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Dedication

Bhutan has always been blessed by the leadership of the "Righteous Kings" who inspired and administered a society based on ten virtues of the King: Justice, generosity, morality, liberality, honesty, gentleness, righteousness, truth and selfless public service. His Majesty the King is the direct offspring of Memory and Wisdom. Their Majesties the Kings have been the manifestation of the sympathetic and harmonious spirit of kindness and well-being. His Majesty the King is the symbolism of the profound qualities of fearlessness, wisdom of the jinas, and the possessor of the supreme skill in method. It is the enlightened qualities of His Majesty the King endowed with self- awareness wisdom and marvelous ability to accomplish the good of each and every one.

His Majesty the King is the selfless illuminator, the ultimate object of refuge, and the creator of the stainless space of glorious nationhood. A good King is both "rare and supreme"- very rare occurrence that is endowed as the "ornament of the world."

His Majesty embodies the ten aspects of the Buddha nature, and can be compared to the pure jewel, which has emerged into this Kingdom through the aspirations of Dharma, highest prajna, and compassion. It is the connection of our karmic bonds. The fruits of these "purifying causes and conditions" have brought onto this country the "Heir of the Victorious One."

On the 42nd Royal Birth Anniversary of His Majesty Jigme Khesar Namgyel Wangchuck, the Bhutan National Legal Institute take this opportunity to rejoice and dedicate our services to His Majesty the King, His Majesty the Fourth Druk Gyalpo, the Royal Family and the People. May His Majesty's sacred Royal endeavours illuminate the destiny of the Bhutanese People and usher in the continued golden rays of His leaderships, compassion, and extreme selflessness.

We would like to pledge this Volume of the Bhutan Law Review to enrich legal academics, information and legal scholarship in the country.

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Preface

His Majesty the *Druk Gyalpo's Royal National Address* on the occasion of the 114th *National Day* was formidable, filled with great affection and concern. National reformation requires the unstinted commitment of the people; and the commitment has to be supported by principles of resilience, professionalism, grit and dedication. Time and again His Majesty has been reminding us about the daunting task of national reformation process and the challenges brought in by modernism, and forces of global development. Some of the global forces have been long recognized and included in the economic, socio-cultural, political, demographic changes and technological dimensions.

Bhutan is a developing country. It is economically reliant on neighbouring countries: and the whole of commodities in Bhutan, except for few internally resourced vegetables, rice and furniture, Bhutan imports almost all the things required for daily sustenance. We always aspire what other country produces thus making Bhutan an import driven country. Importing radish, for example, shows that we are agriculturally impoverished; and radish to our experience, grows abundantly in the geography and climate of Bhutan. The question is who will grow it? While importing may remain easy due to substantive availability of goods at the door steps of the nation, it constrains our resources and the analysis of the income and the expenditure[s] every year risk the difference in the *balance of payments*. If we take an example of [an] office: use of Internet, the power heating the offices, the laptops, and so many official paraphernalia, is consuming the budget[s] of the nation. It evokes sensitivity, does the nation have enough: all we do in the office[s] is spend government money. Can this remain the same? Institutional governance system is costing Bhutan expensively and on the other hand, how much does Bhutan earn in a day? In the same line, a single civil servant, let us assume earns a monthly median salary of fifteen thousand ngultrum only and let us multiply this

by 23,000 [approximate number of civil servants]. By this calculus, we can on estimate say, Bhutan spends ngultrum three hundred forty five million [every] month on salaries despite other overhead capital and recurrent expenditures. In this light, are we doing enough to recoup these financial expenditures? It is these things that should generate words as accountability which comes and that should come in.

All across the world, the "competitiveness edge" is becoming a defining moment for each nation. New products and designs; new technologies and inventions – are marking the new market-based economy thus evolving social expectation[s], social wants and needs. The consumer driven economy "is a monetary economy" in which financial status of a person or the country is directly dependent on patent financial capacities. The modern concepts of "glass edge" competitive issues require that, we need to be resilient, effective and efficient. Competition is a manifestation of the aspiration of the nation to compete in the global stage. Competitiveness is becoming a new ground for fierce race in the evolving fields of science and technology. In this sense, the competitiveness goal for Bhutan should not and cannot be based on a global stage; competing with every country. The goal has to make the Bhutanese equally competent; but better than others in the fields of new dimension of value based development. We must be ready to survive challenges and prospects given by technological development. This has to start with internal reforms such as 21st century development agendas by reflecting, assessing, analyzing and documenting our past best practices and expected modern best practices Bhutan aspire to imbibe. The best way to reflection is introspection: and for that matter, national introspection of our values, challenges and goals are a must. Making a national goal based on national values and aspirations is critical to ensure that Bhutan enters into a sustainable path of development.

It need to look over our national strategies, aims and objectives. While making laws may be easy and things may change with the evolution of the government systems in the country, our national aspirations have to

be strategically aimed through relevant national driving methods. The nation building has to be supported by the people through discipline, integrity and values pertinent to our needs and aspirations. We require integrity and intrinsic national values rested on best professional competence, and tireless endeavour. Above all these, accountability as commanded by His Majesty the King: necessitates transparency, hard work and committed national development tasks. Unless for the values of integrity and discipline of the people, civil service reforms have to cater with brightest national vision and goals. It merits accountability in government, corporate governance, non-profit and private sectors and accountability in every citizen. This has to come.

The Buddhist ethos of accountability is rested on the principle of cause and effect and fertile causes and conditions. This is further rested on values inherent to Bhutan- the evolving nature of *Damtsig* and best psychological equalizing of the elements guided on three faiths: sincere interest, as a source and guide on the path, longing, being eager to pursue the path and establishing the conviction[s]. We have to borrow the Bhutanese epithets of higher perceptions based on the transcendental - perfectionist approach rested on discipline *(sila),* exertion *(virya),* analysis *(dhyana)* and knowledge *(prajna)* to engage in the path of excellence and merit. While any precepts of *good governance* will require the four basic institutional and personal foundations of discipline, exertion, the unwavering will, the multifold personalities of analysis, and knowledge and awareness of the requirements of the nation is paramount. The basic inculcation of the "great rules of life" requires the use of "appropriateness" and being "zealously mindful" that we are versed in the ritual of *"Life on the Path."* These terminologies of accountability, good governance, *rule of law* and transparency are the language and the definitions of universal life- be it in governance, personal lives or any other interactions and correspondences. It requires the dictation of self-discipline. The role of democratization and Justice, and the balance between openness and effectiveness are crucial to fulfill the goals of the nation.

Bhutan is a small nation with a very small population, cultured on "small society syndrome" as others call it. The best way to exert accountability can be by ensuring a competitive checks and balances. The word competitive is important. In theory, academic documents has a plethora of guidelines that explores how accountability, and good governance based on principle and *rule of law* has to be initiated. These doctrinal theories should be used as guide or as an insight to increase awareness, "discriminatory knowledge" is essential to establish relevant institutions of change. It has to be based on one-pointedness *(tse chig),* simplicity *(tredrel)*, and one taste *(rochig)*. This has to fit the aspirations of the nation and its people. The vehicles of the change has to be steady, systematic, founded on well-reasoned judgments and calibrated national endeavour. To recall the twelve link[s] *(tendrel chunyig)* which can be customized to nation building: it has to be characterized by knowing the national, institutional or personal deficiencies, developing credible and conscious actions, institution of realistic changes, which should be tested on the three domains of contact, feelings and results and instituting the changes and ensuring that realistic national development goals are developed and implemented. These twelve links provide us the basis for the development of formidable national development strategies that are rested on the *common conscience*, *acceptability* and *popular opinions*. These entails that all development strategies has to be tested.

Accountability is exercise of the virtuous powers *(tob)* based on intelligent choice, knowing the consequences: knowing the circumstances of living (practical national circumstances), knowing paths of wrong actions, knowing the sources of the obscurations to accountability. It requires immovable discipline, good intelligence, and stainless actions *(thinley drin ma mepa)*. The cosmology of Buddhist teachings offer very profound teachings on accountability, prudent actions and supreme aspects of governance and principled living. The genesis is both experiential and can be violated. Unless strict rules, and a systemic and conscious reforms are initiated it can be comparable to a polished mirror- *clean* as well *need to be constantly cleaned*. A mirror gets easily dirty. The goals for governance

should be guided by legitimate, effective, responsive institutions and policies that directs a value-based governance system. One of the essential element of the accountability is love, trust and care. These basic human values are essential patriotic foundations that are interdependent. If we love and admire, it is certain we will care and when we care, "caring with love and patriotism is different than caring without it." These innate feelings or motivations has to be nurtured, guided and respected by all institutions; and such feelings, in any person, can be eliminated due to reasons of demotivation and preferential treatment.

Although there are uncountable documents, research papers and policy documents on accountability, most of them talk about surface tensions-on building institutional accountability without considering the basic foundations – the credible human person. This foundational consciousness about accountability has to be tendered on the basic notions of human behaviour and the uncompromising ethical culture. It should be accepted that while compassionate governance is essential, compassion has two faces- the peaceful *(zhiwa)* and the wrathful *(throwa)*. Both these manifestations are premised on the indelible nature of truth "that good things should grow and the bad things should be eliminated." A system of governance and administration as we call it, is the systemic values of work, put in by a group of people. All rules, laws, and the normative human behaviours are social constructs and the nature of the social construct is that society can change it. It requires the basic humility and the unbreakable commitment and will.

Accountability and *rule of law* are concomitant social, administrative and legal principle. It can be professed that, many rules come up, when people are unable to discipline themselves and rules are purportedly the expression of the commitment to correct. It can be similar to writing the personal commitments on a book; which basically is to ensure that we have to abide by it; since we are unable to abide. These [may] be a wrong philosophy to few, but basic birth indoctrination[s] of good

human conduct and basic nature of human mind and consciousness are regulated by the cognitions of self-discipline; an unwritten personal law. It is that no person should instruct you to wake up, or sleep on time; the natural cycle of basic human conduct is essential in recognizing the inner values of prudence, discipline and self-regulation.

Bhutan has always nurtured the innate discipline. While discipline is professedly a rule of self-instruction, a Bhutanese by birth has a distinct inborn discipline. The cosmic Bhutanese concept of *Le* (Action), *Ju* (Cause), *Dre* (Results) are simply the straight line principles of "chaste actions" from a principled mindset that leads to principled actions. These are philosophies everyone knows; but inoculating them into our lives' values can be as difficult as a child fearing the syringe. An acceptable "social conduct" and the "populous ideology of the best" remains both relevant and critical. The theoretic of Darwinism- "the survival of the fittest" is a rudimentary living doctrine, but its inner beliefs and principles are undying, useful and competitive. The basic idea of "doing good" always start from the "dark recess of human mind" and it is the personal, social and national psychology that has to start with the "best is never enough" ideology. What is best today cannot be best tomorrow; and the perceptions of best performance are continually changing; and as conceived an expert of a disease, yesterday, as in "a single night," so many diseases evolve, come anew or simply exist. He may not be an expert today. Things are governed by extreme natural subjectivity. These theoretical underpinnings of the so called "best ideology" is conceptually never static. It evolves. The best car today, may, in few days, become the most ordinary car in the garage due to new and smart cars as a result of new innovations. Keeping vigilance, as others say, is one of the best competitive way to keep alert and best ideals can be learnt from mobile phone industries and automobile industries: they are never constant. The competitive edge and the *glass wall cliff* of modernism has to be rechecked so that we do not fall into the abyss.

The concept of personal grit and national grit is about "cutting edge." One of the best enigma of a metal substance is that "it can be hardened to meet the challenges." While a best cutting *Samurai knife* requires the best skills of cutting, the use of balanced force, and the angle of using the blade against the expected object; it basically rests on the strength of the metal, the smoothness of its finish as well as on the hilt. In such cases, the most perfectly hardened knife is easily spoilt if the person using it is unskilled. Taking that analogy, holistic approach to development is essentially necessary-it is the use of reasoned skills and tools and the challenges ahead. The best knife cannot cut a stone in half and the relevant tool has to be sought after.

Accountability in Bhutanese social as well as legal parlance has nothing to be sought from other doctrines. Although the facades are evolving and becoming multifaceted, it relies on the most rudimentary concept of how we think and processes our thoughts. An intelligent reason is not the incubation of naturally originating best-ideated thoughts, but thoughts that has been refined and processed-a progressive human cognition, reason and repeated judgements. It is the analysis; "incubating the best" and "doing the best" mentality. *Jugmentalism* in the thought processes is one of the fundamental ways to change our working culture and ingrained habits of responsibility and accountability. One of the established flows of work culture is theorized on the pre-conceived notion of "what I do is always right" and the "imposition of work culture of the few" and there is no horizontal as well as vertical transmission of best work values: the veil of senior against supposedly junior, the cult of age comes the wisdom, perpetuates the "similar working culture" that has been practiced over the decades. However, the younger generations and their mental characteristics are acutely defined by the *z generation effects*, who idolizes modernism and openness. The openness culture is also punctuated by "self-adulation" and "self-centricity:" that can create an intolerable society. Striking a fine balance is must; amalgamating the visions of the new and old is crucial; and infusing a work culture that respects hard work and non-superficial

dedication is going to be both profound. Most of the dedication in the institutions are directed at *self- propulsion*, *self-growth* and *career self-enrichment*. If that is not in the horizon, their mental rockets bursts and most remain lifeless at the launch pads.

Bhutan cannot eradicate the culture that has been existing for many decades at an instant; it has to be replaced slowly, by synthesizing and incubating time. However, we cannot keep the time as the healing factor. It is a universal character in the Bhutanese work culture that "we spring up like a frightened doe" as Joseph Conrad describes in the *Heart of Darkness*, when we hear the thunder; but we are soon asleep when the sun shines again. We are socially engineered to be "frightened only once," and what we can call as the "social relapse," may soon take over. We forget what we planned to do initially. The idea of consistency, constancy, reliability, fidelity, and "non-regression" is essential to imbibe the best work ethics and ideals. While we are cleaning the road ahead, it is imperative that we do not block the road that has been paved, thus imperiling our own safety. These analogies are critically relevant and we need to rehabilitate the way we approach to works, including infrastructure development[s]. It has to be initiated in many sectors. Accountability can be a poison for some: and if it is a helpful, taking poison as an anecdote is rational and should not be *lost in translation that the poison was administered for the purpose of good health*. If it is expedient as a means of attaining an end, it is still correct to administer the particular substance. We have to know the epistemology as well as the ontology, through investigative analysis-both relative and absolute.

From the academic perspective, accountability has taken new shades of meaning through its increased usage in accounting, socio-psychological, public administration, political scientists, international relations, including others. The idea of accountability is historically rooted in the practice of bookkeeping and in the discipline of accounting. It is a concept arising from some relations based on obligation and with some consequences

in view. The sense of accountability of a person [actor] depends upon the forum. In an ordinary social relationships amongst citizens; as a child we are accountable to our parents, the same actor as a student is accountable to teachers, when that actor grows up and enter the job, he or she is accountable to the employer as an employee, and after marriage he or she is accountable to spouse. These are classified as private or closed-door accountability. It is far more complicated when it comes to public accountability in public organizations and institutions, where an actor is accountable individually as well as collectively following chain of command within a bureaucratic organization. As a member of the political party, one has to give account to political forums, to voters, other *Members of Parliament* and other political representatives, Ministries, Political Parties and so on.

Based on the relationship, the content or subject of accountability may vary from financial, legal, procedural, communicative, and so forth. The *Royal Civil Service Commission (RCSC)* strives to establish transparent and accountable civil servant *inter alia*, in the service of the *Tsa-Wa-Sum*. Accountability in civil service has the attributes of both private and public accountability. At an internal level for instance, a Legal Officer accountable to his or her superior can be seen as a private accountability. The collective responsibility of the legal department is a form of public accountability, which can be further categorized as external accountability. Accountability is often seen in a vertically up-ward line of hierarchy, where subordinate is accountable to a superior. It is also felt in the presence amongst equals in the horizontal line of hierarchy. In a true sense, accountability must be imposed at all levels of hierarchy and in all directions. Someone on the top of the hierarchy with decision-making power is obliged to account vertically downward, for the implementation of the decisions they have taken. In this respect, the *RCSC* along with other agencies has started to initiate reforms from within. However, it is yet to know the forms and magnitude of those reform measures. The *RCSC* might come up with the policy and standards, but it is the responsibility of every one to remain

up to that expectations. If left upon *RCSC* alone it will remain as mere policy without short of implementation. All things has to be systematic: the process of systematization requires the postulation of a *logic rubric*, coming up with the policies and laws; and ensuring it is informed and applied "indiscriminately" as per the intent, letter and spirit of the law.

Public accountability invites scrutiny and requires transparent and open work culture. One such agency for instance, the *Judiciary* has a good role to play. While injustices are and becomes [mostly] spoken through the social media platforms, the social media platforms, for that matter is a simple conduit of expression, it does not have the essence of judgment. In such sense, accountability as a credible, and respectful step towards "maximization" of national output, cannot be revolutionized through the parameters of the Internet. Recalling and living the profound and sacred words of His Majesty the King, the *Bhutan Law Review* aspires to capture the auspices of accountability so that we build a stronger nation- looking at the lives that may come and the paths of development, Bhutan has to tread in the coming future. We recognize the elemental importance of accountability today, and in the future to come, so that the directions of administration, governance and national building efforts are professional, progressive and dedicated and is devoid of superficiality and *self or vested* interests. The name of Bhutan has to be called from the heart, and not from the lips.

The conceptual background of accountability has been surrounded by the normative beliefs of public institution accountability. It should be recognized that discipline and accountability is a very pervasive terminology and interweaves the personal as well as institutional domains. These contexts, also confront us with the rising openness of the people, degrading respect in the society, and the penetration of individualistic work and life cultures. This may be in one word, the balancing of modern personal priorities, however, modern priorities have become more of a voice than it has reasons behind it. Accountability and official

task performance, freedom of speech and accountability, transmission of useful knowledge and use of resources, development and cultural vitalities; there are many things we have to be aware of-thus the middle path approach, which has been already mentioned: requires walking with mindfulness. While mindfulness is not very objective but critical thinking and mindfulness in modern day interventions and interactions are essential to preserve our own sanctity and safety, be it legal or social.

The notions of modern radicalism is, "I am always right…" "The government has to fulfill … and this is my right" is a confusing social and legal nomenclature. Rights and duties are both legal and social outcomes and this [has evolved] through the theory of nature and natural; for that sense, duties are also natural offspring of a right. We claim [many] rights as our own, enforceable through the social or legal mechanisms. However, pathetically, we are still evolving childishly. We are unable to take care the cover of the sweets we have eaten. If we do not question the self, the right to self may not exist, interchangeably. We are unable to take care of our own selves. So, accountability cannot be defined, in few words, it, simply is a waste of time; it should be sunk in the behaviour as well as in the characters of the society, it has to be taught, if required through a carrot and stick method. The era of self-regulation has come concomitant with normative regulations.

The biggest threat to democracy is lack of critical thinking skills of general public to differentiate information from misinformation. For that matter, the accountable usage of words, be it in the media or the construction of social media information based lifestyles, has accentuated personalized views: thus distorting the role of media and public opinion. Social media platforms can be weaponized by anyone, anywhere, anytime. Internet reporting might destroy investigative journalism and genuine reporting. We cannot avoid blame, for each one of us have unique role to play in the nation building process. Accountability has to be in many fronts-it will need a social restructuring. Be it public institutions, social media users, the

media, the public, the government structures has to be very sensitive: it requires to balance responsible living, be it in the social, political or national domain. "Shoot the reason before the words," has to be encapsulated personal or institutional doctrines. There should be mechanisms put in place to ensure accountability and if there are no good mechanism[s] for the reason, the blowing of the issues through the charnels of social media may, in the long run evoke negative public sentiments and destabilize social and legal order and provide national forum to mimic "what is done by the societies in other countries." The best example is the truckers' protest against the vaccine mandate in Canada: when we think about our rights more than what is done to protect us, it is inevitable to say and quote Oscar Wilde, when he said: *"It is the best intention that worst work is done."*

The *Bhutan Law Review* is a transformative legal and social discourse forum. It aspires to emulate the noble role of laws as information for good conduct, capture the essences of nation-to recoup the values the society needs and strengthen the threads of social fabric through legal information and engagements of the laws as tool to an informed and righteous conduct. In this Volume, the *Journal* reflects the timely and most important considerations of accountability in line with the commands of His Majesty the King to relook at the appearances of our administrative, personnel and national machineries, so that we are accountable, responsible, disciplined and result-oriented. It recalls that when digging for gold, simply digging with a lost mind is not enough: we have to dig energetically; recount not the hardened surface of the pit, but the inner value of the gold, that we [may] discover. The articles in the *Journal*, tries to focus on basic ideas of accountability and *rule of law,* and other contemporary and relevant topics to ensure that, we keep the *Journal* relevant, timely and responsive. We hope our readers find the publication worthwhile; and we will continually serve our readers with the time, space and institutional considerations to enrich legal research, legal academic discourses and expand legal thoughts and repositories

in the country. We aspire to promote the *rule of law,* legal research and use law as one of the tools for self-discovery and enrichment through education, information and communication. We aspire to aid the *Judiciary* and the legal professionals in arriving carefully considered and researched interpretations, arguments and decisions, policies and publications, which have long-term implications for the country and the people. The Institute seek to balance and publish national legal priorities, while at the same time echoing the aspirations of our writers and authors, so that it is relevant, and provide opportunities for legal academic research and writings.

Article 10: Parliament

The Exposition of Constitutional Kuthangs

The Constitution of Bhutan is the [best] expression of Bhutanese values, identity and legal sovereignty. It is the most profound legal document that guides us towards the ideals of fortune, best national interests, governance based on values inherent to our culture and nation. It is the most profound piece of legislation, that supports the breathe of the nation, safeguards the legal and geographical frontiers of the nation and ushers the streams of five coloured heavenly Justice. It is the emanation of a heavenly law or a celestial gift of human thought that commits to advance the fortunes of Bhutan and its people. Recalling the immense weight the *Constitution* has, in protecting the people and securing the sovereignty of the nation- we cannot call it as the law, but a spell of legal bliss, that eternally exists to turn the wheel of good actions. It is the conduit through which the Bhutanese aspirations are voiced; and glossed treasure trove that Bhutan has inherited as a country. While the *Constitution* in other countries, in most cases, is the document that reclaim[s] the rights of the people, Bhutanese *Constitution* is embedded in pure national thoughts-driven by ascetic and divine vows to provide *refuge* and *salvation*. It is doctrinal path for realizing the secrets to national aspirations, the spirit of the *Buddha* and the letters of the law.

