-19, it has forced nearly everyone to confront greater levels of uncertainty in many aspects of their lives. It is not surprising that the doctrinal legal

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9 *Contract Act of Bhutan, 2013,* s. 87.

10 Rochefort, P. L., Boland, M.K., & Mc Roskey, E. M. (2020). *The Corona Virus and Force Majeure Clauses in Contracts.*

11 Garner, B. A. (2019). *Black's Law Dictionary,* 11th (Eds.), Thomson Reuters.

12 The 2020–2021 Indian farmers' protest is an ongoing protest against the three farm *Acts* which were passed by the *Parliament of India* in September 2020.

13 Mashal, M.& Kumar, H. (2021, January 12). *Indian Farmers Vow to Continue Protest, Unappeased by Court Ruling*. The New York Times. Retrieved from Indian Court Suspends New Farm Laws, in Blow to Modi - The New York Times (nytimes.com).

concept of *force majeure* is now an area of heightened focus.[14] Such legal defences are an appropriate and pertinent legal tool in the delivery of Justice in different aspects of contract law. It balances the scope of uncertainty and unavoidable natural and man-made circumstances to circumvent the letters of the agreement, so that the difficulty is remedied. Generally, for any event to fall under defence of doctrine of *force majeure* to excuse or delay a performance in a contract, three requirements must be present:

a) It should be specifically mentioned in the *force majeure* clause in the contract;

b) It should have rendered performance impossible; and

c) It should be beyond the control of the parties.

Courts interpret *force majeure* provisions strictly. In their interpretation of the clauses in such specific instances, general words are not given expansive meaning, but are confined to things of the same kind or nature as the particular matters mentioned in the provision.[15] Merely ensuring that an event qualifies under the *force majeure* clause in the contract is not enough. A party would not be allowed to take the defence of non-performance under the doctrine of *force majeure* where:

a) The event could have been foreseen and mitigated; and

b) Performance is merely impracticable or economically difficult rather than truly impossible.

In light of this matter, it is interesting to review the recent *Notification* of the *Ministry of Finance*. The *Ministry of Finance* issued a *Notification*[16] pertaining the re-scheduling of intended completion date for ongoing construction works between procuring agencies and contractors. The *Notification* intends to shield the industries and construction firms from the levy of penalties for non-completion of the construction and associated works within the stipulated time. The *Notification* provides that the factors contributing to non-fulfilment of contractual obligations were attributed

14 Q&A: Rethinking commercial contracts post COVID-19. (2020, December). Retrieved January 18, 2021, fromhttps://www.financierworldwide.com/qa-rethinking-commercial-contracts-post-covid-19#.YAWsNGQzard

15 Pepper. T. (2020). *Your Contracts in a Coronavirus World*. Retrieved from https://www.troutman.com/insigh ts/your -contracts-in-a-coronavirus-world.html.

16 MoF/DNP/GPPMD-09/2020-21/611 dated 21 January 2021.

to closure of international borders, nation-wide lockdowns in August and December 2020 and declaring *High Risk Zones* in the southern Bhutan, which limited the movements of both labourers and materials.[17] In this light, the *Ministry of Finance* guides the parties to the contract to re-schedule the intended completion dates for ongoing construction works. Some of the key requirements under the *Notification* are:

a) Review all on-going projects, irrespective of whether the contract was awarded before or after 6 March 2020 and determine whether the project is affected by the pandemic or the existing duration is sufficient to complete the project;

b) If the project is not affected by the pandemic and if the existing duration is sufficient to complete the project, the existing contract duration shall be retained;

c) On the contrary, the procuring agency shall re-schedule intended completion date and issue a new intended completion date;

d) Only the Liquidated Damages (LD) for LD period beyond 5 March shall be waived off and LD period up to 5 March 2020 shall not be waived; and

e) LD or penalties collected for non-performance or delay of projects because of the pandemic shall be refunded or adjusted.