It can be surmised that for the unclean eye, it can be seen as the consolidation of a law; in the eyes of the enlightened, progressive and open-minded, it is a gilded casket of a wish-fulfilling treasure. We will realize its values; only when it becomes a matter- an interest that affects us individually. As said, the *Constitution* is the combination of acute national acumen, foresight and "unsurpassed legal wisdom" distilled into the best national legal scripture that assembles the treasure and blessings of the compassionate and enlightened leaders. It is the field of unified "legal wisdom and method" that perpetuates and enriches the sources of happiness, stability and security. The *Constitution* is the fundamental

law of the nation. It encapsulates "purity of action" and a culmination of inexhaustible treasure of good legal judgment and nine noble powers of conduct, of vehicle, of loving kindness, the power of merit, wisdom, knowledge and skills. The *Constitution* can be called as a gateway to excellent traditions of pure view and conduct. The *Constitution* is a tenet of Bhutanese legal authority and an expression of the will of the people to nurture the ideals of Bhutanese values, rich cultural heritages and establish the "auspicious order" of good legal conscience, and strengthens the precepts of *Gross National Happiness.* It established a new political order, *rule of law,* the principle of institutional morality, and the compassionate administration of *Justice.* It is the major carrier of values, institutional procedures and memories, so that a nation is able to create a "legal identity" of its own. The *Supreme Law* provides the ripened basis for democratic norms, socio-economic development and political reforms.

It consolidates the famous phrase *"that the destiny of the nation lies in the hands of the Bhutanese people."* The destiny of a nation is secured by the nature of our laws, and how fairly and strongly laws are administered to ensure *Justice.* The *Constitution* is the life force for our laws and the legal system. It secures the "physiology" of our laws and enunciates the principles of good governance and physiological regulation of our laws and the legal system. It espouses the basic fabric of nation building based on the principles of *Gross National Happiness*, *rule of law* and compassionate governance. We celebrate the *Constitution* with the patriotic fervour, as it is the celebration of the independence of the laws, and defines the legitimacy of the legal system. The Bhutanese *Constitution* is the most venerable document. It is a focal point for collective loyalty. It filters, formalizes and directs the nation building process towards democracy and the *rule of law.* It includes traditional symbols and values and establishes collective identity, common history and common popular conscience collective of the Bhutanese nation. It provides a discipline mechanism for a more rapid, effective and flexible method of law as governance. The *Constitution* is the convergence of the laws, our culture and traditions but also plays as an effective agent

of modernization and social change. It is the reflection of our collective consciousness and an appropriate intermediary in relation to law and social change.

Bhutanese laws are a manifestation of pure thinking and habitus of kindness and compassion. It encapsulates the traditions of middle way thinking with the "fundamental intent" to fulfill the aspirations of the Bhutanese people. The *Constitution* embodies the profound essence (*zabtik gyastsho)* and is a meticulous expression of the laws thus setting auspicious conditions for the growth of sacred legal traditions in the country. The *Constitution* is the monument to His Majesty's vision for His people to protect and preserve their destiny. It outlays the visions and guiding principles with which the nation and its state actors should function.

The *Constitution* is the most serene legal document-that encapsulates the Bhutanese vision of legal sovereignty based on best Bhutanese ideals of a compassionate society. It is a reflection of our desire to usher a nation with contemporary legal values, and a visionary visualization of our future legal, social, economic and national values that will sustain Bhutan. The *Constitution* is the mother of the Bhutanese laws; and it has engendered a legal system that best respect the values of the people; a democratic culture based on the ideals of the popular opinion of the people and the society. As the brainchild of His Majesty the Fourth *Druk Gyalpo* Jigme Singye Wangchuck, the *Constitution* is the gift to the people of Bhutan; since few leaders in various parts of the world are able and willing to give a law that best respect and uphold their rights. In many countries, the birth of a *Constitution* is based on a very hard struggle to obtain legal and constitutional rights; and it is an outcome of generations of internal struggle, strife and national uncertainty.

Stability in the nation is ushered by laws that is nurtured by best social and national practices, understood, shared and owned by the people. The *Constitution in Bhutan* is not only a reflecting mirror of the legal aspiration, practices, social mores, political ideals, and governance practices preserved

on the higher ideals of *Gross National Happiness,* it best dictates the future of Bhutan, our laws and the legal system and the concept of governance – making it practical, relevant, contextual and contemporary to fulfill the evolving aspirations of the people and the country. In many countries, best laws dictate contradictory social norms, and encapsulates a right-based social moralities, guiding the nation to different aspirational legal paths. These "paths" fuel national and legal values that is viewed through the lenses of a right based legal ideology, and a system that enforces rights more than duties. This will lead to changing legal expectations of the people- and channel a view that only "demands," "expects," "litigates" and "stresses" on rights and privileges. These legal doctrines not only best reflect the individualistic concept of legal, social, political and other rights, it perpetuates an intolerable and non-compassionate society. One of the fundamental aspects of the laws, is its ability to shape social expectation and provide a right-view to the people. Law should generate positive social culture and shape the views, expectations of the people; and channelize a society based on indigenous values and morals.

The *Constitution of Bhutan* is the best legal precept. It is based on the fundamental and quintessential jeweled casket of rights, a gem that purifies the defiles of humanity, thus providing an ocean of wisdom, and awakening guidance to the people of Bhutan. These descriptions are not unmerited praises but description of the legal phenomenon and cosmology of Bhutanese legal and constitutional architecture. It is grounded on discipline, diligence, the equality of self, and the equality of beings, providing an unconditioned path to cultivate and nurture a life based on "unsurpassed human values." Legal precepts, conditions and virtues are a constitution of legal and social ethics practiced in certain culture, and place, thus "purely" ground the legal ideology on that particular place with practical legal doctrines.

Many laws in other jurisdictions, and especially the constitutions are both

aspirational and primitively right-oriented. This, instead of providing a firm and *rule of law* based legal culture, it provides a basis for *"legal sound and fury"* – that circulates and perpetuates a "legal view" without morality and *moral discipline*. One of the important aspects of laws today is the need to infuse the *moral discipline (sila)* in the people. The *Constitution of Bhutan* is a much disciplined legal document that has *moral disciplines* as a constitutional ornament – that finds the highest state of existence. *Moral discipline* is the basis of happiness of the people. It is comparable to a precious vessel of richness that generate good qualities. Further, the *Constitution* is a design of wisdom, logical reason and valid cognitions.

In the Buddhist text of *Dege Kangyur*, the concept of *rab tu byung ba i zhi* or *"The Chapter of Going Forth"* enunciates a rich bricolage of disciplines and provides the guidelines on the "rites to going forth." In the same way, the *Constitution* provides an immortal, peaceful, ageless and unwavering state of the laws, thus postulating a very important legal verses as:[1]

When land and life are threatened,
Seek always to protect life.
When the wise look at both, they see
Land, but not life, can be found again.

In the similar way, the *Constitution of Bhutan* is a source of love, care and affection. It is the wealth of the noble beings, and will remain as an ornament to the world, whose latent roots of virtue will bud, whose virtue roots of budding will blossom and open and un-cloud the eyes of the people.

The constitutional philosophies are manifested representation of the self-less nature of Bhutanese leaders. While many will say that the *Constitution* reflects the tenets of the *Universal Declaration of Human Rights (UDHR) 1948,* thus losing our careful study of its selflessness, it is a *transcendental perfection* of phenomenal legal, social, political and national wisdom. We

1 As translated in *The Sutra of Having Moral Discipline* in the *Dege Kangyur.*

can eulogizes the *"skill in means"* to attain perfect nation state of Bhutan. Our constitutional legal values are a mediation between modern and traditional legal and social infrastructure that professes inner morality and the assimilation of the cosmos and the individual. It provides the legal space and causational attributes for a matured legal system and acts as a great vehicle of happiness for the people.

As a tribute to His Majesty the Fourth *Druk Gyalpo* on His 60th glorious Royal 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. There shall be a Parliament for Bhutan in which all legislative powers under this Constitution are vested and which shall consist of the Druk Gyalpo, the National Council and the National Assembly.

2. Parliament shall ensure that the Government safeguards the interests of the nation and fulfils the aspirations of the people through public review of policies and issues, Bills and other legislations, and scrutiny of State functions.

3. The election of the members of Parliament shall be in accordance with the provisions of the Electoral Laws of the Kingdom.

4. A person shall not be a member of the National Council as well as the National Assembly or a Local Government at the same time.

5. The Druk Gyalpo shall summon the first sitting of Parliament after each general election.

6. At the commencement of each session of Parliament, the Druk Gyalpo shall be received in a joint sitting of Parliament with Chibdrel Ceremony. Each session shall be opened with a Zhugdrel-phunsum tshog-pai ten-drel and each session shall conclude with the Tashi-mon-lam.

7. The Druk Gyalpo may address or sit in the proceedings of either House or a joint sitting of Parliament as and when deemed expedient.

8. The Druk Gyalpo may send messages to either or both the Houses as deemed expedient.

9. The House receiving the message shall, as early as possible, consider the matter referred to in the message and submit its opinion to the Druk Gyalpo.

10. The Prime Minister shall present an Annual Report on the state of the nation, including legislative plans and the annual plans and priorities of the Government, to the Druk Gyalpo and to a joint sitting of Parliament.

11. Both Houses shall determine their rules of procedure, and the proceedings of each House shall be conducted in accordance with its own rules. The rules of procedure in each House shall provide for the appointment of Committees to carry out the business of Parliament.

12. The Speaker and the Chairperson shall convene an extraordinary sitting of Parliament on the command of the Druk Gyalpo if the exigencies of the situation so demand.

13. Each Member of Parliament shall have one vote. In case of equal votes, the Speaker or the Chairperson shall cast the deciding vote.

14. The presence of not less than two-thirds of the total number of members of each House respectively shall constitute a quorum for a sitting of the National Council or the National Assembly.

15. The proceedings of Parliament shall be conducted in public. However, the Speaker or the Chairperson may exclude the press and the public from all or any part of the proceedings if there is a compelling need to do so in the interests of public order, national security or any other situation, where publicity would seriously prejudice public interest.

16. The Speaker shall preside over the proceedings of a joint sitting and the venue for the joint sitting of the Houses shall be the hall of the National Assembly.

17. When the office of a member of Parliament becomes vacant for any reason other than the expiration of term, an election of a member to fill the vacancy shall be held within ninety days as from the date of the vacancy.

18. The members of Parliament shall take an Oath or Affirmation of Office, as provided for in the Third Schedule of this Constitution, before assuming their responsibilities.

19. The Prime Minister, the Ministers, the Speaker, the Deputy Speaker, the Chairperson and Deputy Chairperson of the National Council shall take an Oath or Affirmation of Secrecy, as provided for in the Fourth Schedule of this Constitution, before assuming office.

20. Every member of Parliament shall maintain the decorum and dignity of the House and shall desist from acts of defamation and use of physical force.

21. The members of Parliament or any Committee thereof shall be immune from any inquiry, arrest, detention or prosecution on account of any opinion expressed in the course of the discharge of their functions or vote cast in Parliament and no person shall be liable in respect of any report, paper or proceedings made or published under the authority of Parliament.

22. The immunities herein granted shall not cover corrupt acts committed by the members in connection with the discharge of their duties or cover other acts of accepting money or any other valuables in consideration to speak or to vote in a particular manner.

23. The concurrence of not less than two-thirds of the total number of members of each House respectively is required to remove the right of immunity of a member.

24. The National Assembly and the National Council shall continue for five years from the date of the first sitting of the respective Houses. While the National Council shall complete its five-year term, premature dissolution of the National Assembly may take place on the recommendation of the Prime Minister to the Druk Gyalpo or in the event of a motion of no confidence vote against the Government being passed in the National Assembly or in accordance with section 12 of Article 15.

25. Except for existing International Conventions, Covenants, Treaties, Protocols and Agreements entered into by Bhutan, which shall continue in force subject to section 10 of Article 1, all International Conventions, Covenants, Treaties, Protocols and Agreements duly acceded to by the Government hereafter, shall be deemed to be the law of the Kingdom only upon ratification by Parliament unless it is inconsistent with this Constitution.

The *Parliament of Bhutan* is the most sacrosanct national institution in the country. The *Parliament* is constituted by the *Druk Gyalpo*, *National Council* and the *National Assembly*. It is tripartite institution that engineers Bhutanese laws, and possesses the legislative power under the *Constitution*. The *Constitution* provides them with an immense duty to legislate and fulfill the aspirations of the people by enacting laws that are stable, helpful and supports people to enrich their lives. The *Parliament* is the highest law-making body in the country. They shoulder an immense responsibility to direct research, logic, reason and ensure a continuum of Justice, so that laws are a transmission of greatest values to the society. While they conceptualize the formal conception of the *rule of law*, it has to be pragmatic, and serve the interest of the community and inspire confidence in the institution of law and Justice. The Buddhist precept of the *Silken Knot* and the *Golden Yoke* are two inherent Buddhist as well as Bhutanese legal drafting principles that ensure that [any] laws that are drafted are good, and serves as the guardian and protector that will punish the guilty and secure a just legal cause and remedy.

The *Parliament is* the repository of the voice of the people. While the nation constitutes numerous sects of people, and in big countries, a segregated levels of people- rich and poor, and of different races, their voices are directed through the words and voices of the *Parliamentarians*. The *Parliamentarians* are voices of the people-and it is through them that national aspirations are voiced, and the "wheel of perfect laws" are turned. The *Constitution* says that they are mandated to review the policies and issues, *Bills* and other legislations and scrutinize the state functions. These are huge national tasks, a mandate provided by the *Constitution* which, in Bhutanese phrase is a very heavy political, national and legal weight. They have to condition that the national machineries are smooth, well-oiled and engineered to travel great lengths, thus overcoming any hurdles of any nature in the governance of the country. A "well-engineered machinery" in simplest terms require the fixture of requisite components of the machinery; and components have to be both standardized, and

"fitting" and "responsive." A "well-functioning machinery" may not last long; if it has been composed of inferior material parts. It requires well-tested and perfectly manufactured mechanical components that are apt and responsive. In the same way, the machinery of governance should be fixated on the *principles of quality and excellence.*

The *Parliament of Bhutan* is made up of sacrosanct personalities that transcends the paradigmatic boundaries of different people and locales. They are expected to possess team work spirit, coordination of powers, political collective responsibility, with respect for democratic norms and principles. They have the utmost duty to safeguard the *Constitution*, democratic values, strengthen the *rule of law,* promote public interests and act diligently to promote good and effective governance. They are also mandated for proper stewardship of public resources, avoid improper influence, and strengthen public integrity and accountability.

Political pluralism and space of diverse political discourses are essential part of a strong political institution and society. They have national as well as international responsibility to direct and fulfill the aspirations of the Bhutanese people. The *Constitution of Bhutan* enumerates a period of five years as the "term of the government;" and these times show that government and political parties will be cyclic political phenomenon. The wheel of the *Parliament* will keep on turning; thus *Parliamentarians* may resemble the spokes of the wheel and His Majesty the King as the axle in the democratic wheel perimeter. In this case, applying the principles of the laws of physics, the spokes [may] support the smooth turning of the wheel, but the real weight of the load is borne by the axle. Even in *Kangyur*, drawing the analogy of the wheel, *Lord Buddha* has instructed his disciples that unless the axle is extremely strong, the wheel may falter and the spokes may break. In similar way, the role of His Majesty the King as the guardian of the *Constitution* and the *Parliament* is both enormous and sacred. His Majesty the King is a sacrosanct institution in the *Parliament*, who [shall] direct the *Parliament* with His transcendental wisdom.

The *Parliament of Bhutan* is the "*vajra* quintessence"[2] to support, uphold, maintain and extend the image of Bhutan to the outside world. Under Article 25 of the *Constitution*, they have the power to ratify the international legal instruments, including *International Conventions*, *Covenants, Treaties, Protocols* and *Agreements* entered into by Bhutan. These international legal instruments are international norms and standards, and conditions that may dictate Bhutan to abide, respect and follow legal principles enunciated in the international legal environments. These [may] require absolute mindfulness for:

a) Investigation;
b) Reasonable quiescence;
c) Awareness, knowledge and foresight; and
d) Judgmentalism.

The *Parliament of Bhutan* is an institution for national rectification and action. In [all] cases, the *"intents of the Parliament"* are interpreted through the letter and spirit of the *Act, Orders* and *Resolutions* that affect people, institutions and the nation. In this political background, it is apposite to recall the values elucidated in the *Silasamannata*[3] as

a) Harmonious moral conduct;
b) Maintaining a level of conduct that meets community standards;
c) Adhering to community rules;
d) Not making oneself as an object of distrust in the eyes of the community;
e) Refraining conduct that is detrimental to the community; and,
f) Homogenous and equal respect for community law and compliance.

2 *Phags pa rdo rje snying po'i gzungs zhes bya ba theg pa chen poi mdo* as enunciated in the *Dege Kangyur,* vol. 56 (mdo sde, na), folios 278.a–289.b.

3 Tobgye, S. et al. (2021). *The Buddhist Jurisprudence and Pre-constitutional Principles,* Kuensel Corporation Limited, Thimphu, p. 36.

In line with Section 1 of this Article, the *Parliament* consists of the *Druk Gyalpo*, the *National Council,* and the *National Assembly*. Pictorially, representations are captured in the *Kuthang* to ensure that we illustrate the symbolisms and the intentions of the *Constitution* through illustrative representations that shows the intent and the sacred syllogism of the *Constitution*. The *Raven Crown* is the symbolic representation of a sacred Royal person embodied in His Majesty the King, who is flanked by emblem of the *National Assembly* and the *National Council* thus embodies the two separate Houses of *Parliament of Bhutan.*

The Raven Crown

The *Raven* is the national bird of Bhutan. The *Raven Crown* signifies His Majesty the King, a *Chakravartin,* who has acquired eons of merit and good fortune who rules the nation with compassion and doctrines of *Buddha nature,* the most sublime possession of a true benevolent leader. The *Raven Crown* was designed and gifted by *Lama Jangchub Tsundru* to His Majesty *Gongsar* Ugyen Wangchuck before His coronation in 1907. The *Raven Crown* reflects the sacred nature of Bhutanese authority; and inviolable sacred nature of our leadership and governance.

The People

The Bhutanese people are an allegory of boundless resilience and spirit. The catalogue of the *National Memorial Chorten* in Thimphu pronounces:

The completely white body of altruistic attitude;
Is always clothed in a sense of modesty and shame.

These lines show Bhutanese people are directed and guided by the best moral and spiritual precepts as outlined in the *Gyewa Chu* and *Michoe Tsangma Chudrug*.[4] These spiritual precepts enable Bhutanese to lead a

4 These precepts underscores the people to be "right- minded" thus leading "righteousness" and encapsulates a philosophy of "right life" based on intrinsic *human values.*

happy, contented and spiritually fulfilling lives as echoed in the catalogue thus,

> *From the dual system of the glorious Drukpa tradition flourishing far and wide;*
> *May the fruit of benefit and peace for the present and ultimate times;*
> *Equal and exceed those of the golden ages.*

The Golden Scripture of the Constitution

The words of the *Constitution* were captured in gold. The golden script venerates the sacred spirit of the *Constitution* and the golden letters of the words of the *Constitution* mark the dawn of the *golden age* in Bhutan. The inscription on the middle courtyard of *Samye Monastery* in Tibet reads:

> *The Lord of humans who reigns over a country justly;*
> *Tames beings through gentle and discriminating wisdom.*
> *Surrounded by an assembly of gallant ministers,*
> *He protects them as his own children.*

In this context, the *Constitution* as a *golden scripture* represents the quintessential synthesis of the views and objectives of the King, Ministers, and the subjects. It is the culmination of the nexus of the noble guide to the present and ultimate destiny of Bhutan, which is as deep as the ocean and impeccable as the 84,000 teachings of the *Lord Buddha.*

People Joining Hands

Unity is an important national aspiration. It is the culmination of common values, aspirations and principles as a Bhutanese nation. In accordance with Section 20 of this Article which states that every member of *Parliament* shall maintain the decorum and dignity of the *House* and shall desist from acts of defamation and use of physical force, this image symbolizes the need for all the people to come together to achieve common national objectives.

The Image of Four Elements

The four elements are essential component of physical integrity and wellbeing. It corroborates to support life and existence and the realization of natural life. All sufferings are result of the distortion of the four elements.

> *Whatever suffering arises from the disconcerted Four Elements,*
> *May it all cease and radiance and strength take their place,*
> *May long life, peace and happiness without diseases and sufferings prevail.*

The image symbolizes the prevalence of the "perfect harmony" of all the four elements to achieve a life of prosperity and the cessation of the sangasaric[5] sufferings on this world.

5 "Sangasaric" is synonym for the *"Samsara."*

Social Media Platforms: Becoming a Challenge to the Judiciary[1]

> *I would like to remind our youth that television and the Internet provide a whole range of possibilities which can be both beneficial as well as negative for the individual and the society. I trust that you will exercise your good sense and judgment in using the Internet and television.*[2]

Introduction

The *Internet-based Social Networking Sites* (hereinafter *SNS*s) such as the *Facebook, Twitter, YouTube* and *Linkedin, Internet forums, webcasts* and *blogs* and others social media platforms have revolutionized modern communications. According to *Statistica,*[3] there are 2.9 billion active *Facebook* users as of October, 2021. In comparison to other *SNS*s, *Facebook* is the most popular amongst the Bhutanese users. *The Digital 2020* states that the number of social media users in Bhutan increased by 43,000 in just ten months between 2019 and 2020[4] and as of February 2020, there were 4,42,600 *Facebook* users, which accounted for 51.8% of the total population.[5]

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1 Contributed by Judge Thongjay.

2 The message of His Majesty the Fourth King Jigme Singye Wangchuck, during the introduction of television and the Internet on June 2, 1999.