While the *Notification* seemingly is designed to cushion the contracting parties and assist them, by legally incorporating the COVID-19 situations in the country, it apparently lacks the clarity on other private constructions and other contractual on-going projects falling within the notified time. The *Notification* may be interpreted as applicable only to those contracts where one of the parties is a government agency. It throws a legal conundrum to the private contracting entities to settle the similar situational contractual disagreements through various formal and non-adjudicatory methods and models. The *Notification* should lay a bare roadmap for all contracts, including the private contracts, so that it eases contractual obligations based on genuine reasons. This will also unfetter the courts in the decision

17 On 21 January 2021, M/s. Bhutan Concast Pvt. Ltd. based in Pasakha was taken to the Phuentsholing *Dungkhag* Court for breaching the COVID-19 *Protocol* by illegally bringing foreign workers. There is a high restriction of import of foreign workers.

making, enabling them to expound the doctrine of *force majeure* based on the *Notification*. It can be also summarily argued that, for those contracts, which were executed after 5 March 2020, especially, which required the operation of human labour, constructions and others, in short, contracts which normally fell within the general restrictions for COVID-19 cannot be covered by this *Notification*. The parties as reasonable persons, who were able to assess the impending situations brought in by the pandemic, should have had reasonable prudence to foresee that the pandemic is going to last for uncertain periods of time. Unless and until the dangers of the pandemic had been mitigated so in far as to consider it safe, major contracts, that involved substantial financial inputs, should not have been carried on. Unless the contract works were executed to fulfil the mandates of developments and prioritized activities that require fund spending, contracts awarded after or on 6 March 2020 should not be covered by this *Notification*. If the contracts were awarded on general necessities, including the agency necessity to complete financial regularities on time, it shows the lack of risk assessment at the first place. Those contracts falls under the event that could have been foreseen and avoided and hence, a party would not be allowed to take the defence of *non-performance* under the doctrine of *force majeure.* In such cases, both the parties gambled in the risk assessment processes.

Impossibility of Performance

The other possible alternative is excusing contractual obligations under *impossibility of performance. Impossibility of performance* is a legal doctrine under which a party is excused from its contractual obligations due to an occurrence of an unforeseen event or circumstance, which render the performance of contractual obligations impossible. For example, if the contracting parties have agreed to construct a house at a certain place, and the place where the intended house construction was to take place has been made unsafe, owing to a landslide, it can result in the *impossibility of a performance.* In order to avail the defence of *impossibility of performance*, it need not be expressly mentioned as a clause in the contract and performance can be excused where:

a) The intervening act or occurrence was an unexpected;

b) It was of such a nature that parties would have assumed its non-occurrence; and

c) The occurrence of it rendered the performance impossible.

Like the doctrine of *force majeure*, courts construe the pleas under impossibility of performance in a strict manner. The doctrine of *impossibility* is also a very potent legal tool. It enhances defence for not carrying out an impossible task, which by an act or occurrence after the contract, has been rendered impossible. It balances expectations of the parties, and can reduce the contentions of the aggrieved party. It also acts as balancing tool to ensure that the contracts consider "fairness" on its part, so that it minimizes coercion to the performer. In many cases, the doctrine of *impossibility* is invoked in executory contracts. In a *Case,*[18] the defendants argued at the summary judgment stage that their repayment under a financing agreement was rendered impossible by the economic crisis. The court rejected this argument, where the court stated that impossibility "only excuses the performance of an executory contract," a reasonable restriction, considering that the doctrine applies only where the contract's *subject matter* or *means* of performance is destroyed.[19]

Frustration of Purpose

Similarly, the doctrine of *frustration of purpose* could be another defence. *Frustration of purpose* is an equitable doctrine, which focuses on the intent of parties, and whether an occurrence of an unforeseeable event has frustrated the purpose of making a contract. This doctrine "deals with the problem that arises when a change in circumstances makes one party's performance virtually worthless to the other, frustrating his purpose in making the contract."[20] *Frustration of purpose* applies when the purpose of the contract as understood by both parties is so completely frustrated that it makes little sense to proceed with the transaction. In an example, a party wanted to construct a house on a land at a place. However, the land had been forfeited by the government for some reasons. Therefore, here the purpose to construct the house has been eliminated since he does not own any other land than the plot aforementioned. For the defence of doctrine of *frustration of purpose* to be applicable, there should have been an event:

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18 *KBS Preferred Holding I v Petra Fund REIT,* [2010].

19 Hall, J.T. (2017). Defenses of Impossibility of Performance and Frustration of Purpose, *New York Law Journal,* Norton Rose Fulbright LLP, the United States.

20 *7200 Scottsdale Rd. Gen'l Partners v Kuhn Farm Mach. Inc*., [1995] 184 Ariz. 341, 345, 909 P.2d 408, 412.

a) Which frustrated the party's principal purpose in making the contract;

b) Which occurred without that party's fault; and

c) Whose non-occurrence was the basic assumption on which the contract had been based.

The Contract Act of Bhutan, 2013

Under section 58 of the *Contract Act of Bhutan*, it provides that parties to a contract are required to perform or offer to perform their respective obligations, unless such performance is excused under the provisions of the *Act* or any other laws in Bhutan. This is in keeping with the generally accepted rule of *pacta sunt servanda* as discussed earlier. Although the legal principle is applied at the international contexts, it also is equally relevant in contractual terms, since it basically entails the upholding of the treaties and agreements. In Bhutan, most contracts are governed by the *Contract Act of Bhutan.* The *Evidence Act of Bhutan*[21] talks about how legally enforceable agreements can be made, and what constitute invalid written agreements. As mentioned earlier, section 87 of the *Contract Act of Bhutan*, is one of the provisions, which excuses performance of contractual obligations under *frustration of contracts.* It states that:

> *If after a contract is entered into, performance of a promise made under the contract becomes unlawful or impossible by reason of some event which is not within the control of the promisor, the contract shall become void when such performance becomes unlawful or impossible, and such a contract need not be performed.*

Section 87 encompasses "unlawfulness" which destroys the "purpose" of the contract and "impossibility" as the reason of defence. In Bhutan, incorporation of the doctrine of *force majeure* clauses within the contract documents is not common. It is not specifically incorporated either in *Contract Act,* but can be inferred from section 87 of the *Contract Act.* Section 87 of the *Contract Act* provides this clause in all contracts automatically.[22]

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21 *Evidence Act of Bhutan, 2005,* s. 35.

22 Tshering, S. (2020, March 21). Getting out of a contractual liability due to Covid-19. *Kuensel*. Retrieved from https://kuenselonline.com/getting-out-a-of-contractual-liability-due-to-covid-19/

One might legally imagine that since these sections are incorporated automatically, it may easily excuse one from the liability of non-performance on the reasons of the COVID-19 pandemic, but legal contestations involve further judicial scrutiny and wisdom. It is not apparently simple.

A party seeking to rely on the defences of the doctrine of *force majeure*, *impossibility* or *frustration of purpose* must prove that the particular performance that they had promised under the contract has been rendered impossible or commercially impractical due to the pandemic situations, and that it was beyond reasonable control. For instance, a lease agreement between a landlord, **Mr. A** and the tenant, **Ms. B** wherein **Ms. B** works in the tourism sector, and has lost her job and exhausted all of her little savings due to the inhospitable pandemic situations. **Ms. B** in her dire financial circumstances is unable to pay her monthly house rents. Apathetically, the landlord, who has been discreetly hoarding himself with enough cash, demands that **Ms. B** should pay the monthly rents as specified in the rental agreement. The tenant is financially incapacitated and the demand for the due monthly rent has been relentless on the other. **Ms. B** is likely to be evicted due to failure to perform her obligations to pay rent. In this dramatic socio-legal scenario between the tenant and the landlord, if the issue is protracted into becoming a legally contested dispute before the court of law, **Ms. B** can request for the delayed performance or non-performance before a court under section 87 of the *Contract Act*, but must prove that due to the direct correlation between the pandemic and her loss of employment, the performance which is the payment of monthly rent has become impossible or impractical, and was beyond her reasonable control.