3 *Statistica* is an advanced analytics software package originally developed by *StatSoft* and currently maintained by *TIBCO Software in*. It provides data analysis, data management, statistics, data mining, and machine learning text analytics and data visualization procedures. Retrieved from *https://www.statista.c-1p4om.*

4 *Digital 2020: Bhutan*. Retrieved from https://datareportal.com/reports/digital-2020-bhutan.

5 The Statistics are published in *NapoleonCat,* which is a cloud-based social media engagement and content publishing platform for businesses and marketing agencies of all sizes. Retrieved from https://napoleoncat.com/stats/facebook-users-in-

With the proliferation of digital connectivity, social media has reached even the remote parts of Bhutan and it has emerged as the new arena of social expression. Even school going children as young as ten years old have a *Facebook* account, some which are administered by their parents or guardians. According to *Social Media Landscapes in Bhutan*, a Study conducted by *Bhutan Media Foundation* in 2021, a Bhutanese spends nearly three hours on social media every day.

Social media contains arrays of information and allows communication among millions of people through quick access, frequent update, instant sharing and exchange of ideas, pictures and videos. Hence it is a repository of information. However, despite being a source of information, ideas, and innovations, it has its own dark side. Its emergence has led to an open and non-restricted expression of thoughts and emotions. This has invited both advantages as well as disadvantages. Even the *Judiciary* is not spared. All institutions and people come under its criticisms as well as positive feedbacks.

In fact, when the *Judiciary* and the Judges are criticized, the public tends to be brutal. Be it through identified or anonymous accounts, maligning the *Judiciary* and the Judges has become a favorite pastime for public and some litigants after losing a court case. This trend started a few years back through the *Facebook* platform of Bhutanese news and forum and of very recently, two people alleged the *Judiciary* and the Judge[s] who presided their cases for *gross miscarriage of Justice* and sought an appeal to the public for a Justice.[6] One post is still there on *Facebook.* As of 1st February 2022, the post has generated 6.3K views, 2.2K shares, and 1K comments.

Social media platforms are slowly becoming like a courtroom for Bhutanese people and as a seeming rule, these courtrooms have their own laws and the conviction[s] are very easy. Justice is delivered within the shortest period

bhutan/2020/02/.

6 Dema, T. (n.d.). *Judiciary's silence more dangerous than online videos.* Retrieved from https://kuenselonline.com/judiciarys-silence-more-dangerous-than-online-videos/.

of time and it *does not matter if one is innocent or guilty*. Their Justice is an opinion-based social ideology. People become overnight legal experts. The verdict depends on how beautifully one presents the case and all in all, it is the most powerful courtroom ever seen.[7] Hence, the aim of the present paper is to sensitize the *fundamental principles of right to freedom of speech, opinion, and expression* and its limitations, trial by media, in particular the social media trials and how it influences the public perception about the judicial system. Further, it will examine the existing provisions of law and legal consequences of baseless allegations and its accountabilities, including the web hosts. Perhaps, it will end with the way forward for social media to reduce the challenges to the legal system.

I. Right to freedom of Speech, Opinion and Expression

The *right to freedom of speech, opinion and expression* is broadly understood as the notion that every person has the natural right to freely express themselves through any media and other frontiers without outside interference such as censorship and without fear of reprisal such as threats and persecutions.[8] Media is considered to be the fourth arm of government and undoubtedly, the *right to freedom of speech, opinion and expression* is a grandeur of the democratic right. Democracy without the right to freedom of speech, opinion and expression has been ineffective to groaning anguish of the people.[9]

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7 Gaur, M. (n.d.). *'SMS: Social Media Courtroom'*. Retrieved from https://timesofindia.indiatimes.com/readersblog/ultimateloser/smc-social-media-courtroom-25238/.

8 Neshapriyan, M., *'Social Media and Freedom of Speech and Expression.* Retrieved from https://www.legalserviceindia.com/legal/article-426-social-media-and-freedom-of-speech-and-expression.html.

9 Tobgay, S. (2014). *THE CONSTITUTION OF BHUTAN: Principles and Philosophies*, p. 97. Retrieved from https://www.judiciary.gov.bt/education/constitutionphilosophies.pdf.

As an idea, *freedom of expression* existed since ancient times, dating back to the times of Greek Athenian era more than 2400 years ago.[10] However, as a legal right, it did not exist until the 17th century. In the 17th and 18th century, legal philosophers like Jeremy Bentham were concerned with establishing the *freedom of expression* and in particular the *freedom of the press* as a protection against despotism. On the contrary, John Stuart Mill defended *freedom of expression* on the grounds that it promoted the discovery and maintenance of truth.[11] Down the line, this freedom became much more elaborate and close to many philosophers and activists.

The Article 19 of *Universal Declaration of Human Rights* (hereinafter *UDHR*) and Article 19(2) of the *International Covenant on Civil and Political Rights* (hereinafter *ICCPR*) provides for *freedom of speech and expression.*[12] The two soft laws are the foundation of modern constitutional rights and almost all the constitutions have these provisions faithfully reproduced. *The Constitution of Bhutan* also confers on the citizens the right to *freedom of speech, opinion and expression*.[13]

In the past, the traditional mass media were used to exercise the right to *freedom of speech, opinion* and *expression*. Now in the digital age, social

10 When Socrates was brought before the Athenian Court on Charge of impiety and corrupting the city's youth, he said to his prosecutors, *"If you offered to let me off this time on condition I am no longer to speak my mind... I should say to you, 'Men of Athens, I shall obey the Gods rather than you".* Hence, this indicates an idea of free speech and expression there since a long time back.

11 Schofield, P. (2019). *Jeremy Bentham on Freedom of the Press, Public Opinion, and Good Governance',* Scandinavica Vol. 58 No. 2, Bentham Project, Faculty of Laws, UCL.

12 Article 19 of the *UDHR 1948* states that *"Everyone has the right to freedom of opinion and expression: this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers'*. Article 19(2) of the *ICCPR 1966* states that *'Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice'.*

13 *Constitution of Bhutan 2008*, Art. 7(2).

media is taking over. It has reincarnated into a strong medium influencing and molding public opinions. The *UN Human Rights Committee* has also tried to give realistic application to *freedom of opinion and expression* and stated that the member states should take all the necessary steps to foster the independence of new media and ensure access to them.[14] Thus, the *freedom of speech*, *opinion and expression* is recognized as a *Fundamental Right* in whatever medium it is expressed. Further, in the light of growing use of social media as a medium of exercising this right, access to this medium must be also recognized as a *Fundamental Right*.

II. The Reasonable Restrictions

No right is absolute and *no freedom is free*. There are reasonable restrictions being imposed for enjoyment of any *Fundamental Rights*. According to Justice Das, reasonable restrictions are imposed on the enjoyment of *Fundamental Rights* due to the fact that in certain circumstances, individual liberty has to be subordinated to certain other larger interests of the society.[15] However, the phrase 'reasonable restriction' implies that the limitation imposed should not be arbitrary or excessive in nature.[16]

The right to *freedom of speech, opinion and expression* does not confer on the citizens the right to speak and publish without responsibility. It is not an unbraided license giving immunity for every possible use of language and prevents punishment for those who abuse their freedom.[17] The *ICCPR* too restricts this freedom when it comes to safeguarding certain public interests like public health or morality, national security, good public order and the respects of the rights of reputations of others.[18] As per Article 7(22) of the *Constitution of Bhutan*, the State can put a reasonable restriction by law

14 *Human Rights Committee* 102nd session Geneva, 11-29 July 2011 *General Comment* No. 34 Article 19: Freedoms of opinion and expression General remarks. Retrieved from https://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf.

15 *A.K. Gopalan vs. State of Madras*, AIR [1950] SC, 27.

16 *Supra* n. 9, p. 109.

17 *Supra* n. 8.

18 *ICCPR,* Art. 19(3).

when it concerns:

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

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

c) The interests of friendly relations with foreign States;

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

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

f) The rights and freedom of others.

The restrictions are to be imposed only *by a law* and a *law means* an *Act of Parliament*. Further, the restriction imposed must be imperative to achieve the legitimate aims and must not be excessive. It must be used to protect the interests of the public and not the individual interest.

With regard to online restrictions of *freedom of speech, opinion and expression*, there are plethora of challenges. It is censured through filtering or blocking of online content, but the standards are different in different countries. Europe for example, has the principle so-called *'what applies offline also applies online'* and any restriction of online content to be imposed must pass a three-part cumulative test, which firstly, it must be provided by law to meet the principles of predictability and transparency. Secondly, it must pursue purposes envisaged and thirdly, it must be necessary and also the least restrictive means to achieve the respective objective.[19]

III. Social Media Trials

Trial by media is a phrase popular in the late 20th century and early 21st century to describe the impact of television and newspaper coverage

19 Benedk, et al. (n.d.). *Freedom of expression and the internet,* Strasbourg, France : Council of Europe Publishing, 2013, p. 45.

on person's reputation by creating a widespread perception of guilt or innocence before, or after, a verdict in a court of law.[20] Its universal accessibility and amplifying effect, the information shared online through *SNS*s plays a prominent role in our society. The English Philosopher Jeremy Bentham said:

> *There is no right where there is no attention. Publicity is the essence of justice itself. It is the strongest spur to exertion and the most sure of all guards against improbation*

The investigative and pre-trial publicity by the media impacts the *Fundamental Rights* of accused to a *fair trial* and the *due process* of law. It is injurious to the very *principle of innocent until proven guilty* as even before the accused is arrested and tried, the media proclaims the person to be guilty. People are falsely convinced about the guilt and often the accused is portrayed as a despicably depraved character, where even the lawyers may refuse to defend the accused. The publicity may also persuade the witnesses to custom-tailor their testimony against the accused. As a result, it undermines the *Criminal Justice System* and the *rule of law.*[21]

The sensationalization of *trials by the media* has a long history. However, for the sake of relevancy, the focus is from the 20th century. In America, Roscoe Conkling Fatty Arbuckle was acquitted of rape charges and murder of actress named Virginia Rappe, but lost his career and reputation because of the media coverage.[22] The London High Court sentenced Joanne Frail to eight months imprisonment for contempt of court for conducting Internet research on defendant.[23] In recent times, *Indian*

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20 Suresh, N., & George, S. (2021). *Trial by Media: An Overview*, pp. 267- 272. Retrieved from http://doi.one/10.1732/IJLMH.26050.

21 Justice Chauhan, R.S. (n.d.). '*Trial by Media: An International Perspective',* SCC Online Blog. Retrieved from https://www.scconline.com/blog/?p=235735.

22 Fisher, E. *The Fatty Arbuckle Trial: The Injustice of the Century',* Constructing the Past, *5*(1). Retrieved from https://digitalcommons.iwu.edu/cgi/viewcontent.cgi?article=1034&context=constructing.

23 *Attorney General v. Fraill and Sewart* EWCH 1629 [2011].When sentencing Joanne

Judiciary witnessed numerous instances where the media has conducted the trial of an accused and has passed the verdict. The cases ranges from corruption to *rape, murder*, *sexual harassment* and terrorist activities, to name few. However, in some cases, media convicts were acquitted by the court of law due to lack of evidence.

Out of many examples of trials by media, Mr. Sarvjeet Singh's trial was eye-catching. In 2015, a woman by name of Jasleen Kaur posted a photograph of Sarvjeet Singh on *Facebook* and accused him of *sexual harassment*. The post went viral which was followed by a media trial, thus labeling him as a 'pervert.' However, four years later, he was found out to be innocent by the Delhi Court and was acquitted of all the charges. The incident prompted Mr. Sarvjeet Singh to share his true story in a *TED* talk program which is still available online.

Trial by media including social media is also picking up in Bhutan. Although not as extreme as those in India or other developed countries, it is happening quite often. The mass media such as newspapers share their story on social media platforms and the public trial starts immediately through comments. For example, in what is called one of the unique cases, a 35 years old man from Samdrup Jongkhar suffered an open attack on *Facebook*. The *Kuensel* shared a news captioned *Man arrested for alleged rape of minor after 12-years-old gives birth'* on *Facebook.*[24] The case was still under investigation. The post went viral which was followed by a social media trial labeling the man as 'hungry ghost.' Although the man was later convicted, people would have hung him even before the punishment was pronounced by the Court.

Fraill, the Hon. Judge Lakin said: *"Her conduct in visiting the internet repeatedly was directly contrary to her oath as a juror, and her contact with the acquitted defendant, as well as her repeated searches on the internet, constituted flagrant breaches of the orders made by the judge for the proper conduct of the trial."*

24 Wangchuk, K. (2021, November 4). *Man gets 32-year prison term for rape of a minor'*. Retrieved from https://kuenselonline.com/man-gets-32-year-prison-term-for-rape-of-a-minor/.

Another case of social media trial is the death of a woman after a rusted electric pole fell directly on her. The incident happened on 18th April 2021 and the *Kuensel* shared a news titled *'Rusted streetlight pole collapses on woman's head'* on *Facebook.* More than 162 comments were passed by *Facebook* users and majority of comments claimed that the *Bhutan Power Corporation Limited* (hereinafter *BPCL*) and *National Housing Development Corporation Limited* (hereinafter *NHDCL*) must be held responsible and the victim must be adequately compensated. Due to incessant social media pressure, the *Royal Bhutan Police* registered a case against *NHDCL*. To add fuel to the fire, the victim unfortunately succumbed to the injuries on New Year eve of 2022 and the news reads that her family still awaits Justice almost nine months after the incident.[25] This further led to many opinions expressed against the above-mentioned Corporations. Although the Judgment from the court of law is yet to be out, the *NHDCL* is already guilty of reckless endangerment to the eyes of the public.

There are quite a number of other examples in Bhutan and any legal dispute news report shared in *SNS*s undoubtedly draws controversy and starts open social media trial. Internationally, the evidence shows that the trial by media including social media influences the way public perceives and it causes prejudice to the ultimate decision makers which in turn is an imminent threat to the very bases of fair trial ideals.

IV. Judiciary and the Social Media

The *Judiciary* and the media share a common bond through so-called men, who are the centre of their actions. According to Justice R.S. Chauhan, the Chief Justice of Uttarakhand High Court, both engages in the same

25 Lhaden, Y. (2021, April 2). *'Rusted streetlight pole collapse on woman's head',* Retrieved from https://kuenselonline.com/rusted-streetlight-pole-colapses-on-womans-head/. Also read by the same author *'Woman struck by electric pole in Changjiji succumbs to injuries',* January 4th 2022. Retrieved from https://kuenselonline.com/woman-struck-by-electric-pole-in-changjiji-succumbs-to injuries/?fbclid=IwAR0z-SE0702ZiKjsRWgrkIW2PXD13VvxVplsKZl2iJdDWxxjiCcIiebn8luA.

task to discover the truth, to uphold the democratic values and to deal with social, political and economic problems.[26] But for the most part, these two pillars of democracy are at loggerheads. The advent of social media through different *SNS*s and its uncontrollable effect added salt on the wound. On one hand the media through right to *freedom of expression* has a duty to carry on pre and post-trial publicity, but on other hand, the *Judiciary* must protect the *right to fair trial* of an accused.

The legal principle prohibits media from reporting *sub judice* matters as it may influence Judges in their decision making process. The *Madrid Principles* on the relationship between the media and judicial independence further mentions an obligation of the media to respect judicial independence.[27] In addition, *Bangalore principles of Judicial Conduct* restricts Judges from making any comments that will affect the independence of the *Judiciary* and impartiality in the judging process.[28] *The Judicial Service Act of Bhutan, 2007* too restricts Judges from making any comments in public that might reasonably be expected to affect the outcome of cases or impair the fairness of the process.[29] Customarily, it is always assumed that truth will prevail itself and Judges need not defend themselves.

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26 *Supra* n. 22. Justice R.S. Chauhan further argues that the media, in fact, has been called the handmaiden of Justice, the watchdog of society and the *Judiciary,* the dispenser of Justice and the catalyst for social reforms.

27 *The Madrid Principles on relationship between the media and judicial independence, 1994*. In January 1994, participants from 40 countries met in Madrid, Spain in a meeting convened by the *International Commission of Jurists*, the *Centre for the Independence of Judges and Lawyers*, and the *Spanish Committee of UNICEF*. For detail refer to https://www.icj.org/wp-content/uploads/1994/01/madrid-principles-on-media-and-judicial-independence-publication-1994-eng.pdf.

28 *'The Bangalore principles of judicial conduct, 2006'. The Bangalore Principles* are intended to establish standards for ethical conduct of Judges. They are designed to provide guidance to judges and to offer the judiciary a framework for regulating judicial conduct. Six core values are recognized: Independence, impartiality, integrity, propriety, equality and finally competence and diligence. Not only have some States adopted the Bangalore Principles but others have modeled their own *Principles of Judicial Conduct* on them. For details refer https://www.judicialintegritygroup.org/images/resources/documents/ECOSOC_2006_23_Engl.pdf.

29 *The Judicial Service Act of Bhutan 2007,* s.110.

In the light of these restrictions, the *Judiciary* is often considered to be a soft target for negative criticisms. All things considered, even the layman become heroes in social media by exaggerating and aggressively criticizing the *Judiciary* and the job of judging, be it positive or negative, without knowing what it foretells or what it impacts. The posts filled with vested interests are gaining momentum. They get shared, liked, and commented and sometimes the comments are too personal even leading to *character assassinations*.

It is not a suggestion that the *Judiciary* and Judges' decisions and conduct cannot or should not be scrutinized or criticized. No matter whether the issue appears on social media or not; it is a hallmark of democracy that Judges are accountable for their exercise of judicial power. *The Constitution of Bhutan* mandates the *Judiciary* to safeguard, uphold and administer Justice fairly and independently *without fear, favour or undue delay* in accordance with the *rule of law.*[30] The judicial power is a public power of a State that regulates the rights of a person against the state itself in criminal proceedings as well as, in civil proceedings, against other persons.[31] The eighth President of the Supreme Court of Israel Aharon Barak said:

> *I view my office as a mission. Judging is not a job. It is a way of life. Whenever I enter the courtroom, I do so with a deep sense that, as I sit at trial, I stand on trial.*[32]

Of course, the *Judiciary*, Judges and Judicial Officers are public figures and they are publicly accountable for their decisions. As long as judging is done with an utmost sincerity and critical analysis, due diligence and impartiality, good faith, the clear conscience and based on the best of

30 *Constitution of Bhutan, 2008*, Art. 21 (1).

31 Justice Rares, S. (2017). *Social Media-Challenges for Lawyers and the Courts.* Australian Young Lawyers' Conference. Retrieved from https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-rares/rares-j-20171020.

32 Morris, J., & Newman, S. (2007). *The Judge in a Democracy.* By Aharon Barak, Princeton University Press, p. 6. *International Journal of Legal Information, 35*(1), pp. 179-200.

one's ability, the known or anonymous public vilification on social media should not deter one's action.

Social media posts targeting the *Judiciary* and Judges do not happen only in Bhutan. In fact, it is an imminent challenge of almost all *Judiciarie*s around the world. For instance, in 2018, Bombay High Court jailed activist Ketan Tirodkar for writing objectionable posts against the Judges on *Facebook*. In 2020, The Supreme Court of India held Prashant Bhushan guilty of criminal contempt of court for publishing a photograph of the *Chief Justice of India* on an expensive motorcycle. Again in 2021, the *Central Bureau of Investigation* booked seventeen people over life-threatening social media posts against Andhra Pradesh High Court Judges.[33] The present *Chief Justice of India*, Justice N.V. Ramana said:

> *Judges are becoming victims of juicy gossip and slanderous social media posts*[34]

He recommends that the law enforcing agencies need to deal with the malicious attacks effectively. The contempt of court through *suo moto* action by the *Judiciary* proved to be a less lethal against social media attacks.

The *Chief Justice of the United States of America*, John Roberts also advises the public to be cautious with social media as it instantly spreads rumour and false information in the era of Internet. The *Chief Justice designate* of Ireland Mr. Justice Donal O'Donnell, while addressing the *Bar Conference, 2021*, said that the Judges are an easy target of populism, which increasingly casts the *Judiciary* in the role of elites, because they cannot and do not answer back. He went on to say that:

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33 Sinha, S.R. (2021). *Attacks on the Judiciary: Open to Scrutiny.* Retrieved from https://www.indialegallive.com/attacks-on-the-judiciary-nv-ramana-social-media-supreme-court-judge/.

34 Ramana, N.V. (2021). *The Constitution Day Speech.* Retrieved from https://www.thehindu.com/news/national/article37715798.ece/BINARY/JusticeRamanaSpeech.pdf.

Social media has completely altered public affairs and social discourse, if that is not too gentle a word.[35]

In essence, Judiciaries have never been over sensitive to criticisms; in fact, genuine criticism is always welcomed for self-reflection and introspection. The problem starts when social media is maliciously used to attack *Judiciary* and Judges based on unfounded facts and wrong information or an understanding without any accountability.

V. The Existing Provisions of Law

The *freedom of expression* does not mean that one can say anything. Unverified and unsubstantiated facts or allegations, *mala fide* attacks and even unintended posts against any person are unlawful. It is not without consequences. *The Information, Communications, and Media Act 2018* (hereinafter *ICM Act*) makes it accountable for the content. Section 464 (22) defines content as *"any information, sound, text, date, picture (still or moving), other audio-visual representation, signal or intelligence or any nature or in any combination thereof which is capable of being created, processed, stored, retrieved or communicated electronically or in other form."* Thus, by this definition anything and everything one does on social media can constitute a content.

Any person posting, sharing or commenting on photographs, images or information in any form may constitute a criminal offence of online harassment[36] and the owners of *Information and Communication Technology* (hereinafter *ICT*) or system who knowingly permits the

35 Keena, C. (2021). *Judges are easy targets of populism, warns Chief Justice designate.* Retrieved from https://www.irishtimes.com/news/crime-and-law/judges-are-easy-target-of-populism-warns-chief-justice-designate-1.4595458.

36 *ICM Act, 2018,* s. 426. According to Section 464 (52), the harassment "*includes persistent conduct which is calculated, or likely to cause insult, injury, intimidation, enmity, obstruction, stalking, annoyance, distress, or extreme irritation to any person, making use of such ICT device, apparatus or facility or system."*

facilities are liable for an abetment.[37] A person can also sue the content provider for defamation, which is both a criminal offence and a civil wrong in Bhutan.[38] The content provider cannot disseminate contents that are offensive to public, cannot mislead, instigate or cause alarm to public by sensationalizing the treatment of any issues whether local, regional or foreign in nature. The factual contents must be presented in an objective, accurate and balanced manner. Overall, it must respect the privacy of individuals and avoid naming and shaming of any individual unless when the act is proven by the *Royal Court of Justice* and in circumstances where it may be required in the interest of the public.[39]

However, should the content provider be penalized for being in contempt of court for the *mala fide* or harmful contents uploaded or shared in social media against the *Judiciary* and the Judges? Unlike India and other countries, Bhutan does not have a separate *Contempt of Court Act*. The contempt provisions are contained in *Civil and Criminal Procedure Code of Bhutan 2001* (hereinafter *CCPC*) and the *Bhutan Penal Code 2004 (*hereinafter *BPC*).

Chapter 16 of *CCPC* deals with contempt and associated offences. The chapter deals with contempt during the court proceedings such as failure to appear or present evidence, failure to adhere to a hearing calendar, and absence without leave. Interfering with a case, failing to comply with judicial orders and unnecessarily obstructing the course of Justice in the due course of court proceedings are the grounds for contempt. Of course, the Judge can instruct litigants against publishing, filming, recording or reporting of any matters which are considered to be *sub judice* with any media. The non-compliance with such orders may result in a finding of contempt and be subject to civil or criminal sanctions.[40]

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37 *ICM Act, 2018.* s. 427.

38 *BPC, 2004,* s. 317.

39 *Rule* 2.2(c)(e) and (f) of *Rules and Regulation on Content 2019*. According to the *Rule* 1.8, Content provider means any person or organization that provides for use in various print and electronic platforms.

40 *CCPC 2001,* s. 104.

Section 367 of *BPC* states that the defendant shall be guilty of an offence of the contempt of court if he or she:

a) Has been served with a court order and fails to comply without any reasonable cause;

b) Purposely interferes with or interrupts a legal proceeding including a failure to respond to a court directed inquiry, makes a public outburst, an antagonistic comment or directs a threat at a judicial official or person present in the courtroom, or engages in acts demonstrating a lack of *Driglam Namsha* befitting the court; or

c) Refuses to abide or obey a direction rendered by the Court.

Principally, once the legal proceedings become active, the public must refrain from any form of discussions regarding the matter be it online or off line. Parties can also obtain 'gag order' from the court to prevent others including the media from talking about the ongoing case.

VI. The Way Forward

Despite the existing provisions of law and penalties, social media posts against the *Judiciary* and Judges will not stop. It happened in the past, it is happening in the present and this unfortunate trend will continue in the future. As long as social media stays, the institution and some of the Judges will become a frequent victim of inappropriate, populist or contemptuous attacks and baseless allegations.

As of now, social media is a largely unregulated domain. It is girdled by the provisions of the *ICM Act, 2018.* The *Act* does not specify which information sent through a computer resource or a communication device are grossly offensive or has a menacing character and which are not. It is not known what punishment would be met for sending offensive messages through communication services. In addition, other than categorizing as an offence of defamation, it also does not provide specific prohibition and punishment for any information which the content provider knows

to be false but still shares through any computer device for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will.

The computer data protection too is important. However, the data protection part of the *ICM Act* is not detailed enough. Legally, it is the duty of the *Media Council* to regulate or curtail any harmful, offensive, illegal or antithetical contents on the Internet and other *ICT* media services, yet, there are no materials available or any policies that are specifically directed towards regulating harmful and offensive messages available on the Internet. Hence, the amendment of *ICM Act* incorporating the missing provisions is desirable as the modern technology assisted communication must strike the right balance with the *freedom of speech, opinion and expression*.

Presently, the contemptuous behaviours of litigants are regulated by the *CCPC* and *BPC* respectively. However, provisions contained in both laws are concerned with only the active court proceedings. It regulates willful disobedience to any direction or an order passed by the court during the proceeding and a willful breach of an undertaking given to the court. It does not address unbefitting actions, spicy gossips and slanderous abuse of the *Judiciary* and Judges by litigants and public once the Judgment is rendered. Of course it is completely right to discuss the decisions of the court including passing of comments and criticisms.[41] The Judgments can be criticized, but not necessarily their authors. When the *Judiciary* and Judges are criticized instead of their Judgments, it poses challenges for the *rule of law* and maintenance of public confidence. This in turn, disturbs the very basis of unity, happiness and well-being of the people.

We are living in extraordinary times. Extraordinary times call for extraordinary measures. Arguably, defamation is an inappropriate solution for baseless outcries against the *Judiciary* and Judges when they have acted

41 *CCPC Amendment Act 2011*, s. 96A.

in their official capacities. Contempt is the worthy and justifiable solution for such berating. However, the existing contempt provisions both in *CCPC* and *BPC* are applicable only during an active court proceedings and very subjective as well as restrictive in nature. As of now, even if a separate *Contempt of Court Act* is not desirable, the insertion of new provisions in *CCPC* by way of amendment is necessary as well as timely. The new provisions could address innocent publications and distributions of court verdicts including proceedings in chamber or in-camera and when it is the fair and accurate reporting of judicial proceedings. What are the criteria for a fair criticism of judicial acts and when they could be made? Genuine complaints against presiding Judges and Judicial Officers be it pre or a post-trials, contempt by Judges and other Judicial Officers including *Bench Clerks*, and more importantly, who and when contempt cognizant must be taken. The *Judiciary* is silent despite numerous attacks through social media due to the fact that there is no express provisions for *suo moto* action. The contempt and *suo moto* power of the courts could also be included as a new provision.

In addition, a social media outburst against the *Judiciary* and Judges could also be partly due to lack of legal education. Not many of Bhutanese know and understand the operation of the court system. The limited knowledge of judicial processes poses a risk of creating confusion and misunderstanding amongst the general public. Interestingly, many of our people, at the same time, do not care to find out how the court works. People are more interested in what the courts have done in a substantive sense, rather than finding out how it has come to its decision.[42] The striking difference is that the Bhutanese condemn the *Judiciary* and Judges, whereas, in a foreign countries, they condemn laws.

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42 Judiciary of the Kingdom of Bhutan. (2015-16). *The Annual Report.* Retrieved from https://www.judiciary.gov.bt/archive-content/annual_report.

Conclusion

The relationship between social media and the law is that the Internet works at the blink of an eye. It is boundless. Whereas, the law needs boundaries which are called legal boundaries. As long as one has a social media account and uses it for anything, one is the content provider. Unverified and unsubstantiated allegations are a gross violation of not only the *Fundamental Rights* of people but also ethically and morally wrong. Punishing offenders is one thing, but it destroys innocent individuals and their families as they face mental trauma and social stigma for no reason.

It is not that social media courts always give false verdicts but it becomes menace to people who are related to the cases. Social media court lacks the judicial temperament, do not have the concept of fair trial and *due process of law*, and have a damaging effect on the community vitality, which is one of the eight domains of the *Gross National Happiness*. Often it is driven by selfish or fake reasons with fake accounts. They pass Judgments based on presumptive and unsubstantiated facts.

In a court case, it is a 'win-lose' situation. One party will always lose and ideologically, there cannot be two winners from two. If the *Judiciary* and a Judge do not decide in one's favour, is resorting to social media bursting the only solution? There could be other more sensible solutions. Human beings are by nature fallible and so are Judges. The Supreme Court is also fallible but they have the final say. The tiers of courts and appeal system, the review and the re-review of the Supreme Court decisions are all to correct the unintended gaps.

In other countries, there is an increase use of social media in the courtrooms. J.H. Grey said:

> *Exponentially there has been an increase of social media in the courtroom. It covers everything-Twitter to Facebook to Myspace-all of those platforms are there and that is a concern*

> *for the courts. The courtroom is changing and what we perceive as the justice system is going to change, and it should change for the better.*[43]

The life of a Judge is not one of roses. The current *Law Minister of India*, Kiren Rijiju said:

> *In the court, we know what the judges do and what their responsibilities are. But many people don't understand the life of a judge. There are some unpalatable remarks being made on social media and various forums, but when you see closely how much the judges have to perform, it's difficult for people like us to comprehend.*[44]

Judicial integrity is a matter of grave concern and unpalatable remarks over social media made without accountability are in fact violation of the *rule of law,* public policy, the moral values, and natural Justice. The *Judiciary* alone can do nothing much and the collective actions are required. We must recognize a duty of the *Executive* as well as the *Legislature* to protect the *rule of law*. His Majesty during the 20th *National Judicial Conference*, 2012 commanded:

> *What is important is the respect for the rule of law for a stable democracy. Good democracy needs rule of law. One must have regard for the laws and become productive and upright citizens. To ensure respect for the law by the citizens is not the responsibility of the judiciary alone.*

A democracy must allow criticisms against any institutions but must ensure that criticisms are constructive. It must hold social media critics accountable. It is needless to prove that social media trials generally breed

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43 Cooper, J. (2021). *Social Media, the law and Social Justice.* Retrieved from https://www.lawnow.org/social-media-the-law-and-social-justice/.

44 Jacob, S. (2021). *Defending the Judiciary.* Retrieved from https://www.indialegallive.com/criticism-defending-judges-judiciary-social-media/.

hatred, ill-will and disturbs the unity of the people, whereas, the court trials breed harmony. Although, it is difficult to regulate social media from becoming like a courtroom and challenge the continuous interferences to the *Judiciary,* yet, we can definitely regulate its contents and posts more efficiently than ever.

The Practices of Alternative Dispute Resolution in Bangladesh[1]

Introduction

Courts are the formal mechanism for the administration of Justice. Justice is a much priced social commodity – essential to uphold the *rule of law* and social aspirations. While the institutions of Justice are invariably different in different countries, the existence of courts and informal Justice mechanisms are ubiquitous and universal. Everyone has the right to *access to Justice*; and equal *access to Justice* is considered as one of the basic rights of people.[2] In Bangladesh, access to formal Justice system is inhibited by geographical distance from the court, cost, inadequate legal representation and the trepidations of the fear of the Justice system, with other reasons. Mediation is seen as an effective remedial Justice system to avoid the complexities of the formal Justice system. Generally, mediation is questioned as to undermine the formal justice system and the competence of the mediators and different philosophies state that it is the "second best Justice."[3]

Common to many countries across the world, the legal system in Bangladesh is formal, complex and urban based. Many people living in the rural areas are illiterate; and many of them are unable to enforce their rights; and writers say that they allegedly suffer the injustices in silence. Bangladesh has also got a traditional method of dispute resolution called as *Shalish.* The *Shaliske*rs or [mediators] had been engaged in the resolution of disputes. Like elsewhere, the village elders were the mediators and this has helped to restore the relationships of the people and reinforced community effective mediation services thus negotiating a principled

1 Contributed by Judge Mohamad Abdul Halim.

2 Penal Reform International, Community based Mediation as an auxiliary to formal Justice in Bangladesh: the *Madaripur Model of Mediation (MMM).*

3 Ibid.

society based on *rule of law* and equity. Finding a solution through developed *Alternative Dispute Resolution* mechanism[s] in [any] country is essential to promote an indigenous system of dispute negotiation. This will help to revive individual country's unique legal approaches and dispute resolutions specific to [that] particular nation or a society.

The use of "middle way" dispute resolution is the most effective method to settle disputes; so that it does not scar the society. The nature of disputes, both in the legal and social sense, has the ability to cut a trench in their relationships and foster an adversarial system of existence by adhering to the legal norms. When legal norms take precedence, social customs and the ways of living take backseat. One of the character of the legalistic society is that "all answers to the problems of the society" has to come from the letter of the laws, and the legislations, in place. This "fair system" cannot be at [all time] responsive; and disputes by nature does not mean and always need to undergo the formal adjudication processes. Many legal issues can be a result of emotional, mental or pyscho-social disturbances-which requires the medication of the emotional wound through non-legal measures. The courts are the formal expression of "legal hospitality;" and many wounds can be medicated through the use of indigenous healing and remedy. Courts can be compared as the final hospital for a legal remedy.

In this light, Bangladesh has adopted *Alternative Dispute Resolution* as one of the method of resolution of the disputes, but has not been an effective non-legal remedy. Recently, settlement of land disputes have become a good means of settlement of dispute informally; and this was due to expeditious processes, and other economic considerations. The lack of proper "court management," shortage of court officials, unreasonable delay, expenses, corruption and procedural complexity, efficient and dutiful court officials and lawyers are some reasons, that has retarded the use of court-based mediation in Bangladesh.[4]

4 M.M.H. Patoari et al. (2020). Legal and Administrative Challenges of Alternative Dispute Resolution (ADR) as a Peaceful Means of Resolving the Land Dispute in the

Constitutional Guarantees

The Constitution of Bangladesh provides the legal and constitutional basis for *Alternative Dispute Resolution* practices in the country. It guarantees *access to Justice* as a *Fundamental Right* as it is done in almost in all democratic countries. Bangladesh *Constitution* confirms that the *fundamental human rights*, *freedom* and the *respect of the dignity* shall be granted and *equality before law*, *equal protection of law* are ensured and the right to *fair trial* is protected. The concept of *access to Justice* includes the whole range of laws, procedures and institutional arrangement through which Justice can be delivered to the people in an efficient and effective manner and it denotes the instrumentalities by which citizens can approach the courts, lawyers, legislatures, Judges and administrative agencies for both *substantive* and *procedural Justice*. *The Commonwealth Government* appointed the *Access to Justice Advisory Committee* which stated that *access to Justice* involves:[5]

a) Equality of access to legal service;
b) National equity; and
c) Equality before law.

While *access to Justice* means the access to equitable Justice services and it also talks about the "equality of Justice," that Justice is effective, remedial and timely. Development of *Alternative Dispute Resolution* in different countries of the world, especially in developing countries is a step towards the proper administration of *civil Justice*. It has successfully opened the door of Justice equally for the rich and poor where the ordinary legal system has failed to do. Through *Alternative Dispute Resolution* the parties can reach to a harmonious settlement of the dispute which is opposed to the win-lose outcome of the legalistic and formalistic approach of litigation.

Usually the win-lose situation becomes a rigorous obstacle in the way of future relationship between the parties. As it sequels win-win situation

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Rural Areas of Bangladesh, *Beijing Law Review, 11.*

which not only settles the dispute but also brings peace and healing that preserves the future relationship between the parties. Avoiding all kinds of legal procedural complexities, technical legal principles it follows, *Alternative Dispute Resolution* provides the process which the parties and their appointed mediator think best for the settlement of their issue. In *Alternative Dispute Resolution,* as every person knows, the parties select and control the process of it for smooth, correct, effective and efficacious remedy and they are under the liberty to appoint any expert in the subject matter of the dispute.

The *Constitution of Bangladesh,* like any other constitutions practically guarantees the *"right to equality*, *equal protection of the law*, and *rule of law*." Historically, *Alternative Dispute Resolution* was incorporated in the *Family Court Ordinance* in 1985. In 2000, the legal norms of *Alternative Dispute Resolution* was incorporated in the *Code of Civil Procedure, 1908*. Today, it has become compulsory to initiate and use *Alternative Dispute Resolution* system in the country.[6] The [system] has been incorporated in many of the laws, *Income Tax Ordinance, Legal Aid Rules, Labour Act, and Conciliation of Dispute* amongst other laws including the *Customs Act, 1969*.[7] The basic reason behind the incorporation of non-legal dispute resolution methods were to ensure that there are no procedural delays, reduce high expenses of litigation, and avoid a unfavourable Judgments. In this sense, this non-formal dispute system ensures that aside an expedited resolution of the disputes, it also puts in discipline; and fight against corruptive judicial practices.[8]

On the other hand, *Alternative Disputes Resolution* is a globally accepted mechanism for dispute resolution. It is matter of regret that although

6 Sultana, R., & Islam, S. (2019). The Effectiveness of Alternative Dispute Resolution in Bangladesh: A Critical Analysis, *International Journal of Multidisciplinary Research and Development*, Rajsashi Science and Technology University.

7 Ibid. p. 108.

8 Ibid., p.109.

Alternative Disputes Resolution is globally accepted, it is not well known to the third world countries, including some African-Asian countries. However, there are various factors that impedes the use of *Alternative Dispute Resolution,* in light of Bangladesh jurisprudence in the use of non-formal mechanism of dispute resolution as an effective means of dispute resolution is challenged by:

a) **Lack of ideas about *Alternative Dispute Resolution***

Many people of these countries even do not have idea that *Alternative Disputes Resolution* is a mechanism of settling a dispute outside of the court with a third party neutral, known as mediator or arbitrator beyond the existing legal procedure of the country. *Alternative Disputes Resolution* is less time consuming, informal, cheaper, long-lasting and more fruitful process. In *Alternative Disputes Resolution*, there is no question of losing anything by the parties. All the parties are placed in win-win position in this procedure whereas in adversarial system followed in our country, only one party wins. However, the real solution is a far cry. The losing party generally prefers appeal to the higher court. In this way the parties have to fight up to *Appellate Division* for final decision. But filing a case in the lowest court and fighting up to *Appellate Division* is not a simple matter, rather it is a matter of spending huge amount of money, and time, almost on an average of *ten to fifteen years of income*.

In most cases, the plaintiff or the complainant dies before disposal of the cases. But scenario of *Alternative Disputes Resolution* system is totally different. If one case is disposed off with the use of *Alternative Disputes Resolution* at any stage, it is disposal forever, no appeal, review, revision arises because the case is settled by the parties themselves with full satisfaction.

b) Limited use of *Alternative Dispute Resolution*

Bangladesh is overloaded with thousands of cases. Recent statistics say that almost three million cases are pending before the court. Nobody knows that when these huge number of cases to be disposed of. In this situation, the *Alternative Disputes Resolution* can be most effective tool for ending huge deadlock. Of course, Bangladesh follows the *Alternative Disputes Resolution* in limited fields. Sections 10 and 13 of *Family Courts Ordinance 1985*, section 89(A) of *Code of Civil Procedure* have provisions on *Alternative Disputes Resolution*. Very recently, the *District Legal Aid Officer* has been empowered to take up non-formal dispute resolution methods. Section 89(A) of the *Civil Procedure Code* goes as follows:

> *Except in a suit under the Artha Rin Adalat Ain, 2003 [(Act No. 8 of 2003)], after filing of written statement, if all the contesting parties are in attendance in the Court in person or by their respective pleaders, the Court shall], by adjourning the hearing, mediate in order to settle the dispute or disputes in the suit, or refer the dispute or disputes in the suit [to the concerned Legal Aid Officer appointed under the Legal Aid Act, 2000 (Act No. 6 of 2000), or] to the engaged pleaders of the parties, or to the party or parties, where no pleader or pleaders have been engaged, or to a mediator from the panel as may be prepared by the District Judge under sub-section (10), for undertaking efforts for settlement through mediation.*

Nevertheless, the number of cases are increasing. It indicates that our *Alternative Disputes Resolution* mechanism does not work well. From the practical experience, it can be said that *Alternative Disputes Resolution* under sections 10 and 13 of our *Family Court Ordinance* is working well. As the family issue is sensitive and humanitarian, parties in family matter responsed to *Alternative Disputes Resolution* quickly and disposal through *Alternative Disputes Resolution* rate is good. But *Alternative Disputes*

Resolution under section 89(A) of *Civil Procedure Code* is very frustrating. Many Judges in the *Civil Court* even do not fix up the stages under this section for mediation whereas fixing up the case for mediation under above mentioned section is compulsory for the Judges.

c) Existence of Anomalies in *Alternative Dispute Resolution*

In judicial mediation, the non-fixing up for mediation by trial Judge in subordinate court is not being monitored well by *District Judges*. Of course, this non-fixing up for mediation by trial Judge has many reasons behind. This is due to, foremost, reason behind this non-fixing is that trial Judge is overburdened by cases, he has no time at all to seat in mediation with the parties. Second reason behind this may be perceived as having lack of *Alternative Disputes Resolution* concept among the Judges, advocates and the parties. Some Judges have little idea about *Alternative Disputes Resolution*, benefits of *Alternative Disputes Resolution*, amongst other things. They do not have practical ideas as to how *Alternative Disputes Resolution* takes place, how a mediation session can be run by a Judge and the sort. Even some of them have *Alternative Disputes Resolution* trainings. But those trainings relate only theoretical idea and not practical issues. Practicality is of great importance. Unless mediation trainings are practically relevant, it may not bear the results and serve the purpose of Justice and *rule of law*.

Another reason may be labeled as appointment of Junior Officer having only three to five years' of experience as *Legal Aid Officer*[s] who has been empowered to mediate a case. It is not possible to settle a complex partition case due to lack of experience[s] even to run a *Mediation Session* which consists of parties along with senior Advocates. In fact Senior Advocates feel discomfort in mediation sessions with Junior Officer. As a result successful mediation in civil disputes at the *Legal Aid Office* is very shocking and surprising. Mindset of the stakeholders that includes Judges, advocates, and the parties is also liable, since the parties do not have any idea about *Alternative Disputes Resolution*. He only comes to

know about it for the first time, thus experiencing it in the court. This inhibits from showing credible interests since, the person is not very aware about it.

Again, our lawyers have misconception that if the case gets settled in mediation, they might lose their cases. That is why, they discourage the parties to opt for mediation session before meditating Judge. Bangladesh does mediation, although in limited cases, in her own ways without following international standard. Here presiding Judge conducts the mediation sessions and if mediation fails he again resumes trial, which is not as per the international standards of mediation. In this case, during the mediation session, the trial Judge gets some information on the weaknesses of the parties, and Bangladesh have a mixture of *Alternative Dispute Resolution* Judge and the trial Judge.