Conclusion

From a legal perspective, this pandemic has brought contractual risks allocation to the forefront, especially within the Bhutanese context where entities in this early state of capitalism operated in relatively low-risk environments often sheltered by government policies and assistance. The factor of unforeseen events is seldom put into consideration, the folly of which has been greatly negated by His Majesty's compassionate *Kidu*, i.e., the *Druk Gyalpo's Relief Kidu.*[23] The legal and financial conundrums arising

23 The *Druk Gyalpo's Relief Kidu* was launched on 14 April 2020 to provide income support to individuals whose livelihoods were affected because of the COVID-19 pandemic, has granted Nu.1.4 billion to 34,384 individuals so far (including child

from COVID-19 presents a sobering reminder of examining the *status quo* with the view to negate risk and conflict from subsequent global crises of which there will be many. The pandemic situation has allowed close examination of contracts, and helped in understanding the importance of risk awareness and risk management when entering into a contract. Going forward, it would be prudent to ensure that a contract language considers the implication of future pandemic situations and corresponding impacts of national restrictions on a contract, and lay out how the parties will be responding to them.

support *Kidu* of Nu. 50.2 million). The *Druk Gyalpo's Relief Kidu* has also provided support for interest payment on loans by grant of full interest waiver from July to September 2020 followed by partial interest waiver (50%) for six additional months from October 2020 to March 2021.

The Effects of Self-Instructional Materials (SIM) vis-à-vis the Right to Education in the Times of COVID-19[1]

Introduction

The right to education is meaningful only if the education offered is of high quality. While the concern for quality is prominent in national and international education policies, these too often fail to make explicit the understanding of quality on which they build. The *Council of Europe* advocates an understanding of quality education that takes account of the purposes that education should fulfil and that sees quality in relation to education systems, as well as schools and universities. In this view, quality education must be inclusive and give access to learning to all students, particularly those in vulnerable or disadvantaged groups, adapted to their needs as appropriate.[2] This raises the concern of whether the Internet classes were effective and engaging given the resources available. The question is whether these measures were inclusive and truly acted upon rendering everyone right to education, fulfilled their learning aspirations. On the contrary, it was seen that such classes lead to structural discrimination over period of time amongst students having access to Internet and others who lack access to such technologies.

Education in Bhutan is a culmination of skills, tutored and taught over time. Education strategies are essential to allow students to learn uninterrupted. With the public health hazards as a result of the pandemic, and the first confirmed case of the COVID-19 in the country, all the educational institutions were closed as a precautionary measure. In light of the pandemic to ensure a state of continuous learning, the *Ministry of Education* in

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1 Contributed by Eliseba Sinchuri, Sherab Jigme, Sonam Jamtsho, Tshering Zangmo and Ugyen Penjor.

2 It should also, among other things, provide a secure and conducive learning environment in which the rights of all are respected and develop each student's personality, talents and mental and physical abilities to their fullest potential. Not least, it promotes democracy, respect for human rights and social justice in a learning environment, which recognizes everyone's learning and social needs. *Council of Europe*, Making the Right to Education Reality in times of COVID-19, p. 8.

collaboration with other stakeholders such as the *Royal Education Council*, *Bhutan Council for School Examination and Assessment*, *Bhutan Telecom Limited*, *Bhutan Broadcasting Service Corporation Limited*, *Department of Information Technology*, *Bhutan Telecom Limited and Volunteer Teachers of Bhutan* strategized plans as education response to continue education. Unlike the regular classroom teachings, the modes of delivery were planned through various media platforms like the radio, Television, Google Classrooms and the print media.[3] In such critical times, Self-Instructional Materials (SIM) played a vital role in engaging in academic learning of the students during the pandemic period.

The guidelines for a curriculum implementation plan for *Education in Emergency* (EiE) 2020 states that this initiative was to build education resilience and to continue providing education to all the children in Bhutan. Similarly, immediate response to the education system after closure of educational institutions was an effective measure to adapt to the pandemic situation. However, implementation of the plan in the real field realized some barriers including children residing at remote and long distances, Internet network connectivity and family economic status. Furthermore, it was highlighted that some students got less support from the parents to access the opportunity due to social and cultural obligations. Although planning and framing for the *Education in Emergency* took little time, however providing education was never failed. The lessons continued on various media and social media platforms for children who were in remote areas.