Confidentiality is essential component in mediation. In Bangladesh, *Form* for confidentiality is signed by both mediator and parties in the sense that any information and what is said in mediation is strictly confidential and cannot be used subsequently. Another dark side of Bangladesh *Alternative Dispute Resolution* is that here we do not have institutional private *Alternative Dispute Resolution* system due to lack of *Alternative Dispute Resolution* law. As a result there is no private *Alternative Dispute Resolution* firm whereas developed world accepts private *Alternative Dispute Resolution* gladly. If private *Alternative Dispute Resolution* is allowed there will be more *Alternative Dispute Resolution* firms like law firms, which will lead to competition among the *Alternative Dispute Resolution* firms to attract clients for settlement and which obviously will reduce the burden on the courts. In this sense, new profession named mediator or arbitrator will also come to a daylight. This will reduce the income sources for the legal profession- who are dependent on formal litigations for their legal service fees and income.

The expected success of *Alternative Dispute Resolution* has met with a failure. As the challenges to *Alternative Dispute Resolution* are many, imbalance of

power among the parties, and money power dynamics, settlement are not based on consensus but coercive, due to imbalance of financial or moral power between the parties. These norms further perpetuate injustice or discrimination in the process. It requires public awareness, expand the role of legal professionals to encourage dispute resolution outside the courts; and the mediator[s] should be informed of the best legal and decision-making practices. As there is no arrangement of training for mediators to develop their knowledge and skills, lack of experienced mediator is one of the major challenges of non-formal dispute resolution.

Trainings has to be initiated and promote credibility of mediation amongst the people. There should be established mediation procedure[s] and it should promote court-assisted mediation. There should be accountability for lawyers, to allow the mediation of the cases. The lawyers should be persuaded that formal adjudication is not always a solution to the problems of the people. As a Judge and a mediator, I believe that parties will be most willing to rush to *Alternative Dispute Resolution* service providers and not to the Courts. We just need *Alternative Dispute Resolution* laws, permission of Private *Alternative Dispute Resolution* firm, reorganization of court connected and non-court connected *Alternative Dispute Resolution* structure.

Conclusion

Mediation in Bangladesh is a very important judicial and non-judicial tool for dispute resolution. While dispute resolution should facilitate a process and the outcome benefiting the people in the country, mediation still requires to be fomented as a national decision-making tool. It is used as a means of dispute resolution, but it still remains infective due to many reasons, as cited above. It restricts the parties to freely engage in mediation processes and is influenced by many external forces, including financial power and legal professionals. It is further inhibited by the ignorance of people and it still remains to become and serve as one of the important means of dispute resolution; that enhance legal services to the people.

Many initiatives are required to be taken up by the government to mainstream mediation or *Alternative Dispute Resolution* as one of the most valuable dispute resolution mechanisms in the country. If the country is to open a free and easy *access to Justice*, *Alternative Dispute Resolution* has to be adopted as one of the channels for mediation and *Alternative Dispute Resolution* services to solve the issues of the people. To enhance Justice, *community Justice* has to be enhanced and people have to renew their likings, supported by people familiar as well as associated with *Alternative Dispute Resolution* services in the country.

Ensuring Justice to the Self-Represented Criminal Defendants: The Need for Accountable and Active Bench?[1]

Introduction

The wisdom and farsightedness of our founding fathers have been fundamental in guiding the formulation of the *Justice System of Bhutan* that, was and is, inherently open and equally accessible to all. While representing oneself before the Court remained almost a norm than an exception, the idea of legal representation in its formal sense took birth in the *Bhutanese Justice System* with the enactment of *The Civil and Criminal Procedure Code of Bhutan, 2001*. This allowed the litigants to enjoy the luxury to decide for lawyer[s] to represent their cases before the case. The number of legal representations, whether by lawyers or one's relatives, continues to grow.

Yet by far, as the data will show in the context of criminal cases, representing oneself before the Court, with or without options, continues to be the trend. This inevitably renders the *Justice System* unequal vis-à-vis the *Self-Represented Criminal Defendants (SRCDs)* – the state represented by qualified and competent legal professionals on one hand and individuals, coming in conflict with the law, mostly representing themselves on the other. Courts might not be able to ensure fair *criminal Justice* unless the Judges treat *procedural Justice* as important as *substantive Justice*. Doing so, amongst others, it require[s] the Judges to manage the *SRCD*s as an important aspect of ensuring *fair trial* in terms of both *procedure* as well as the *outcome*. This article seeks to present evidence to suggest the need for Judges who can precisely carry this important judicial task as one of their primary judicial responsibility in a criminal case - active and accountable Judges on the *bench*.

1 Contributed by Dr. Karma Tshering (PhD).

The first part of the article reviews the relevant literature[s] from few *Common Law* jurisdictions to inform the enquiry into managing *SRCD*s to ensure fair *criminal Justice*. The second part seeks to translate the literature into the *"problem-context"* of Bhutan, followed by the method[s] used to collate the data and the limitations thereto. From fourth part on, the article presents empirical findings on the judicial perception about the issue: the extent or number of *SRCD*s, the reasons for self- representing or the *pro se* litigation by the criminal defendant, the needs of, and the difficulties faced by the *SRCD*s, services available to them, the effect of self-representation on the *Criminal Justice* processes, and the current approach to managing the *SRCD*s followed by concluding remarks. The remarks or suggestions include[s] on how *SRCD*s may be managed so as to administer *Justice* based on competent and equal representation[s].

Brief Overview of the Literature

The *adversarial Criminal Justice System* views the *right to counsel* as essential component of *fair trial*.[2] While lawyers or prosecutors represent the state throughout the criminal process, criminal defendants are not necessarily represented during the trial. This uneven position places *unrepresented defendants* at risk of unfair trial and injustice.[3] As noted by the *United States Supreme Court* in the *Scottsboro Case*,[4] a lack of legal representation renders even the intelligent and educated layman incapable of determining for himself whether an indictment is good or bad.

Self-representation is a common phenomenon in *Criminal Justice System*s around the world, notably documented in countries like Australia,

2 Marcus, P., & Waye, V.C. (2004). Australia and the United States: Two Common Criminal Justice Systems Uncommonly at Odds, *Tulane Journal of International & Comparative Law, 12* (1), p. 27.

3 Faulks, J. (2013). *Self-Represented Litigants: Tackling the Challenge*, Paper presented at the Managing People in Court Conference, National Judicial College of Australia and the Australian National University.

4 *Powell v. Alabama* 287 US 45 [1932].

Canada,[5] England and Wales,[6] and the United States of America (USA).[7] Studies in these countries identify some reasons why defendants may self-represent, including by choice.[8] Irrespective of the cause, *SRCD*s may find themselves in an *unfamiliar and unknown territory* amidst *qualified and skilled legal professionals*. In such trial proceedings, the conventional *Criminal Justice* procedure may be insufficient to *ensure a fair trial and Justice*.

As noted by Black J in the USA case of *Gideon v Wainwright*,[9] a person produced before a court who is unable to afford to hire a lawyer, cannot be assured a *fair trial* unless [a] counsel is provided. In Australia, case law has

5 Trevor, C. W. F. et al. (2012). Addressing the Needs of Self-Represented Litigants in the Canadian Justice System, *Commission Reports and Studies, Paper* 38*,* Toronto and Edmonton.

6 Judicial College. (2017). *Equal Treatment Bench Book 2013 (with 2015 Amendments)* Courts and Tribunal Judiciary. Retrieved from <https://www.judiciary.gov.uk/publications/equal-treatment-bench-book/> and a recent report on unrepresented defendants in the United Kingdom - Transform Justice, *Justice Denied? The Experience of Unrepresented Defendants in the Criminal Courts* (April 2016). Retrieved from http://www.transformjustice.org.uk/wp-content/uploads/2016/04/TJ-APRIL_Singles.pdf>. Of three separate legal systems in the United Kingdom, the sources mentioned relate to England and Wales and not Scotland and Northern Ireland.

7 See Johnstone, E.J. (2011). Representational Competence: Defining the Limits of the Right to Self-Representation at Trial, 86 *Notre Dame Law Review,* 524, Myra, M., & White, S. et al. (2007). Litigant Self-Representation I: The Fate of Defendants Who Represent Themselves in Court, *Journal of Psychiatry & Law, 39,* p. 289, *Indiana v Edwards* 554 US 164 [2008], and Erica J. H. (2007). Defending the Right to Self-Representation: An Empirical Look at the Pro Se Felony Defendant, *North Carolina Law Review, 85,* p.423.

8 For example, see for Goldschmidt, C.J. (2008-09). Judicial Assistance to Self-Represented Litigants: Lessons from the Canadian Experience, *Michigan State Journal of International Law,* 601, a recent report on unrepresented defendants in the United Kingdom, see Transform Justice, *Justice Denied? The Experience of Unrepresented Defendants in the Criminal Courts* (April 2016) Transform Justice. Retrieved from http://www.transformjustice.org.uk/wp-content/uploads/2016/04/TJ-APRIL_Singles.pdf> and for the USA, Cabell, K. (2012). Calculating an Alternative Route: The Difference between the Blindfolded Ride and a Road Map in Pro Se Criminal Defense, *Law & Psychology Review, 3,* p. 266.

9 *Gideon v Wainwright* 372 US [1963], Black J, 344.

identified that ensuring a *fair trial* is at least difficult or might be impossible when an unrepresented accused is required to answer a charge of a serious crime.[10] *Lack of legal representation leaves self-represented litigants vulnerable and at the risk of suffering unfairness*.[11] The Australian experiences show that the court must grant a stay of proceedings, potentially indefinitely, if legal representation is required to ensure a *fair trial*.[12]

Such vulnerability entitles defendants to special treatment as the threat posed by the criminal process to the individual's liberty creates a specific risk of *abuse of state power*.[13] The *SRCD*s are bound to face difficulties arising from the *lack of legal knowledge and the stress of the occasion*.[14] Gaudron J in *Dietrich v The Queen*[15] (*Dietrich*) found it difficult to accept that trial without representation could be a *fair trial* although the majority in *Dietrich Case* determined that it may depend on the facts of the case and background of the defendant.[16] While that remains the case, a study found that while some litigants *deliberately choose to represent themselves*,

10 *Dietrich v The Queen* [1992] 177 CLR 292.

11 Dewar, J. et al. (2000). *Litigants in Person in the Family Court of Australia* – A Report to the Family Court of Australia, *Research Report No. 20* (Family Court of Australia) 8. The research findings in this study were in the civil jurisdiction, particularly the family courts. The findings may not necessarily be analogous to the criminal jurisdictions. See also Australian Institute of Judicial Administration. (2001). *Litigants in Person Management Plans: Issues for Courts and Tribunals* (Australian Institute of Judicial Administration Incorporated); *Re F: Litigants in Person Guidelines* (2001) 161 FLR 189; Sourdin, T., & Wallace, N. (2014). The Dilemmas Posed by Self-Represented Litigants: The Dark Side, *Journal of Judicial Administration, 24,* p. 61; Richardson, E., Sourdin, T., & Wallace, N. (2012). *Self-Represented Litigants – Literature Review*, Australian Centre for Court and Justice System Innovation (ACCJSI), Monash University; Productivity Commission, *Access to Justice Arrangements.* (2014). Productivity Commission Inquiry Report, Australian Government, Vol. 1, No. 72.

12 *Dietrich v The Queen* (1992) 177 CLR 292.

13 Assy, R. (2015). *Injustice in Person – The Right to Self-Representation,* Oxford University Press, p.17.

14 *Dietrich v The Queen* [1992] 177 CLR 292, Gaudron J, 369. See Supreme Court of Queensland, *The Equal Treatment Bench Book* (Supreme Court of Queensland, 2016) 137.

15 *Dietrich v The Queen* [1992] 177 CLR 292, Gaudron J, 369.

16 Ibid.

some are unrepresented as a matter of necessity.[17]

Gray J in the Australian case of *Nagy v. Ryan*[18] observed that the court system *operates on a professional level with the assistance of persons having both the appropriate* [professional] skills and owes certain duties to the court. *Having neither the required skills nor owing certain duties to the court*, the *SRCD*s *may not be able to partake in the proceeding effectively*.[19] This is due to reasons that the *SRCD*s *may not be able to follow the court processes, and may not understand or observe ensuing obligations on parties to follow orders, cooperate and conduct themselves with honesty*. Higher professional duties are also imposed upon lawyers working in court for the parties and these can be enforced against them through professional sanctions. The courts cannot discipline the *SRCD*s like lawyers for breaches of professional ethics although courts retain the powers over the parties including contempt and costs powers that may be employed to ensure the *due process*. Further, the *SRCD*s *may not often be able to assess their case with dispassionate objectivity as would be applied by their legal representative*[s], which may affect their ability to provide *good legal submissions to the court*.[20] All of these can hinder the "best-interest" based proceedings to the *SRCD*s.

The *disparity in skill and knowledge* of the *SRCD*s raises questions about a court's duty to assist them. A court must properly discharge its functions according to the principles of *independence*, *impartiality* and *fairness*.[21] However, where one party is at a *significant disadvantage* such that they may not get fairness at the trial, the court may need to proactively intervene in the interest of *Justice*. How much and of what nature these intervention[s] takes, poses as a difficult questions for the court. As Engler points out: *'[a]*

17 See Dewar et al, above fn 10.

18 *Nagy v Ryan* [2003] SASC 37, Gray J, 40.

19 *R v Zorad* (1900) 19 NSWLR 91.

20 *McInnes v The Queen* [1979] 143 CLR 575, 590.

21 Stewart, R.(2011). The Self-Represented Litigant: A Challenge to Justice, *Journal of Judicial Administration, 20,* pp.146, 147. See *Constitution of Bhutan,* Art. 21(1) & *The Civil and Criminal Procedure Code of Bhutan, 2001,* s. 3, 4, 5 & 6.

ny act of enabling the unrepresented litigants to have their case heard may be perceived by the state, and its counsel, as favouring the unrepresented accused, while not doing so would not ensure a fair trial'.[22] For this reason, the *right to counsel* derives from the disadvantage of being unrepresented.[23]

The concept of *fair trial* extends beyond the interests of the defendant. The criminal trial must balance *fairness* not only to the *defendants* but also to the *victims* and *society*.[24] Confronted with these triangulation of competing issues, mechanisms to ensure that the *SRCD*s receive a *fair trial* have developed in jurisdiction like Australia that impact the role of Judges[25] and prosecutors,[26] and the procedures to examine certain

22 Engler, R. (2011). The Toughest Nut: Handling Cases Pitting Unrepresented Litigants Against Represented Ones, *Juvenile and Family Court Journal, 62* (10), p. 10.

23 *McInnis v The Queen* [1979] 143 CLR 575, Murphy J, 586.

24 Bowden, P., Henning, T., & Plater, D. (2014). Balancing Fairness to Victims, Society and Defendants in the Cross-examination of Vulnerable Witnesses: An impossible Triangulation, *Melbourne University Law Review, 37*(3), p. 539. See Art. 21 (1) of the *Constitution of Bhutan,* & s. 3, 6 and 28 of *The Civil and Criminal Procedure Code of Bhutan, 2001*.

25 Judges and Courts are aware that: a criminal trial may become an *unfair trial* due to judicial error (*Black v R* [1993] 179 CLR 44, 51-2); Judges must ensure that the accused is put in a position where he or she can make an effective choice as to the exercise of his or her rights during the trial, but not obligated to tell the accused on the manner of exercising those rights (*R v Zorad* [1990] 19 NSWLR 91, 94), and a court could encourage appropriate early guilty pleas (New South Wales Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas*, (2014). Report 141). *See also* King, M. (2003). Applying Therapeutic Jurisprudence from the Bench: Challenges and Opportunities, *Alternative Law Journal, 28*(4), pp. 172, 134, and Mack, K., & Roach, S.A. (2011). Opportunities for New Approaches to Judging in a Conventional Context: Attitudes, Skills and Practices, *Monash University Law Review, 37*(1), p. 187.

26 In the Australian legal system, while defence lawyers have a role to ensure that their client's case is presented fully, properly, fearlessly and with vigour (for example, the *Australian Bar Association*, *Barristers' Conduct Rules 2010* (Cth) (27 November 2010) r. 37), the prosecution lawyers are more constrained. They must refrain from conduct that may render the *trial unfair* (*Grey v R* [2001] HCA 65), for example, not to address the jury where the defendant is unrepresented (*R v Zorad* [1990] 19 NSWLR 91, 94), not to take advantage of unrepresented defendant

witnesses[27] in criminal trials involving the *SRCD*s. The article is, however, primarily limited to examining the role of courts or the Judges vis-à-vis the trials involving the *SRCD*s. The article traces similar conceptual and procedural approaches to the concept of a *fair trial* in Bhutan, thus making an appropriate comparative analysis. It can be agreed that in many aspect[s], comparative analysis find its root[s] in different legal systems and country contexts. Differences must be duly acknowledged. As such, the experiences of foreign jurisdictions in managing and ensuring *fair trial* to the *SRCD*s will assist in making the comparative assessment of the roles of courts or the Judges in ensuring *fair trials* to the *SRCD*s in Bhutan.

Contextualising Literature in Bhutan

In trial proceedings in Bhutan, the *Royal Bhutan Police (RBP)*[28] and the *Office of Attorney General (OAG)*[29] represent the State against the criminal defendant[s]. Despite strong legislative foundations for the *right to a fair trial* and *legal counsel* in Bhutan,[30] previous reports have assumed that the majority of *criminal defendants represent themselves before the court of law*.[31]

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by asking an inadmissible question (*R v Reeves* [1992] 29 NSWLR 109), and have some consideration for unrepresented defendants. See Craigie, C. (2000). *Unrepresented Litigants: The Criminal Justice Perspective.* Retrieved from <https://www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/Papers%20by%20Public%20Defenders/public_defenders_unrepresented_litigants.aspx>, Stone, J. (n.d.). Civility and Professionalism - Standards of Courtesy, *Journal of the Law Society Northern Territory,* p. 42.

27 For example, in Australia, cross-examination of children and witnesses with intellectual disability can lead to unreliable evidence and further traumatise the victim, and thereby jeopardize the chance of both the truth emerging and ensuring that Justice is done. See Phoebe et al, above n 23.

28 Under section 71 of the *Royal Bhutan Police Act 2009,* the *Royal Bhutan Police* is authorized to prosecute any person for any criminal offence other than a misdemeanour and above.

29 Section 16 of the *Office of Attorney General Act 2009* empowers the *Office of the Attorney General* to prosecute.

30 *The Constitution of Kingdom of Bhutan 2008,* Art. 7(21) and *the Civil and Criminal Procedure Code of Bhutan 2001,* s.33.

31 Judiciary of the Kingdom of Bhutan. (2016). *Annual Report of the Judiciary of the*

This phenomenon presents Bhutanese courts with a qualified and competent prosecutor on the one side and the *SRCD*s on the other. Unlike the State, the *SRCD*s may be *significantly disadvantaged* and be at risk of an *unfair trial*. In general, the *SRCD*s are not legally qualified. They are usually unaware of the *legal rules*, the substance of the laws, court processes, including their *legal rights* or *duties*. This makes defending extremely difficult for them. Defence is a legal contestation[s], and a contest of both *legal wit and knowledge*. For example, the *SRCD*s unaware of the court procedures and are usually not able to correctly understand and submit relevant facts and issues- including effective defences.[32] The appearance of *unevenly resourced and qualified parties* before the court makes it more difficult for the courts to ensure a *fair trial*. These difficulties are amplified in the context of the Bhutanese *Criminal Justice System* where there is no clear law or guidelines on how courts should manage cases involving the *SRCD*s and with no functioning *legal aid*, this offers limited protection to the defendants when they *cannot afford it*. Criminal procedure in Bhutan does not offer guidance, best practice, or a set of strategies for the courts to properly address the issue of the *SRCD*s and their needs, which raises further concerns.[33] There is no data, evidence or information to inform how better Judges might have to hear and decide the cases involving the *SRCD*s to ensure *fair trial*. The article seeks to fill this precise gap and develop new knowledge to inform the need for more concerted action by the *Judiciary* and the state.

Kingdom of Bhutan, p. 54. See U.S. Department of State, *Country Reports on Human Rights Practices – Bhutan* (2010). Bureau of Democracy, Human Rights, and Labor. Retrieved from https://2009-2017.state.gov/j/drl/rls/hrrpt/2010/sca/154479.htm>5. This report broadly claimed with no prior substantial measurement of the problem of self-representation in the country.

32 Judiciary of the Kingdom of Bhutan. (2016). *Annual Report of the Judiciary of the Kingdom of Bhutan*, p. 55.

33 See Tshering, K. (2020). Self-Represented Criminal Defendants in Bhutan: Empirical Findings, *Australian Journal of Asian Law,* Tshering, K. (2019). Ensuring Fair Trial in the Interests of Justice vis-à-vis Self-Representing Criminal Defendants in Australia and Bhutan, *Bhutan Law Review, 12,* p.76, and Tshering, K. (2017). Administration of Criminal Justice in Bhutan – From the Right to Counsel Perspective, *LAWASIA Journal,* pp. 1-18.

Methodology and Limitations

This article relies on the data collated for the PhD Study. A total of 25 Judges were requested to partake in the in-depth semi-structured interview. They were provided with information about the Study. Of the preferred sample size, 16 Judges comprising one Justice of the Supreme Court, two Justices of the High Court, 10 Judges of the *Dzongkhag Court*, and three Judges of the *Dungkhag Courts* agreed to participate in the Study.

Although some Judges were not able to participate, Judges from all tiers of the courts took part in the interview. This ensured to broaden the breadth of the sample and that the findings are generalizable and representative of the experiences of courts in the country.[34] Particular Judges were sellected based on their consent to participate as well as the geographical location of their court and their ability to comment on the phenomenon of the *SRCD*s. This allowed the generation of *'a broader spectrum of data for analysis'* and study the judicial perception[s] of the *effects of self-representation* on the administration of *Criminal Justice*.[35]

The interviews were conducted at the respective courts or other place[s] as deemed convenient by the interviewees and each interview lasted between the time range of one hour or one hour and forty five minutes. The interviews were transcribed. Respective transcriptions were sent to interviewees for their final reviews to ensure that it reflected their responses. This method allowed the researcher to solicit accurate information about the experiences and views[36] of the Judges.[37] Judges were identified and selected due to reasons of their significant knowledge and experience

34 Saldaña, J. (2011). *Fundamentals of Qualitative Research,* Oxford University Press, New York, p. 32.

35 Ibid. p. 33.

36 Hartley, R.D. (2011). *Snapshots of Research: Readings in Criminology and Criminal Justice,* Sage Publications, pp. 221-2.

37 Mason, J. (2002). *A qualitative research requires a highly active engagement from its practitioners*, Qualitative Researching, Sage Publications, p. 4. (2nd Eds.).

about and in the *Criminal Justice* processes and the issues faced by the *SRL*s in the country.[38]

Identifying information were removed prior to the analysis. The participants were listed and coded as Judge followed by a letter of the alphabet, for example, **Judge A**, **Judge U**, **Judge V**, with no identifiable information.[39] Questions were thematically framed following a review of the literature relating to *self-representation* and the *fair trial* process. This provided the basis for the thematic analysis of the interview transcripts. In light of the themes contained in each question, the transcriptions were read and re-read together and noted for similarities or dissimilarities, including any provisos or illustrations, and recognized a category of views as a norm or exception within the theme.[40] From these, codes were created for each theme and then applied to paragraphs. Paragraphs that best illustrated the identified themes are quoted wherever relevant[41] to the subject of enquiry.

There is no publicly known data available about the number, proportion or nature of those appearing as *SRCD*s in Bhutan. However, there are other sources of data on this topic that are analyzed in this research. Accordingly, in addition to the interviews, the researcher gathered and collected reliable data about the representative rates of *SRCD*s in criminal matters by accessing and analysing the relevant *Judicial Forms* [which are in *Dzongkha*] contained in *Criminal Case Files* held by several courts. *Judicial Forms* relevant to the Study were **Forms H-11** and **H-13**, including **H-12**

38 A criterion sampling ensures that the most credible information to study is obtained from the qualified participants: Palys, T, (2008). Purposive sampling in L. M. Given (Eds.). *The Sage Encyclopedia of Qualitative Research Methods Vol. 2,* Sage Los Angeles, p. 697. See Turner, D. W. (2010). Qualitative Interview Design: A Practical Guide for Novice Investigators, *The Qualitative Report 15*(3), pp. 754-760.

39 Seidman, I. (2006). *Interviewing as Qualitative Research: A Guide for Researchers in Education and the Social* Sciences, Teachers College Press, p. 9. (3rd Eds.).

40 Ibid. see also Matthew, B.M., & Huberman, M.A. (1994). *Qualitative Data Analysis: An Expanded Sourcebook,* Thousand Oaks, p. 9.

41 Kvale, S. (1996). *Interviews: An Introduction to Qualitative Research Interviewing*, Sage Publications, pp.188-90.

wherever a defendant chose to representation. These *Forms* record whether a defendant chose representation along with their personal details, for example, the place of residence, employment status, which are crucial in understanding the profile and the level of self-representation.

As per the *Annual Report* of 2018, the *Judiciary* registered 8,577 cases in 2018, of which 1,232 were criminal cases.[42] Of the 1,232 *Criminal Case Files* in the country, the researcher accessed *Judicial Forms* (**Forms H-11**, **H-12** and **H-13**) for 92 *Criminal Case Files* (relating to 118 individuals) from across the country. The *Judicial Forms* contained in 92 *Criminal Case Files* of nine courts for July 2018 were analyzed to study whether the criminal defendants were represented before the court. A month of cases was selected to provide a manageable representation across the regions of the average number and type of criminal cases and the defendants. The month of July were selected as it is the median month of the year, meaning the number of criminal cases in July is not necessarily affected by cases being forwarded from the previous year nor is it affected by the courts' attempt to dispose the cases towards the end of the year.

To generate a broader, generalizable and representative data, one *Dzongkhag* and *Dungkhag Court* each, from the eastern, western, northern, southern, and central Bhutan was considered. One of the busiest *Dzongkhag Court*s in each region was considered; this allowed for the collection of a broad and representative data about the number of criminal cases involving the *SRCD*s in the *Dzongkhag Courts* in different parts of Bhutan. However, for the *Dungkhag Courts*, the four busiest Courts were taken for the Study. These *Dungkhag Courts* are spread over the country. Gelephu *Dungkhag Court* in the south-central region of Bhutan, Phuentsholing *Dungkhag Court* in the southwest region, and Nganglam *Dungkhag Court* in the central-south region were included as they were the three busiest *Dungkhag Courts* in the country in 2018.[43] On the other, Jomotshangkha

42 Judiciary of the Kingdom of Bhutan. (2017). *Annual Report,* p. 7.

43 Phuntsholing *Dungkhag Court* registered 636 cases in 2018 with 180 cases pending

Dungkhag Court to the south-east was added to provide additional data from the eastern region. However, Nganglam and Jomotshangkha *Dungkhag Court* Registries stated that they did not have criminal cases in July 2018. Further, the unavailability of *Dungkhag Courts* in every region of the country coupled with some *Dungkhag Courts* with a very small caseload limited the ability to collect data from *Dungkhag Courts* from all parts of the country. While counting the *Form*, it provided an improved quantitative understanding of the numbers of criminal defendants who are represented, their details helped us to understand and map the profile[s] of the *SRCD*s. No other aspect of the *Case Files* were analyzed.

Representative Number of SRCDs in the Country

Cumulatively, the data calibrated in the *Judicial Forms* found out *high level of self-representation* in courts across Bhutan. The data gathered from courts in different regions revealed that more than *90 percent of the defendants in criminal trials represented themselves* in July 2018. In July, 92 *Criminal Case Files* from the courts identified to access and analyze *Judicial Forms* involved a total of 118 defendants. Of the 118 defendants, *90 per cent of defendants represented themselves before the court* and the rest (12 defendants) were represented either by the *member of the family* or *a relative or by the legal counsel*. Of the 12 with representations, 58 per cent of representation was by a *member of the family or a relative* and 42 per cent of *representation was done through a legal counsel*.

Given that the data from the *Forms* provides a very limited idea of the number of *SRCD*s in criminal trials in Bhutan, the Judges were enquired about whether they have contact with the *SRCD*s and if they maintain any specific data about them. Most participants said that *'most,' 'the majority,' 'over 90 per cent'* or even *'almost 100 percent'* of the criminal defendants

from the previous year. Gelephu *Dungkhag Court* registered 372 cases in 2018 with 68 cases pending form the previous year. Nganglam *Dungkhag Court* registered 136 cases in 2018 with cases from the previous year.

represent themselves before the court of law. Their responses confirm[s] that *self-representation in criminal trials* is an everyday phenomenon. **Judge A** commented that *self-representation was rather a norm before 2010* due to *few legal professionals in the market* and the *litigants routinely came to court in person*. **Judge A** thought that post-2010, *with the gradual increase in the number of professional lawyers in the market*, it has facilitated the gradual transition or shift from *self-representation* to *lawyer-led litigation*. However, the findings rather demonstrates that *lawyer-led litigation* might be *increasing only in the urban areas* but it is yet a *new phenomenon in most of the courts in the parts of comparatively less developed districts and sub-districts* in the country. Judges confirmed that *there is no formal or specific record or data about the numbers of SRCDs* maintained by the courts or the government nor there is a requirement for the courts to maintain such records. Without formal official records, Judges interviewed were unable to provide a realistic and certain scale of the phenomenon of the *SRCD*s.'

Reasons for Self-Representation

Judicial Form H-13 requires defendants to acknowledge their right to representation by counsel or a relative by the court and to confirm their decision to waive it and to proceed in person with 'competence and intelligence.' Such waiver implies that a defendant in a criminal case can represent and defend himself or herself. Other than the conclusion that one prefers to proceed in person because he or she believes that he or she has the *competence* and the *intelligence* to do so, the information contained in the *Forms* do not reveal any other reasons for *self-representation* by the criminal defendants.

Against this backdrop, the Judges were queried for their views about the [possible] reasons the criminal defendants self- represent. **Judges N** and **U** acknowledged that the question about the *reasons for self-representation* is subjective and can heavily depend on the nature of the case, the background of the criminal defendants and the context. However, **Judge**

H remarked that 'self-representation is inextricably concerned with the question of affordability or the cost factor[s] and to some extent on the awareness and accessibility of *Jabmis*[44] or a legal counsel.' **Judges Z** and **E** suggested that a range of factors may influence the criminal defendants to self-represent, but broadly they identified two reasons: a *deliberate choice* or a *forced option*.

Self-Representation as a Deliberate Individual Choice

Besides the enactment of a formal procedural law, the courts in Bhutan have become more *accessible*, *user-friendly* and *efficient*.[45] While *Alternative Dispute Resolution* mechanisms remain equally important and successful, with the introduction of *Court Annexed Mediation Units (CAMU)* in all courts in the country, simplified judicial processes have facilitated people to use the judicial services of the courts. Some of the Judges were of the view that some criminal defendants might choose *self-representation* due to the *accessibility of the court, with its simple and litigant friendly judicial procedure*. For example, **Judge U** said:

> *I think most of the people in both civil and criminal cases like to represent themselves because our system is simple. They feel comfortable to do it themselves. For example, there is an increasing number of appeals because currently, appeals are almost automatic. The court has relaxed the appeal procedure and allowed litigants to appeal irrespective of whether a case involves questions or issues of facts or law. Unlike in the past, all the Judges are qualified and well equipped with knowledge*

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44 *The Civil and Criminal Procedure Code of Bhutan, 2001,* s. 215 (17). *Jabmi (Amendment) Act of Bhutan 2016,* s. 72 (1). The phrase *Jabmi* refers to a Bhutanese, professionally qualified and licensed to practice and represent a party before the court of law.

45 Dubgyur, L. (2019). *Review of Judicial Reforms in Bhutan*, Judiciary of Bhutan. Retrieved from http://www.judiciary.gov.bt/publication/reforms1.pdf>. See also Royal Court of Justice. (2019). *Procedural Reforms.* Retrieved from <http://www.judiciary.gov.bt/index.php/Welcome/get_pages?id=37%20&cat=8.

> *and skills to ensure a fair trial. The Judge guides them through the process. The procedure is made more simple and friendly. They get to learn in the very first hearing stage only.*

Others identified that *self-representation* was a usual judicial norm. **Judge R** stated that *self-representation* was a practice and norm rather than the exception in the past and that the concept of legal representation is *'quite new to most people.'*[46] **Judge O** noted that 'Bhutanese are used to self-representing before the court.' Likewise, **Judge V** opined that most of the litigants were in the period of transition from *self-representation* to *representation through a legal counsel*.

The majority of the Judges also identified that for few, *self-representation is deliberate* by reasons of self-confidence as some criminal defendants [might] think they can defend themselves. Some consider *self-representation* as more appropriate to relay their case; they think they can present their cases better than anyone other person and they feel they best know their case. They may think that 'they know the case and involving lawyers would not … matter' (**Judge U**) and 'they could convince the Judge better than a lawyer.' **(Judge Z).**

Some Judges also suggested that some defendants opt to proceed to trial in person because they, at times, they do not trust the lawyers. They may think lawyers have multiple cases at hand and they would not get the amount of attention expected of them. **Judge F** stated that some *SRCD*s think that the lawyers are tactical and can delay the process to increase their fees or simply they might not have much time due to multiple cases in hand.

Some Judges were of the view that some criminal defendants choose to represent themselves because the case is simple. They may be involved in 'straight-forward or simple and petty cases' **(Judge F). Judge B** noted that

46 The Judge referred to *The Civil and Criminal Procedure Code of Bhutan, 2001* as the governing law that provided law[s] relating to judicial process after 2001.

the *choice to self-represent* may be due to reasons that *cases are open-shut cases* with no possible issues. In cases of lesser charges, for which punishment might be to either to pay a fine in lieu of imprisonment or undergo an imprisonment term, an accused might not want to contest the case because he or she might think they can pay a fine in lieu of imprisonment. **Judge D** suggested that there are also criminal defendants who are honest and would not opt to contest charges – 'out of their honesty' they might prefer to 'agree or plead guilty to the charges than to contest it.'

In some cases, criminal defendants may *not feel the need for legal representation*. This may be due to reasons mentioned earlier – cases are simple and not complicated. However, some Judges suggested that some criminal defendants deliberately choose to represent themselves because they know they are guilty and that engaging counsel or a representative would not make a difference. Judges also suggested that some defendants might not want to pay for legal representation. For example, some **Judges (I, E, N,** and **U)** identified that there are wealthy criminal defendants who could afford legal representation but do not want to pay for it.

Some Judges commented that *some self-representations* might be a deliberate choice due to *social stigma.* For example, **Judge B** notes that *self-representation in some cases might also be a deliberate choice* since the accused does not want the case to be publicly known. **Judge B** said:

> *Some self-represent because they do not want the case to be public. They can be very consequentialist at times. Given the small society, they would request the court to end the trial as soon as possible, not to contact family and relatives while anyone can come and assist him, and not to make the case publicly known. They feel the social stigma that results from having involved in a trial for a crime at times are also in some sense punishment as well.*

Judge H noted that the social stigma connected with violence and coming into contact with law enforcement officials like the police have irreparable consequences to ones reputation even when acquitted. Involvement of any third party, including legal counsel might result in disclosure of the case to family, relatives and the public. **Judge H** suggested, some of the criminal defendants would want to proceed him/herself without the help of any third parties, including legal representation, family and relatives. **Judge H** stated that:

> *Some do not want their case to go public. Because of the social stigma connected with arrest, detention, and conviction or even in case of acquittal the fact they are being involved in cases related to a crime, some even do not want their family, friends, and relatives to know about the case and their involvement.*

Self-Representation as the Only Option

Conversely, all the Judges identified that there are also some defendants who have no other options than to represent themselves before the court. They expressed a variety of reasons as outlined below.

All Judges identified that some defendants represent themselves because they are indigent and do not have sufficient income or resources to pay for representation. **Judge A** commented they are not able to pay the 'exorbitant lawyers' fees. 'Lawyers are', according to **Judge R**, often 'too expensive.' **Judge F** noted that some criminal defendants have little or no income. This economic factor, **Judge F** pointed out, constrains them from engaging a lawyer though they might prefer to be represented at the trial. **Judge E** commented that criminal defendants have 'no option' when they are indigent. Likewise, **Judge X** mentioned that *self-representation relates to an economic factor*. The Judge said that even if criminal defendants require representation, most of them are not able to afford to pay for it.

Most Judges were of the view that *self-representation might also depend on the nature of the case* – criminal defendants are more likely to opt for representation by legal counsel in *more technical and complicated cases*. **Judge B** stated that 'at times, self-representation can also depend on the nature of offence and charge'. For example, **Judges F** and **I** emphasised that representation is sometimes sought for certain types of cases such as high profile or sensitive matters. **Judge F** suggested that representation in such cases is often a 'strategy'. **Judge I** stated that, in his jurisdiction, almost all 'defendants charged with corruption offences tend to employ lawyers to represent and fight the case on their behalf [irrespective of the amount of fees they might charge].' This trend or practice can push some defendants to proceed without representation despite the need for a lawyer.

Most Judges also identified that some represent themselves as there are no services. **Judge D** stated that 'some self-represent because *there are no facilities in my jurisdiction. There are no law firms and legal offices. There is no legal aid'.* Similarly, **Judge I** stated that 'some may represent themselves for there are *no other options. There is no legal aid, public defence, and not much pro bono services.'* In some jurisdictions (for example, according to **Judges F**, **N, O,** and **Q**), there are not many professional lawyers or qualified legal practitioners. **Judge F** noted that even if there are some legal offices, these offices provide drafting services and not representation since they are often not qualified legal practitioners. **Judge Y** noted that 'even if they were able to afford they have nowhere to go at times.' Therefore, in the view of many of the Judges, most of the criminal defendants represent themselves *due to non availability of services like legal aid, pro bono legal services, qualified legal practitioners, and public defence, to avail for legal advice or representation*.

Some Judges also suggested that some represent themselves because they are repeat offenders who have lost their support networks. **Judge F** noted that *'some habitual offenders represent themselves for the reason that they lost support from the family and relatives.'*

Majority of the Judges also identified that there are some litigants who also represent themselves owing to the reason that *they are unaware of their rights, including their right to a legal counsel*. For example, **Judge H** commented that *self-representation by criminal defendants also 'inextricably concerns with ... the awareness and accessibility of Jabmis' and that 'some are not aware of the availability of legal representation or legal aid.'*

Reasons for Representation

The reasons for representation were recorded in **Judicial Form H-12** in some of the cases as shown in table below. The reasons for representation ranged from a defendant being a student, not able to submit before the court of law to the feeling of personal inconvenience related to employment, business, old age or language difficulties. As clearly shown in the table below, most of the *Forms* mentioned the name or the *nature of charges instead of reasons for representation*. One criminal defendant or his or her representative has not stated [any] reason for legal representation.

Of 12 *Forms*, only one *Form* mentioned the reason for representation due to the need for the *knowledge of law and judicial procedure.* This suggests that the *need for legal representation is often seen as personal convenience rather than a need to defend oneself competently before the court*. This also suggests that *the wish for representation is not necessarily connected to the severity of charges, type of offences or technicalities of the law and procedure*. Where case involved multiple defendants, they were either represented by their *respective family member, a relative or a legal counsel.*

Nature of Offence	Representation	Reasons for Representation
Illicit trafficking of Narcotic Drugs and Psychotropic Substance	By Relative	Illicit trafficking of Narcotic Drugs and Psychotropic substance
Deceptive Practice through WhatsApp	By Relative	Deceptive practice via WhatsApp

Battery	By Son	Old age and language difficulty
Tax evasion	By Counsel	No knowledge of law and procedure
Illicit trafficking of Narcotic Drugs and Psychotropic Substance	By Mother	Illicit trafficking of Narcotic Drugs and Psychotropic substance
Battery	By Counsel	Battery
Battery and failure to report a crime	By Father	Defendant being a student
Battery and failure to report a crime	By Father	Defendant being a student and not able to submit submissions
Battery and failure to report a crime	By Counsel	Inconvenient personal circumstances
Illicit trafficking of Narcotic Drugs and Psychotropic Substance	By Mother	Illicit trafficking of Narcotic Drugs and Psychotropic substance
Larceny by deception	By Counsel	Larceny by deception
Fraudulent cheque writing	By Counsel	Not completed

Table A: Reasons for Representation of Criminal Defendants in July 2018

Needs and Difficulties of SRCDs

Judges were requested to mention on the needs of and the difficulties faced by the *SRCD*s when they appear in person before the court. All Judges affirmed that the *SRCD*s are often poor and not competent and qualified like legal professionals and are, therefore, naturally prone to face difficulties and needs help.

Many Judges pointed out that the level of needs and the variety of difficulties they might face could depend on the facts and circumstances of each case and more importantly, the socio-economic background of the defendants, also play vital. The various needs and difficulties faced by the *SRCD*s are numerous as revealed by their responses. Most Judges observed that the

*SRCD*s lack *knowledge of and skills in law - both substantive and procedural law*. Judges recognized that *litigants are not competent and qualified like lawyers, are not legally qualified, are ignorant of the law and do not have much legal information and knowledge*. **Judges V** and **Y** identified that the *SRCD*s *do not know much about the law and its process*. Owing to this, when they come to the court in person, the courts have to educate them on laws. One Judge specifically pointed out that the *SRCD*s, especially the *first-time offenders,* owing to their *ignorance of law* and *procedure*, *need all relevant legal information irrespective of how difficult it is for them to understand*. **Judge F** stated that:

> *[T]he court, during the preliminary hearing, tells them about the law and procedure, court decorum and almost everything, including the strict observance of two-way communication. They need to know how the case will proceed, what rights they are entitled to and what duties they have to comply with … The charges need to be explained. They need to know what they are charged for under which sections of the law and why, and most importantly what this law says.*

Most Judges identified that the *SRCD*s *need legal information, legal advice, and guidance on the relevant law and judicial procedures during the trial*. **Judges I, Y** and **Z** stated that the *SRCD*s are not well versed in law and procedure and therefore, specifically, as **Judge Z** puts it, *'they need to be educated about the relevant laws and procedure.'* **Judge U** noted that *even after going through the court processes at the trial court, the SRCDs are still lost on appeal and 'need to be refreshed about the court process and the relevant laws.'* **Judge Y** said, *'they need to be made aware of both procedural law as well as the relevant substantive law.'*

Majority of the Judges raised concerns that unless they are aware about various provisions of the laws, *the SRCDs may not be able to defend charges against them*. **Judge R** said that the *SRCD*s *'need legal information and advice so that they can seek an acquittal or at least plead for a minimum*

sentence.' As **Judge D** puts it, *the SRCDs need to be legally informed and made legally aware to defend charges*. **Judge D** mentioned that:

> *They are not competent and qualified lawyers. Due to their ignorance of the law and its procedure, they need legal information and legal awareness in defending charges. For example, they are not able to argue mitigating circumstances surrounding the case and invoke appropriate defences. They are also ignorant of the punishment ranges. With this ignorance, if not for acquittal, they may not even be able to argue for a minimum range of punishment in cases of conviction.*

Similar to the need for legal awareness, most Judges understood that the *SRCD*s *are not aware of their legal rights and duties*. For example, **Judge D** stated that the *SRCD*s are *'unaware of their right to counsel and the possibility of the state to come to aid if they need a lawyer and they cannot afford it.'* **Judge V** cautioned that because of 'their naive nature,' there are chances that they could *become the victims of manipulation* both in the *procedural and substantive terms* by the *seasoned prosecutors and legal practitioners*. **Judge V** suggested the *SRCD*s are not properly informed by the people who know the law, and hence, they need their legal rights and duties to be explained by the Judge**. Judge Y** stated that the *court has to play a vital role in educating the litigants about the court procedure and its processes, including bringing to their notice 'the need to take upon themselves the onus to know both the procedural laws as well as relevant substantive laws.'* He reasoned that while the *court must balance the two unequal arms of the prosecution and defence, the court cannot instruct the SRCDs everything and they can only guide them through the processes in accordance with the procedural law and Bench Book.*

Except for those who deliberately choose to represent themselves before the court, most Judges suggested that generally, the *SRCD*s need *legal aid* and *pro bono* legal services, including public defence. Interview responses confirmed that most of the *SRCD*s are poor. While generally, the *SRCD*s

are not able to hire legal representatives due to economic means and conditions, there is no institutionalized system of *legal aid* to facilitate the legal services of the lawyers. According to **Judge X**, the definition of *SRCD* "is a person who does not have money and freedom to seek assistance." **Judge B** noted that most *SRCD*s 'need *legal aid* and *pro bono* legal services [which few practising lawyers are already providing]' and **Judge F** observed that 'there is always the issue of the cost involved.' **Judge O** argued that if there is a *legal aid,* the *SRCD*s 'could effectively choose for representation before the court.' **Judge U** claimed that most of the criminal defendants 'might prefer representation if they could afford it or get one at the expense of the state.' **Judge R** also views that 'given a choice, everyone, including the *SRCD*s might like to be represented by a lawyer or counsel.'