The challenges were likely to impose on the general mass during any emergencies but the education coverage mostly catered to the larger interest of the mass. The government designed print materials to reach the unreached. It was rightly mentioned that students in the village had a very difficult time in submitting works from the printed materials. This came into real picture, most of the older students were working somewhere to earn for their parents, and an adaptive curriculum without assessment further eased out the student participation. Despite having distributed the instructional materials to those who were deprived from the coverage of media or smart phones, it was felt that the SIM poorly engaged students.

3 *The Guidelines for a Curriculum Implementation Plan for Education in Emergency, 2020.*

In order to find out whether the above mentioned statement is true, a Study was carried out. The Study was intended to find the effect of SIM implementations on engagement of the children in academic learning in light of their right to education. Consequently, the study aims at providing suggestions for improvement of the SIM and effective implementation of the SIM. In such times, we can analyze the effect of the SIM vis-à-vis the constitutional guarantee of providing education for the purpose of increasing knowledge, values and skills and development of the human personality.[4] The research intends to analyze the effects of SIM at the schools, its challenges and the ways to improve its effectiveness to ensure that education is provided unhindered as per the mandates of the laws and education obligations. Unlike in other countries, Bhutan does not have an *Education Act*, which determines powers and duties, and responsibilities of the students, amongst others. It speaks out about the standards of education, or even the effects of contagious disease, which mandates the closing of the schools.[5] An *Education Act* becomes a legal yardstick to gauge the effect of education and its tools, without it, legal assumptions on the quality of education has to be based on non-legal sources; with educational, social and technological parameters as a yard stick.

Education in Emergency and the Rights of Children

The concept of *Education in Emergency* is the adaptation of different institutions to meet the psychological needs of children and adolescent affected by the different stress factors, and here, it is the pandemic of COVID-19. All these are aspects of *Rights of the Child*. Education is increasingly viewed as the "fourth pillar" or the "central pillar" of humanitarian response alongside the pillar of good health services.[6] Children are vulnerable and dependent, and they are developing, not only physically but also mentally and emotionally. The sudden and violent onset of emergencies, the disruption of families and community structures affect the physical and psychological wellbeing. *Education in Emergencies* is becoming both a legal and socio-legal issue.

4 *The Constitution of the Kingdom of Bhutan*, Art. 9 (15).
5 *The Education Act of Saint Lucia, 1999.*
6 Sinclair, M. *Education in Emergencies.*

Education in Emergencies provides immediate physical and psychosocial protection, as well as life-saving knowledge and skills, for example, with respect to disease prevention, self-protection and awareness of rights. If children and youth receive safe education of good quality during and after an emergency, they will be exposed less frequently to activities that put them at risk. They will also acquire knowledge and mental resources that increase their resilience and help them to protect themselves. Inclusion in national education systems enhances these protection benefits.[7] These collates with other cross-cutting issues on rights of children, gender, right to participation, right to information, non-discrimination, among other rights enshrined in various national laws and international legal instruments.[8] The scopes of *Education in Emergency* can be looked from different dimensions.

A child in difficult circumstances as defined by the *Child Care and Protection Act, 2011*[9] are restrictive and only includes very legalistic approaches. It describes on the dimensions of physical protection and protection from abuse. However, when there are inadvertent situations, dictated by uncontrollable natural circumstances, like the COVID-19 pandemic, children at home, at different instances, are exposed to dangers associated with depravity of family life and associations. They may be distressed from different stress factors. Education, in such instances provides a forum for self-learning and relief with a direct duty on the parents. It provides them a basis for psychosocial and emotional wellbeing, and a platform for building competence.[10]

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7 UNHCR, Emergency Handbook.

8 *Minimum Standards for Education in Emergencies, Chronic Crises and Early Reconstruction*. (2004). The Inter- Agency Network for Education in Emergencies, D.S. Print, France.

9 *The Child Care and Protection Act of Bhutan, 2011,* s. 59.

10 Psychosocial well-being refers to the close connection between psychological aspects of experience (thoughts, emotions and behaviour) and wider social experiences (relationships, traditions and culture). It is broader than concepts such as 'mental health', which run the risk of ignoring aspects of the social context, and ensures that the importance of family and community are recognized.

Education in Emergency and Best Interest of the Child

Most children in our schools are under the age of eighteen. *The Best Interest of the Child*[11] refers to the totality of the circumstances and conditions, which are most congenial to survival, protection and feelings of security of the child and most encouraging to the child's physical, psychological, and emotional development. It includes least detrimental available alternative for safeguarding the growth and development of the child. Here, the word, "least detrimental" and "available alternative" is the consolidation of the idea of *Education in Emergency* since; it is an alternative, which is less detrimental to the students, than having no education in the times of the pandemic. Coincidently, it echoes as the best alternative to ensure that right to education is uninterrupted and expedient education methods are put in place.

Education and the Duties to Respect, Protect and Fulfill

The fundamental freedom of children is the freedom to get educated as guaranteed under the *Constitution* and other laws. The goal of education is the development of the child's personality, talents, mental and physical abilities to their fullest potential, and the preparation of the child for a responsible life in a free society. In support of this goal, it is important that the knowledge and resources of the digital environment are available to all children in a way that is inclusive and takes into account children's evolving capacities and the particular circumstances of children in vulnerable situations.

The Analysis of the Self-Instructional Manuals in light of Right to Education

Constitutionally, the *Right to Education* is part of right to life. *The Convention of the Rights of the Child*[12] states that right to education is to develop the child's personality, talents, mental and physical abilities to the fullest potential. This also inculcates a spirit of peace, tolerance, equality and freedom. In this light, the *Education in Emergency* is implemented through various modules of information, including the Self-Instructional Manuals. Self-Instructional Materials are any kind of print material considered as self-

11 *The Child Care and Protection Act of Bhutan, 2011,* s. 243.

12 *United Nations Convention on the Rights of the Child, 1989*, Art. 28.

learning, self-instructional or learner-centered material which identifies the ways of teaching and learning process and accordingly learning materials and experiences are designed to meet learners' needs. Minnick[13] claimed that while designing Self Learning Materials, "…it will be necessary to create non-verbal visuals as well as verbal communications. They will be valuable tools to assist learning. We can learn how to create these new learning packages, but it will require practice, patience, perseverance, and commitment."

The Self-Instructional Materials are composed of lessons, or units for distance learners. Self-study and assignments are key components of Self-Instructional Materials. Distant learners have to prepare the assignments with the help of self-instructional materials and submit these assignments to the tutors for feedback and marking.[14] It is studied that human brains are designed in such a way that it accepts what it sees, hears and what one does. The cognitive processes take place best when one is given the freedom of self-exploration. However, it becomes difficult without a proper instruction. A study[15] says that in open and flexible learning contexts, instructional materials have the capacity to cater for individual needs while enabling collaborative forms of learning.

In schools, it is focused on students-centered learning approaches, but when it comes to staying at home and learning, it is critical to analyze, if the approaches fulfil the mandates to the right to education of the students. This gives the opportunity to appraise if the students are getting the anticipated lessons, fulfilling their learning objectives. To such questions, Simui,[16] has said that no matter how effectively the Self-Instructional Materials are designed to reach the unreached, without interaction and

13 Minnick, D. R. (1989). *A Guide to Creating Self-learning Materials*, International Rice Research Institute, Manila, Philippines.

14 Sultana, N. (2016). Evaluation of Self- Instructional Print Materials of Distance Education System*, Bulletin of Education and Research, 38* (2).

15 Mc Loughlin, C., & Oliver, R. (2000). Designing learning environment for cultural inclusivity: A Case Study of indigenous online learning at tertiary level, *Australian Journal of Educational Technology*, *16* (1).