Some Judges identified that representation was particularly needed in certain cases but was not available without finances. For example, **Judge E** found that the *SRCD*s *involved in complex and serious cases need legal representation and legal aid but 'without income, they are not able to afford to pay for it'*. **Judge I** also highlighted that the *SRCD*s need *legal aid* to employ lawyers 'particularly, those charged with corruption and other serious cases' because 'these cases are most often technical and involve legal technicalities which the *SRCD*s are more often not aware.' **Judge D** also identified that defending and rebutting the charges without the assistance of a lawyer[s] is challenging, although it might depend on the facts and circumstances of the case. These are examples where legal representation is necessary. **Judge F** provides an illustration of one such situation and how he proactively dealt with it:

> *[A] a man was charged for allegedly raping his minor daughter. He was remanded to judicial custody for about eight months. He was not represented. In every hearing, he denied the charges. There was undoubtedly unequal arms*

> *between the prosecution and the defence. While the Office of the Attorney General was too tough in pressing the charges, the defendant only knew how to merely deny the charges but did not know how to and what defences to put forth. Upon the request by the court, a Jabmi or legal counsel consented to represent him pro bono. At the end of the trial, he was given the benefit of doubt as there was no strong evidence to convict him. In this case, we felt that unless we involved someone for him, he would merely deny the charges without further submissions or arguments in defence.*

There was a divergence of views on the need for *legal aid*. **Judge I** cautioned that most of the criminal cases are simple and that 'the problem with the *pro se* is not that acute.' While **Judge I** acknowledged that there is no *legal aid*, no public defence and not many *pro bono* legal services in Bhutan, he argued that 'the question of affordability has not arisen much'. However, **Judge Q** had a different view. He stated that in those cases involving the *SRCD*s who cannot comprehend court proceedings despite the court briefings, 'counsel representation is a must.' **Judge Q** argued that it is high time that the state institute a *functional legal aid system* for some litigants who cannot afford the cost of a legal counsel but acutely need one.

Some Judges recognized that there may be limits on how much information a Judge can provide to the *SRCD*. **Judge H** said the court should *provide legal information but 'cannot tell everything' finding that too much explanation and legal information at times could also be a problem*. **Judge N** also stated that *giving extensive guidance and directions by the court may come as a challenge to the court*. In contrast, **Judge O** identified that even if there is no *legal aid*, at least the *SRCD*s need a legal advisor. **Judges A, O, R**, and **Y** said that the *SRCD*s *not only need legal information*, *but also advice*, *guidance*, and *direction* about the relevant arguments, submissions, and evidences.

Difficulties faced by the *SRCD*s might depend on the nature of the case (as per **Judge I**), but Judges also highlighted some of the difficulties experienced by the *SRCD*s. Judges commented that, as mentioned, the *SRCD*s are *not or less able to understand the law and its procedure despite the court briefings*. **Judge B** said that the difficulties faced by the *SRCD*s '*surrounds and starts from the fact that they are ignorant of the law and unaware of their rights.'*

Majority of Judges identified that the *SRCD*s are either not or less able to objectively assess the merits of their case. **Judge E** said that 'despite the balancing act by the court, they are not able to submit relevant facts and arguments in defence.' It was also observed that the *SRCD*s 'face difficulty in identifying the main legal issue[s] involved in the case.' **Judge A** found that the *SRCD*s incline to narrate the whole history of the case rather than narrowing it down to the relevant legal issues. **Judge F** said that *SRCD*s 'do not know what or how to submit.' Similarly, **Judge Z** stated that the *SRCD*s usually face difficulties in sorting and assessing the case and preparing the submissions. One of the particular concern is that the *SRCD*s may also struggle to identify their defence. **Judge U** noted:

> *They are not sure what, how and even where to write their defence … Although the court assists them, they may not be able to defend themselves well. Their submission may not argue or defend on the main issues or charges. He or she might also land up incriminating themselves while trying to explain their position in the case*.

Majority of Judges found that the *SRCD*s face difficulties *in sorting and adducing relevant evidence and submitting cogent arguments in defence*. **Judge B** suggested this was a particular difficulty for the first-time offenders who more often feel intimidated and are 'not able to confront and defend the charges.' In these cases, **Judge B** explained 'more often, they are seen to plead for mercy, justify their acts, or simply narrate the stories instead of defending.' **Judge I** noted that as the *SRCD*s are

not aware about the legal principles and jargon, they 'face difficulty in coming up with justifications, explanations, and arguments in defence.' Some Judges asserted that the *SRCD*s are not able to present a timely and written defence. They identified that the *SRCD*s also face difficulties in documenting their defence. For example, **Judge F** explained that:

> *Some might be able to orally argue the case but most face difficulty in expressing or reflecting it in the written submissions. What they submit orally are not reflected in the writing. An inmate, a friend or police who writes either does not get the message through or is not able to include it due to their limited writing skills.*

Judge Y noted that 'in some cases, they have no access to basic facilities like those who can write for them. They sometimes appear before the court without any written submission which therefore delays the process.' In some cases, as noted by **Judges E** and **Z**, the *SRCD*s rely on the help from prison inmates. **Judge E** stated that *'the assistance and guidance they get from other inmates who have already undergone or is undergoing the court process do not effectively assist them.'*

Services Available to SRCDs

Judges were asked what services are available for the *SRCD*s, how adequate they were and whether there was a gap between available services and the needs of the *SRCD*s. All the interviewees believed that there is procedural law[47] that ensures fairness and Justice to the litigants irrespective of their representation status. Some interviewees also identified the *Bench Book*[48] complements the procedural law. The *Bench Book* aims to ensure that the procedures are followed fairly and consistently. Judges also claimed that the active courts are an additional step to administering more inclusive

47 For example, interviewees most often pointed out that the Court has to comply with *CCPCB, 2001* which provides law relating to the judicial process.

48 Royal Court of Justice. (2007). *Bench Book for Judicial Process*, *Kuensel.*

Justice. This is explained in detail in the next chapter. This part explores specific services, if any, available for the *SRCD*s at the court, that were identified by interviewees that might assist Judges and courts in helping *SRCD*s.

a. Availability of Specific Services for SRCDs

All the Judges claimed that there are no specific services solely designed for the *SRCD*s. For example, **Judge U** mentioned that 'there are no institutionalized services for the *SRCD*s. What Judges, *Court Registrars*, and *Bench Clerks* do to help them is informal.' Services, like providing *Judicial Forms* and ensuring *fair procedure*, is, as per **Judge E** 'general and applicable to all the litigants irrespective of representation, including the *SRCD*s.' **Judge D** said that '[a]ny administrative, stationary or other *Forms* of general assistance that the court now renders are purely informal.' Some Judges observed that currently the *SRCD*s, can and are, free to access general services available at the court.

Some Judges also mentioned that without the necessary budget, the courts cannot do much to provide specific services to the *SRCD*s. **Judges D** and **H** observed there is no specific budget allocated for the *SRCD*s. Without a budget, it is not possible for courts to even think of instituting or giving any specific services to *SRCD*s. **Judge Y** opined that 'the court cannot be mandated to address the service needs. The court can only guide them through the process.'

While it is up to the state to provide any specific or general legal services, **Judges D** and **F** believed that the courts are doing everything that will ensure fairness between the parties. Few of the Judges argued that the absence of specific legal services may not necessarily disadvantage the *SRCD*s against the prosecutor.

b. Services Rendered to the SRCDs by the Courts

All participants stated that they do provide certain services to the *SRCD*s. In what follows, some of the illustrative services that the court renders to

the *SRCD*s are discussed. All Judges pointed out that at the preliminary hearing, the *SRCD*s are acquainted with the procedure, relevant laws, and rights and duties. For example, **Judge V** mentioned that:

> *[W]e see the nature and genuineness of the litigants who come to court and see whether any services should be made available to them. In general, we provide all the Forms to them and see the possibilities of availing counsel and possibilities of availing other services. We brief them at the preliminary hearing in general terms to all the litigants. After having done this, if there is a specific need that is required for SRCDs, we do look into their needs.*

As already observed, **Judge A** noted that the *SRCD*s are given *Judicial Forms* to complete to identify whether they plan to exercise their right to legal counsel and a list of lawyers to choose from for their representation. In circumstances where the *SRCD*s identify they want legal representation, the courts are *ad hoc* in their response. **Judge B** mentioned that the court asks 'the lawyers to provide *pro bono ad-hoc* and case by case basis.' **Judge Z** provided an overview of the services the courts provide to the *SRCD*s:

> *What we do is give them relevant judicial forms to exercise their right to counsel. We also render some administrative help. Upon request, we also allow them to make phone calls and consult whoever they feel they want to access. They are also given the printing and other stationery services. More or less, the procedural safeguards are ensured and general services are provided.*

Judge X further stated that the court tries to assist the *SRCD*s as much as it can:

> *[W]e do help SRCDs in contacting their family and relatives or whoever they feel are helpful to them during their difficult*

> *time. Upon request, they can make phone calls. The court facilitates availing bail even if they do not claim it. The court also relaxes detention rules and allow them to contact as mentioned. At times, access to outsiders can be difficult while in detention, whether pre-trial or during the trial.*

As the interview responses show, there is no systematic response to the *SRCD*s. The interviews do however identify a range of services provided to the *SRCD*s by the individual courts. Generally, services offered to *SRCD*s are part of general services but sometimes they are aimed to meet the specific needs of *SRCDs*. The courts provide *Judicial Forms* and other administrative help such as photocopying services, paper and sometimes assist with faxes, some technical information about both substantive and procedural law and inform the *SRCD*s of their legal rights and duties. Upon request, the *SRCD*s are allowed to make phone calls and consult whoever they feel they want to access. If they require, the courts help them complete the required *Forms*, including writing statements for them. In some instances, the courts have requested private legal practitioners to represent the *SRCD*s *pro bono* or at a nominal fee. The courts are shown to facilitate the *SRCD*s in contacting their family, relatives or whoever they feel are helpful to them during their difficult time, especially when they are under detention. Judges said the courts also relax the detention rules and encourage police to facilitate them to contact whoever they feel could be of help to them.

c, A Need for Further Services?

The majority of Judges stated that there was a gap between services available at the court and the service needs of the *SRCD*s. They suggested that institutionalizing a functioning *legal aid* system would be one of the effective ways to address both the needs and difficulties of the *SRCD*s. For example, **Judge D** said that the '*SRCD*s primarily need *legal aid'* explaining that 'if there is legal aid ... their needs and difficulties may be addressed by the system itself to a large extent.' **Judge D** also recognized that there is also

a need for more lawyers, opining that 'if there are lawyers in the market, the *SRCD*s will have better access to legal services.' Similarly, **Judge B** said that 'probably the *Bar Council of Bhutan* might be able to fill in the gap by coming up with certain guidelines, requiring lawyers to provide *pro bono* legal services, and laying out whom to contact if such needs arise'. **Judge O** said that *'administration of criminal Justice* will become more effective if there are public defence and *legal aid.'*

Some Judges pointed out that it is up to the state whether to provide any specific or general services and meanwhile the courts are doing everything to ensure fairness between the parties. **Judge U** said that 'the state will have to allocate the necessary budget and come out with a clear guideline to pay to defend certain individuals charged with certain offences'. **Judge E** stated that 'filling this gap is more of a policy issue. Without the necessary budget, it is difficult for us to even think about instituting or giving any specific services to the *SRCD*s'. **Judge E** explained that if there is a necessary budget, the court could 'plan and provide services that are needed by the *SRCD*s'. **Judge Y** said that if the state provides *legal aid*, the court could effectively inform the *SRCD*s of their *right to counsel* and *legal aid*. **Judge F** argued that:

> *While the procedural gap that has no financial implication can be filled up by the judges to some extent, judges cannot fill up the substantial needs of SRCDs like that of legal aid... judges cannot do anything that has financial implications on the court. Rendering any specific services will require the allocation of the necessary budget ... What services are needed for what purpose boils down to the budgetary issues. This will require serious consideration. In part, if there is a functioning legal aid system, most of these issues would be taken care of.*

Judge I stated that he is not able to assess the gap and service needs of the *SRCD*s. He reasoned that many would prefer to be represented but equally some do not need it or do not claim it. There is also no *legal aid*,

including public defence. According to **Judge I**, most of those who might need *legal aid* are those who are more often involved in small cases. **Judge Z** partly noted that the legal service needs 'has not come up as an issue as the needs and gaps if any has not been articulated.' **Judge U** commented that the gap between the service needs and services available at the court is 'not so big or a serious issue' as 'the court is always there to ensure that the trial is a fair one'. He added that the *SRCD*s are not comparatively disadvantaged to the extent of derailing the trial due to the lack of specific legal services. He argued that the need for *legal aid* also may not be that urgent. Therefore, it was studied that there are diversity of views about the need for more legal services for the *SRCD*s. **Judge X** stated that there is a need for more services and suggested how it might be met:

> *Certainly, there is a gap between the needs of SRCDs and services available. Probably, instituting legal aid to cure the economic disabilities, instituting the practice of pro bono services by the Bar Council are the best option, having a public defence might help in creating level playing fields for SRCDs and facilitate in administering Justice.*

Effects of SRCDs on Criminal Justice Process

The courts in Bhutan are procedurally designed to be the impartial third party[49] that adjudicates the cases based on the *principles of fairness*,[50] *equality* and *Justice*.[51] Litigation is adversarial with some possibilities of inquisitorial adjudication by the Judge.[52] Each party is granted an equal opportunity to contest the case. While all Judges stated that court processes are simple and friendly, some Judges specifically noted this was one of the reasons that the *SRCD*s choose to self-represent. The defendants assume

49 *The Civil and Criminal Procedure Code, 2001*, s.6 (Principle of impartiality).

50 *The Civil and Criminal Procedure Code, 2001,* s. 4 wherein the court must ensure every person' right to a fair and open trial.

51 *The Civil and Criminal Procedure Code, 200,* s. 3 (Principle of equal justice under the law).

52 Royal Court of Justice. (2017). *Court Procedure - Trial System*. Retrieved from http://www.judiciary.gov.bt/index.php/Welcome/get_pages?id=3>.

anyone can come to the court and defend a case. For example, **Judge Y** noted that:

> *The legal system of Bhutan is very unique. As His Majesty the Fourth King always command, Justice is quicker, expedient, equal, inexpensive and convenient to the people. Our simple court process is aimed at delivering it. Anyone can come to the court and seek redressal of wrongs or injuries suffered.*

As observed, the *SRCD*s in Bhutan are not qualified or competent like legal professionals. All Judges stated that this has different bearings on the stakeholders in the *Criminal Justice System*.[53] Judges stated that the *SRCD*s affect the efficiency of administration of *fair criminal Justice*. They all identified that the *SRCD*s may pose a challenge to the ability of the courts to ensure a *fair trial*.

a. Uneven Litigation Field

All the Judges stated that the *SRCD*s are *never equivalent to the prosecution both in terms of legal knowledge and competence*. There is *no equality of arms between the prosecution and the SRCD*. **Judge B** highlighted that 'when an *SRCD* appears before the court, the court is faced with unequal arms between the prosecution and the defence.' This, the Judge said, hinders the court in ensuring a timely dispensation of Justice. Self-representation, according to **Judge Z**, 'leads to a lot of problems.' Therefore, as stated by **Judge V**, the court might have to intervene to assist the *SRCD*s and level the litigation field for them:

53 Data collected shows the [perceived] opinions of the Judges interviewed that indicate certain effects of the *SRCD*s on the prosecution and the *SRCD*s themselves. These speculative perceptions, however, may not always be true or stand valid to both prosecution and the *SRCD*s. A more realistic understanding of the effect of the *SRCD*s on the prosecution and the *SRCD*s themselves would require direct engagement with them. However, some of the perceptions that facilitate the understanding of the effects of the *SRCD*s on the court are incorporated wherever relevant.

> *Generally, the court has to make the ground level or create a levelled atmosphere to conduct a trial. If a person is not to the level, we have to go out of the procedure to make him understand first. It takes time and effort. Obviously, if somebody cannot read and write, we have to give them the facilities and help them out. If a litigant who is naïve is manipulated or is not able to defend the charge well, it does have bearing on the court because there are chances of miscarriage of Justice. On that line, the judges need to be really on the toe and see all the procedural, as well as a substantive part of the laws, are taken care of. So, the Judges have to play the multiple roles and see all the procedure is followed and that there is no miscarriage of Justice.*

b. Need for More Court Intervention and Assistance

As observed, there are no specific services offered to the *SRCD*s by the courts or the state. All the Judges principally stated that trials involving the *SRCD*s need more court intervention[s] and assistance to ensure a *fair trial*. For example, **Judge N** stated:

> *With the SRCDs, the court has to be more inquisitorial. The court can conveniently observe and hear the adversaries if both the parties are represented. No intervention or assistance may be required in those cases. However, cases involving the SRCDs requires court intervention and assistance.*

Judge Q stated that the *SRCD*s are an *additional burden on the court since the courts have to make them understand the process and how to go about the trial.* **Judge I** also noted that the '*SRCD*s impose a burden on the court to be more inquisitorial to avoid injustice. The court might have to walk a thin line between remaining impartial and independent and ensuring a *fair trial*. The court will have to balance the unequal parties.'

Especially, when the defence is weak, it necessitates the court to intervene and assist. In such instances, **Judge F** commented that *'the courts are forced to intervene', including even asking prosecutors to help the SRCDs, for example, to concede to giving more time to reply, completing the Forms, debriefing them on what court said and what they need to do for the next hearing.* **Judge F** also noted that:

> *The mandate of the court is to simply decide the case based on its merits but sometimes courts go beyond their mandate to help self-represented parties … [W]hen the defence is too weak, the court has to go beyond the procedural mandates and try to help and almost side with the SRCDs. The court might have to even direct and advise them about how to write the defence, including what to include in the next submission which the court is not supposed to do.*

Most Judges pointed out that the *SRCD*s make the task of prosecution easy. This might also make prosecution lazy and complacent, as **Judge D** put it, the *SRCD*s may 'affect their diligence' and add a burden on the Judge who will have to ultimately acquit or convict an *SRCD* after hearing and assessing the case. **Judge D** stated that 'without [an assertive] prosecution, deciding a case in the best interest of Justice may be difficult.' This impacts the Judges and the fairness of a trial as the court will have to be more inquisitive and investigative.

c. Risk of Injustice or Miscarriage of Justice

The majority of the responses asserted that the absence of legal representation *might increase the probability of the SRCDs suffering an injustice*. Judges stressed that the courts usually do not hear effective explanations and evidence[s] from the *SRCD*s in their defences. One such situation could be when, as suggested by **Judge A**, defendants are involved in cases involving charges for a higher or serious offence or those involving factual and legal technicalities. In such cases, **Judge A** stated that the

*SRCD*s 'are unable to identify the relevant facts, issues and evidence in defence.' They might think that the historical background, the narration of the stories, and justifying their acts is enough for them to get acquitted. They do not understand the legal technicalities. It is, as per **Judge A,** rare for the court to hear what the court wants from the *SRCD*s as they are not *'able to invoke the law and legal principles/doctrines in their defence.'* **Judge A** stressed:

> *In light of the technicality of the cases, SRCDs would certainly invite miscarriage of Justice. As it is a well-known fact that a decision has to be based on written submissions and evidence, self-representation probably could result in injustice. In that, the courts would not be able to hear submissions and the relevant evidence in defence. For example, more often than not, we notice that in cases when legal technicalities are involved, SRCDs are noticeably lost.*

As mentioned by **Judge E**, the fact that the *SRCD*s are not qualified and competent like lawyers or legal professionals inherently puts them at the risk of suffering injustice. **Judge E** noted that *'their arguments whether oral or written are never equivalent to those of competent lawyers.'* More often, the *SRCD*s simply deny or accept the charge. **Judge F** also opined that the *SRCD*s might not be able to defend well and risks incriminating themselves before the court. **Judge F** noted that:

> *More often, they are not able to come up with strong arguments. Their arguments are usually weak. They do not know and are not able to invoke laws. They cannot raise legal arguments. They cannot express well before the court. For example, they may not be able to plead mitigating circumstance or defence which might otherwise play a crucial role in defending charges. Cumulatively, they cannot defend themselves properly with the help of principles, reasons, and doctrines. They speak and submit whatever that comes to their mind. This can, at*

> *times, backfire and be self-incriminatory. There also seems to be a general feeling that the court might sanction much lesser punishments if confessed and that the prosecution might also become more lenient. In those case, they may simply confess and may not put up the strong defence or even say nothing.*

Judge X stated that the *SRCD*s argue *as they want* and *not as required as per the law*. This *brings about certain difficulties on the court in determining the right conclusion*. **Judge X** explained that the *SRCD*s are:

> *[N]ot able to navigate their case through relevant provisions of the law and therefore, they are not able to defend well. In some cases, SRCDs become unruly and conduct themselves before the court like 'who cares.' Hence, at times, with the SRCDs, it is difficult for the court to reach the right conclusion. Some cases become tedious and frustrating for the court. Some proceedings involving the SRCDs cannot proceed as per the hearing calendar, while a case must be disposed of within one year.*

In some cases, some *SRCD*s might not even speak. This makes the judicial role even more difficult and risks an unfair trial. **Judge D** mentioned one such situation:

> *There are some SRCDs, who stayed silent and made no defence. Such cases become one-sided, though scrutinizing evidence and to base any findings on legal evidence is the responsibility of the court. This happened in a battery case. The accused who was unrepresented said nothing. He made neither oral nor written submissions. There was no express defence. However, the court had to acquit the accused in light of insufficient evidence and principle of the benefit of the doubt. This may be a very bad precedent. But the case could not be stayed, dismissed, or convict the accused without legal evidence.*

d. Need for More Judicial Time and Resources

All Judges stated that trials involving the *SRCD*s require more time and resources. Judges assert that the *SRCD*s are a challenge to the court and waste more time and resources. **Judge E** commented that 'it is easier to deal with lawyers than the *SRCD*s.' **Judge D** noted:

> *Self-representation impacts the courts. SRCDs more often do not know and understand the law and its procedure. When they are unaware, uninformed, and ignorant of law and procedure, the court has to widen its impartial and neutral function and inform and educate the SRCDs about their rights and duties. Doing this obviously delays the trial process and results in the wastage of more time and resources.*

Judge R stated that the court has to explain each hearing stage in detail. **Judge I** added that the *SRCD*s need to be briefed about the court process as well as allow them more time to come up with the defence:

> *The court has to take more time and effort to explain the procedure. The court has to usually give more time for the SRCDs to come to the court with the defence. This results in wastage of more time and resources. The process gets delayed. More often, the court has to guide, advise and direct them throughout the proceeding.*

Judges N and **Z** added that proceedings involving the *SRCD*s take more time and resources because the court might have to balance the arms between the prosecution and defence to deliver Justice. **Judge N** commented that 'the court has to be more favourable towards the *SRCD*s. Only then, can the court balance the arms and deliver Justice.' As revealed by the responses, the Judges assume the role of an informer, educator and intervener to ensure that the *SRCD*s participate in the trials which waste judicial time and resources.