16 Simui, F., Kasonde, S., & Cheyeka, M. (2018). Enablers and disablers to academic success of students with visual impairments: A 10-year literature disclosure, 2007 – 2017, *British Journal of Visual Impairments*, Sage Publications, *36* (2).

communication between the learner and the teacher, it is still difficult to grasp everything on their own. It is researched that although the method is able to reach large group of students, since the students do not consist of a homogenous group, they have styles, habits and learning environment, mastery in the learning outcome cannot be measured. The curriculum design is adaptive; basically a theme-based learning activity. As stated in *Education in Emergency*, it says that since learning by the students alone is limited, it is the sole responsibility of the teachers as well as family members to acquaint the students with necessary guidance for the concepts covered in the learning activities provided in the books. It requires a shared parental guidance to fulfil the aspirations of the right to education of the students.

It is also claimed by Ryan & Deci[17] that play and active learning is intrinsically motivated. Although students are engaged and they are intrinsically interested and motivated, they best learn when they are together with two or more. Friends are important source of learning opportunities and skill development, and most of them play and learn together. In this research, the targeted population sample included sixty-six students[18] who received the Self-Instructional Manuals, as they did not have connections to television lines. The Study followed a mixed method approach called as *Parallel Convergent Mixed Method,*[19] quantitative and qualitative approaches. The Study had intensive participation by researchers in the field collecting data from the villages of two *Gewogs* of Tsendagang and Goshi in Dagana *Dzongkhag*. The researchers carried out a survey and interviews at the convenience of the participants based on the aforementioned category; through survey questionnaires, and semi-structured face-to-face interview including telephonic conversations. The data collected were scrutinized and studied thoroughly based on six steps of qualitative data analysis. The quantitative data was analyzed using SPSS 23 software through descriptive analysis. The final conclusion was drawn by converging the two different data [qualitative and quantitative] analysis.

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17 Deci, E., & Ryan, R. (2007). *Facilitating Optimal Motivation and Psychological Well-Being Across Life Domains*, Department of Psychology, University of Rochester, New York.

18 The representatives of the survey consisted from the students of class PP-X at the Dagapela Middle Secondary School.

19 *Parallel Convergent Mixed Method* is the Research Design in which it involves the simultaneous collection of quantative and qualitative data followed by comparisons and combinations of the data.

Qualitative Analysis

Responses are categorized into three themes for analysis purpose: Challenges faced by the children, guidance and the effectiveness of using SIM and suggestions for improvement. It was studied that learning from the Self- Instructional Manuals posed challenges both to the students and the parents. Learning from the materials was difficult; and it was further aggravated by the remoteness of the settings and illiteracy of the parents. The booklets become idle treasures without a literate guide in the villages, where students were mostly living. The Respondent, R7 claimed that there were none who could clarify their doubts, as most of their parents in the villages were illiterate. Similarly, R8 reported that they could not understand the complete information, as their parents, who were semi-literate were unable to comprehend the information set out in the manuals. R10 also responded that even parents could not understand the contents of the manuals. While one of the Respondents opined that children were least interested to study alone, underscoring the need for child-friendly environment and emotionally supportive atmosphere. Therefore, it is the responsibility of the teachers, care givers as well as family members to afford the students with the necessary guidance to ensure that the concepts are explained comprehensibly.

Considering the educational backgrounds of the parent, parents generally face difficulties in guiding their children, which directly impedes their learning. R4 and R15 shared that "learning without guidance" is difficult. For new beginners, especially the pupils who are in their first days in their school are unable to even recognize an alphabet. The activities given in the Manual were beyond their learning abilities. To Respondent R6 and R7, they voiced, "It is difficult for the school beginners." While others shared that they "cannot read [by] themselves," "face problems in reading big words," and "facing problem in pronunciation[s]." Respondents also showed a lack of seriousness in the study. Some children usually took advantage of being at home. As stated clearly by Respondent R5, "Children are not taking [it] serious [seriously] in the learning." Likewise, Respondent R12 declared, "Refusing to read even after reminder."

SIM turned out to be more complicated for smaller children. Therefore, respondents suggested the ways to improve learning from SIM. Three sub-themes were derived from the responses; guidance, language and illustrations. They stated that learning with a guide would be effective besides simplification of big words and additional illustrations. Respondent R4 reacted that peer learning could be effective. While Respondents R11, R14 and R16 shared that it could be better if some of the words are simplified. R15 and R16 suggested that the manuals could be standardized and few more pictures could be added. Mostly, the respondents shared that teaching can be only effective if teachers were around. Respondents further shared the concerns about the lack of guidance as direct impediment of the manuals. The parents of the lower class students also recommended contact supports.

Quantitative Analysis

The effectiveness of the SIM was analyzed based on data collected from 37 student respondents from classes IV to X using the SPSS 23 software tool. The data were collected from the student questionnaires with eight Likert-type items.[20] The questionnaires sought the effectiveness of the SIMs with four possible responses: Strongly Agree (SA), Agree (A), Disagree (D) and Strongly Disagree (SD).

The senior classes (IX and X) found learning from SIM (Max score of 87%) more effective. However, they were inadequately informed about the purpose of SIMs distribution, which stood at 70% compared to the younger respondents. The Study found out that junior children (classes IV to VIII) were not able to solve the activities given in the SIM (62.5%) by themselves. Further, it states that additional illustrations are needed for detailed concepts.

The Study revealed more than 60% (Minimum of 62%) score in all the items indicating that the SIMs implementation is effective in general. Meanwhile, SIMs required to be modified based on the scores in some

20 A "Likert item" is a statement that the respondent is asked to evaluate in a survey. Retrieved from https://www.alchemer.com/resources/blog/likert-scale-what-is-it-how-to-analyze-it-and-when-to-use-it/. It is also used in feedback forms which consists of answers "Agree, Strongly Agree, Dis-agree, Strongly Dis-agree and Neutral."

of the key areas. The effectiveness of the SIMs lagged behind with mean scores of 2.8 (out of 4) in item III (SIMs provide enough activities for learning) and item VII with 2.7 mean score (I can do activities given in the SIM easily) labeled at the lower mean. However, in classes, IX and X level showed greater effectiveness of the SIMs while it decreased with the lower class level. The activity-based tasks were inadequate to students in all levels of classes that raised a concern.

Results

The Study revealed that the SIM implementation is effective in general. However, children from classes PP to III were facing more challenges due to lack of guidance in understanding the instructions in the SIM. The beginner children had problems in understanding the content, baffled by the high vocabulary usage beyond their level. None of the parents communicated willingly with teachers to solve the issues, as most of the parents were busy with their daily farming works. Thus the beginners got less attention from the parents. This clearly indicated that learning from the printed media seldom helps the school beginners. The Study suggests that it is important to educate both children and parents on the learning mode of the SIM. It was also deduced that inclusion of more pictorial representation and illustrations could have been more effective.

Conclusion

The Study disclosed a general trend that the effectiveness of the SIM was directly proportional to class levels of respondents. The SIM has proven to be more effective at the higher classes (Classes IX and X). It is concluded that students face challenges in reading big words, pronunciations, understanding of questions and diagrams. Tutoring guides could have had the most important contributing factor for a more effective implementation of the SIM. Parents cannot and could not guide the students as teachers do in the schools owing to low level of literacy and other competing tasks in the villages. One of the respondents had stated that beginners were facing the highest challenges to study without guidance, which again points out to the parents unable to explain and tutor the children in detail directly impeding the children's learning.

According to one of the parents, students were not serious in learning at the same time children refused to learn despite the reminders. Besides the researcher team, parents have played a vital role in furnishing correct information to draw the combined conclusion that implementation of SIM is not possible without guidance. The findings recommends for the teacher-guides to visit and guide students while learning through SIM especially those students in the lower classes. The printed copies of the SIM must cater to a larger group of students at all levels for meaningful engagement. Additional Studies on process of assessment on children who are learning through SIM are required. The *Ministry of Education*, even if after its best efforts, has not been able to achieve the objectives of education, especially in the light of these challenging times. This also portrays the ability of our students to pursue self-directed studies, without the interventions of the teachers. Finally, the *Right to Education* is materialized only if the given mode of education is in accordance with what is our understanding of quality education. Moreover, it should take into account the purposes that education should fulfil. *Right to Education* should direct our students to think and learn independently at most times, which will help them to build self-learning attitude and independent working abilities.

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