Further, the delay in the process can also result from the deliberate act of abstention from trial by the defendants. **Judges E** and **H** narrated such a scenario. There are some *SRCD*s, who *do not appear on time and want to refrain from coming to the court as long as they can*. Some *SRCD*s abscond and their whereabouts are unknown for months. These, coupled with the inability of the court to discipline the *SRCD*s professionally, directly result in delays and increases the cost of administration of Justice although the court has the power to reverse bail and hold them in contempt of court.

e. Impairment to Effective Administration of Justice

All Judges stated that the courts have to intervene and assist the *SRCD*s and more often cannot strictly remain impartial and neutral. **Judge A** commented that the *SRCD*s can hinder the impartiality and independence of the courts when they are unable to defend the case. **Judge X** observed that when the court is *forced to become proactive*, it might have to instruct the *SRCD*s almost everything they need to do, directly affecting its role of an impartial adjudicator. **Judge R** said 'the court might be influenced by their circumstances to be considerate, which can affect impartiality. For example, this may happen in a hearing of an *SRCD* coming from a broken family and a consequent drug-offender.' At times, as **Judge F** noted, the court might have to *'virtually teach and intervene, so that, they might, or can, come up with strong arguments.'* This might, as per **Judge F**, 'in itself … contravene its procedural mandate of having to be the independent and the impartial adjudicator' because '… when they are not able to come up with the relevant arguments, the court has to give them indirect guidance' and '… when the defence is too weak, the court has to go beyond the procedural mandates and try to help and almost side with the *SRCD*s'. He added 'prosecution might view and perceive the court as biased' when 'the courts are forced to intervene in the interest of Justice.'

Judge H also highlighted the difficulties the court might face in trying be impartial and independent. He commented:

> *The SRCDs are not competent to understand the legal language. While they are not aware of their rights and duties, the court (owing to its neutral mandate) cannot give all information. If the court explains too much in order to equalise the arms between the prosecution and defence, the prosecution can be left unhappy. So, the SRCDs hinders the impartiality and independency function of the court.*

Similarly, **Judge E** stated that:

> *The court has to strike balance between the stronger prosecution and weaker defence. In doing so, the court is forced to go out of its conventional role or box and assist them. The court, for example, asks them indirect questions and gives hints and suggestions, so that, they can come up with relevant factual explanations or arguments in defence. The court has to indirectly guide them and also create a conducive environment and relax the court process to adapt their needs and difficulties. Doing of all these at times is, and can be viewed as, the court being biased to the defence, and thereby, compromising its procedural mandate of being an impartial and independent adjudicator, while not doing those may not ensure a fair trial.*

The *SRCD*s may believe that courts are part of the prosecution, that the prosecution can easily influence the court, or that the court is unfair to them. This can bring about unwarranted disrepute to a Judge or to a court. **Judge B** illustrates one such situation:

> *The SRCDs perceive that the courts are also part of and are influenced by the prosecution. There are instances where the SRCDs cry outside the court, feeling they are not fairly and equally treated, and that they are victimized by the court and prosecution. The courts can also be perceived as biased,*

> *partial, and unfair. This can bring the court and Judges into disrepute, while on the other hand, the courts do everything possible to strike balance, including allowing the SRCDs to say anything before the court.*

Judge Z noted that the act of explaining the procedures and requirements can also be perceived or viewed as favouring the prosecution:

> [*E]xplaining the procedures can at times be perceived by SRCDs as the court being against them. It is quite difficult to break that barrier. For example, when the court briefs them about refraining from telling lies before the court or face the contempt penalties, they can feel the court is on the prosecution side and against them. So, breaking that barrier between the court and the SRCDs by explaining to them the process and also the substantive law can waste lots of time. The court has to take time to convince them that due to certain actions, they might be subjected to certain punishment…*

Furthermore, some Judges were of the opinion that the prosecutors may not always appreciate the intervention and the assistance of the court. **Judges E** and **F** pointed out that the court might be viewed or perceived as biased and partial to the *SRCD*s when it tries to strike a balance between the prosecution and defence. **Judge I** mentioned that '… at times, the court might become harsh and heavy on the prosecution' which the prosecutors might not always appreciate – 'the court can be viewed as biased to the *SRCD*s and prejudicial to their case.' This might happen when the court scrutinizes the evidence to convict or acquit an accused as suggested by **Judge O**, and when the court tries to balance the unequal footings in the interest of fairness as suggested by **Judge U**.

Judge I noted there is also always a risk of comparatively disadvantaging the prosecution when the court becomes more interfering and helpful to *SRCD*s. He noted:

> *In our mixed system, the court can be the impartial umpire of justice as well as an inquisitor wherever necessary. We can always go beyond the mere procedure and take the shelter of the provisions bestowing courts with inquisitorial powers to ensure a fair trial and to do Justice in all the cases. However, there is always a problem of unequal footings between the parties when the SRCDs are involved. It takes more time and effort to hear and decide these cases. When the court has to be more inquisitive, it also risks compromising our mandate to be an impartial and independent adjudicator of the disputes. There is always a risk that prosecution could be comparatively disadvantaged when the court becomes more interfering and helpful to the SRCDs.*

Cumulatively, all participants stated that the *SRCD*s impact the effective and efficient administration of criminal Justice. **Judge U** stated that:

> *Self-representation does impact the efficient administration of justice. Trial proceedings involving SRCDs take more time. It delays the process. If both the parties are represented, the courts would not have to guide, inform and explain the procedure, relevant laws, rights and duties in detail. The SRCDs add to the workload of the court. The courts have to spend more time and waste more resources. The hearings are long as well as require more hearings in reaching a solid conclusion. Cases involving the SRCDs, directly or indirectly, require more court interventions and assistance. Without certain interventions or assistance to the SRCDs, giving equal Judgment may be a challenge. At times, court intervention may not always assist them. For example, although rare and not much of a big issue, when nothing is offered in defence, the court might also have to ask leading questions.*

Current Approach to Managing SRCDs

The needs and difficulties experienced by the *SRCD*s and the effect of self-representation in the criminal Justice process suggest that the *SRCD*s might not receive a *fair trial*. Against this backdrop, this section examines how the *SRCD*s are currently managed by the courts to ensure a *fair trial*.

a. Addressing the Needs and Difficulties of SRCDs

As found in the interview responses, except for very few who might choose to represent themselves, the majority of the *SRCD*s are likely to be forced to represent themselves as they are poor and cannot access or afford legal representation. As they appear before the court in person, with neither the *legal counsel* to advise them nor with the knowledge or skills required in law, they are at a great comparative disadvantage. In view of this, the court might have to manage the needs and difficulties of the *SRCD*s to ensure a *fair trial* and facilitate *equal access to Justice*. In doing so, akin to providing legal services to the *SRCD*s, Judges reveal that they take all reasonable steps to ensure *fair trial* to the *SRCD*s as discussed below.

b. Ensuring Procedural Safeguards

Most of the responses stated that the court is mandated to explain and inform the *SRCD*s about the relevant law[s], court procedures and brief them about their legal rights and duties during the *Preliminary Hearing* and throughout the trial proceedings.

Judge A stated that if the parties to the case, including the *SRCD*s, are to get a *fair trial*, the court must ensure *'every party gets the due process as per law.'* **Judge B** stated that throughout the judicial processes, the main concern of the court is to ensure that there is a *fair trial* with fair procedures. **Judge B** shared that the *standard protections* address the needs and difficulties of any litigant, including the *SRCD*s, as follows:

> *The court explains to them the law, legal issues, and principles involved in the case. Throughout the trial, the court through every stage of hearings, explain to the SRCDs the procedures and procedural requirements that they must comply with. Irrespective of whether or not an accused is represented, the court assesses whether the investigation was proper, whether confessions and admissions, if any, were made voluntarily, and whether there is conclusive and corroborative evidence and others. In particular, regarding the right to counsel, the court asks the SRCDs whether to exercise their right to counsel or waive the same, and accordingly execute the relevant Judicial Forms, and also provide a list of lawyers for representation.*

Judge E pointed out that the *SRCD*s have the procedure of the day and their rights and duties explained to them, and are given relevant *Judicial Forms* to substantiate their submissions and petitions. Similarly, **Judge N** noted that for every stage of the hearings, there are relevant *Judicial Forms* that ensure that the procedure of the law. **Judge N** mentioned that 'throughout the proceedings, we allow the parties to submit the statements to complement their petitions. They can submit any additional points not included in the petition or as they might become aware during the hearing.' **Judge H** added that the *SRCD*s are 'briefed about their legal rights and duties throughout the proceedings to the extent of telling them even what they have to write and bring.' As such, **Judge V** believes that there are enough procedural safeguards to ensure a *fair trial*:

> *[I]n the first hearing or the preliminary hearing when the court opens a case. We touch all the aspects of what a litigant can and cannot do during the trial process. This makes them aware of their rights, the extent they can go in the courtroom and the consequences if they do not adhere to those duties. Second, after the preliminary hearing, in every hearing, there are Forms available at the court which need to be filled and*

> *submitted it to the court. In every hearing, they need to fill Forms and submit them to the court. In that, there are checks and balances. In case they have some more rebuttal to make or some more evidence to be submitted, they are given the chances until they say they do not have further rebuttals or further submissions of evidence. So, these Forms check that they are acquainted with the procedure. These services help them to get acquainted with the processes and make sure that nothing is left out.*

c. Advising the Need for Legal Representation

Judge E mentioned that the *SRCD*s have their right to legal representation, and the consequences of its waiver, explained during the *Preliminary Hearing*, and are handed with the relevant *Judicial Forms* to communicate their discretion to engage a *legal counsel* on their behalf. Some of the Judges responded that advising the *SRCD*s to engage lawyers to defend them might be one of the best ways to address their needs and difficulties. **Judge Z** said that informing the *SRCD*s of their legal rights and duties must also include 'informing them to hire a lawyer when there is a need for one.'

Judge A noted that the court tells the *SRCD*s, as and when necessary, about their inability and incompetence to defend and suggests the option to engage a lawyer to represent them. He said that if a case involves too many technicalities the court might have to advise an *SRCD* to let a lawyer defend him or her. **Judge F** similarly stated that 'if we feel that the legal representation is necessary in any given case, we inform the *SRCD*s to consider engaging a lawyer or request lawyers to represent *SRCD*s *pro bono.*'

d. *Adoption of More Interactive and Inclusive Approach to Conducting Trials*

Majority of the Judges responded that adoption of a more active, interactive and inclusive approach to conducting trials is crucial in facilitating and managing the needs and difficulties of the *SRCD*s. **Judge A** commented that to ensure a *fair trial*, the court adopts and tries *'to follow a very interactive approach to conducting a trial.'* **Judge D** stated that in some cases, the court *assumes the role of a guide* through the process, informing and educating the *SRCD*s about the court procedures, relevant laws and their legal rights and duties. **Judge D** observed that if the *SRCD*s are not able to submit well, the court asks them questions to extract their version of the story. This, he thinks, brings about an inclusive and fair procedure to the *SRCD*s. **Judge E** also said that the court asks indirect questions and gives hints to the *SRCD*s about the possible explanations or arguments in defence.

Judge F stated that to ensure a *fair trial*, the court always tries to *'balance the inherent unequal footings of the SRCDs and the prosecution'* and this is done through several 'out of procedure tasks' like giving legal information and advice, hinting at what to include in defence, guiding them on how to write and what points to consider while writing, and offering suggestive advice about the defence. These measures are believed to bring about an inclusive process for the *SRCD*s. **Judge I** asserted that the *SRCD*s are guided through the process unless it relates to the points of the main issue or argument.

Judge R asserted that the courts do everything possible to allow effective participation by the *SRCD*s. He noted that *'the courts explain their rights and duties so that they can make an informed choice about pleading guilty or on bringing up the appropriate defence.* The courts try to *create a conducive environment and make them comfortable.'* Doing this is believed to ensure that the procedure is followed and maximum protection is granted to the *SRCD*s.

Judge U felt that the simple court procedure coupled with the active approach can manage *SRCDs* well. He reasoned:

> *Our court procedure is simple. We, the judges, further simplify and make it friendly. We are always open, accessible and friendly. We guide and help them. We instruct them about the process, including what they need to do, what to say or refrain from saying, their rights and duties.*

Judge X further added that the *SRCD*s are treated nothing less than those represented to ensure a *fair trial*:

> *[T]he court filters the prosecution case through the strict or standardised practice of establishing guilt 'beyond reasonable doubt' even if the case is not contested by the SRCDs. The court must ensure that there is a fair trial and convictions if any are as per both procedural and substantive law. For example, stopping the convictions that are sought based solely on a confession by an accused even if such confession is not retracted by an SRCDs*.

Determining Competency to Represent Oneself by SRCDs

One of the established *criminal Justice* principles states that a *person cannot be convicted of a crime if he or she is not competent to stand a trial*. This is fundamentally important to preserve the *due process* and ensure fair proceedings. Section 33 of *The Civil and Criminal Procedure Code of Bhutan, 2001* allows a person to plead or defend in person or through a Bhutanese *legal counsel*. If one waives this right, it must be waived 'competently and intelligently.' Judges were asked about how they determine if the *SRCD*s have such an ability. A clear approach to assessing the intelligence and competence of criminal defendants to plead in person will help address the issue of a *fair trial* to the *SRCD*s. At the least, the *SRCD*s must be able to understand the proceedings against them and accordingly prepare their defence.

a. SRCDs' Choice – the Primary Deciding Factor

All the responses stated that the choice of the *SRCD*s, either to exercise or waive their right to legal representation, is the primary deciding factor. As per **Judge Y**, 'the need of representation cannot be imposed upon them'. They have the option to plead in person or through a representation. **Judge N** mentioned that the courts specifically probe the *SRCD*s if they can defend or if they needed a lawyer to defend them.

Judge A argued that the court might have to advise an *SRCD* to engage a lawyer in instances where cases are serious and the court determines there is a need for legal representation:

> *The current practice is that of giving preference to criminal defendant's decision to either exercise the right to counsel or to waive the same. The courts have no say in either of the cases. However, for example, in between the hearing if the court feels that the case is serious and that he or she might need a lawyer, then we try to advise them to hire a lawyer. If he or she pleads indigent, then the process ... might be delayed ... In such cases, the court might have to ascertain his or her state of indigence. Only upon satisfaction of the court that he or she is truly an indigent, shall he or she be afforded with a state-sponsored lawyer. So far I know, we have arranged pro bono service with the lawyers in the few important cases.*

b. Supervision of Waiver

All the responses asserted that the *SRCD*s are explained, briefed and guided about their *right to counsel* and the discretion[s] to exercise or waive it. Specifically, if the *SRCD*s decide to waive the *right to legal counsel*, the court explains them the advantages as well as the disadvantages and the consequences of their decision.' **(Judge N).**

According to **Judges E** and **N**, *SRCD*s are also told about the availability of possible assistance from the government to engage a *legal counsel* on their behalf. They are also given a list of lawyers on their request. Thereafter, any litigant can convey his or her preference through the relevant *Judicial Forms*. Their preferences are then, as per **Judge E**, endorsed by the court after cross-checking with the *SRCD*. This helps to ensure that they make an *informed choice* and can communicate and understand the consequences of their decisions **(Judge H). Judge I** stated that the preferences of the *SRCD*s, especially those decisions to proceed in person, have to be 'managed' and the court must ask them if they can defend themselves or if they are aware about the consequences. **Judge D** said that the *SRCD*s must be able to understand and communicate with the court. **Judge F** noted that the court must *ensure that the waiver is a proper*:

> *In my court, we look if an SRCD is of sound mind, competent and whether he or she can comprehend what the court says and can communicate with the court. We also look at whether he or she understands the charges, laws explained to them by the court, and what it would mean to him or her if convicted. We also specifically ask them if they can defend the charges themselves. In the process, we also tell them that although he or she might waive the right to counsel, he or she could revive the right to counsel as and when required or feels the necessity of it. So, essentially, they are assessed as to whether they understand the case and the implications of engaging a lawyer as well as the implication of the waiver for the right to counsel.*

Judge V said that the waiver might be proper if the *SRCD*s are 'of sound mind, not intimidated, nor coerced or threatened, or manipulated by other people.'

c. No Uniform Approach

Interview responses reveal that currently, the practice generally accords primacy of choice to the individual criminal defendant with some degree of supervision in cases of waiver through the provision of information to enable understanding of the consequences of the trial and waiver. However, most responses confirmed that there is no uniform approach to assessing the competencies to stand trial or the understanding of the waiver of the right to counsel by a criminal defendant.

Judge U said that determining the issues of competency to stand trial or waiver of one's *right to legal counsel* 'depends on the facts and circumstances of each case as it might also differ from one court to another.' However, he believed that the courts in Bhutan follow a very 'wholesome' and holistic approach:

> *I think we will agree that we are following a very wholesome approach while assessing these issues. We examine and look into the background of an accused, whether it is his or her economic, education, mental and physical health, intelligence, or other such backgrounds. We ask a specific question as to whether they can defend themselves or need to hire a lawyer. If they prefer to represent themselves, we explain the consequences of a waiver of the right and self-representation. We make sure that they understand the case and can communicate with the court. We also ask their reasons for self-representation and see if these reasons might disadvantage them. We then give them relevant Judicial Forms to submit their preferences to the court. We inform and educate them about their rights. However, it is up to them to exercise it.*

Adequacy of the Current Approach?

a. Adequacy of the Current Approach

Judges had mixed responses concerning whether the current approach is adequate to ensure a *fair trial* to the *SRCD*s. While the majority of the Judges believed that the current approaches was adequate, some Judges expressed concerns that more could be done to ensure a *fair trial* for the *SRCD*s. **Judge A** mentioned that *'the present approach of ensuring due process, informing and instructing the litigant about the procedural needs and requirements throughout the trial process is sufficient to ensure a fair trial'* though *'room for improvement and reforms can always be there with the changing times and development.'* **Judge B** also noted that '*there are procedures and number of judicial forms to assess the needs of the SRCDs and the likely intervention that the court must make, and also ensure there is no miscarriage of Justice*'.

Judge D felt that '*the current approach is working well and fine for now.'* He stated that the courts have *'been able to ensure a fair trial to all the litigants'*. He stated that *'whenever there is unequal standing between the parties, there are necessary inquisitorial powers to balance it and ensure fairness.'* **Judge Y** said that 'the present system is good enough to ensure a *fair trial*. The court tries to *balance between the parties*. The court makes the concerted effort to faciliate and ensure a friendly and accessible court for both.' **Judge I** observed that the courts *'are doing enough to ensure a fair trial to the parties irrespective of legal representation' reasoning that 'we explain in detail and brief the SRCDs about the whole trial process. We procedurally guide them throughout the proceeding'*. **Judge N** noted that:

> *Our procedure is simple. Our system is of mixed tradition. We can be adversarial or inquisitorial as the facts and circumstances of the cases might require. We can maintain a minimum of intervention if professional lawyers contest a case before the court unless unfair trial or miscarriage of Justice*

> *might result. But in cases where the arms between the parties are not equal, we do and have to intervene and become more inquisitive to prevent unfair trial and miscarriage of Justice. Even if it is a first-time offender, the court informs and explains, and ensures that nothing comes out a surprise. A farmer can also very much feel home at the court. It does not matter from where one comes from, they can appear before the court like anyone else, present or contest his case, and walk off with a Judgment.*

Judge Q claimed that the current approach holistically reviews the case before deciding and ensures a *fair trial:*

> *We assist them to participate in the court proceedings to ascertain the facts. Once the facts of the case are established, we do the legal interpretation that gives the maximum benefit to the accused. Yes, ultimately, we deliver Judgment based not only on the contention put forth by the parties but considering the holistic view of the case, we ask evidence suo moto if Justice so requires.*

On the other hand, some responses found the current approach inadequate to ensure *fair trial* to the *SRCD*s. **Judge E** stated that though the current approach may be able to ensure a *fair trial* in simple cases, it may not always be able to ensure a *fair trial* in complicated cases that require competent contestation by the parties. **Judge E** pointed out that 'in either of the cases, it can be said that our approach is not adequate'. **Judge F** argued what courts do now is insufficient and requires policy intervention[s], including institution of *legal aid*, to make the current approach fair and uniform. He said:

> *We could do more. There is room for improvement. But again, it is a policy and money issue. If we are to do more than what we do, we will need money to do more. We will need to bring*

> *about uniformity in our approach. Only then we could ensure fairness to the parties as well as avoid unwarranted comments from the public. Perhaps, one of the solutions to the problem is to have a functioning legal aid system.*

Judge H echoed the concern that though the current approach might be considered to be sufficient to ensure a *fair trial* to the *SRCD*s, '*there is a lack of facilities and awareness'*. **Judge O** stated that *'there are no standards amongst the court as we do not have a guideline on the subject matter.'* Likewise, **Judge X** commented that although the current approach of doing 'everything and anything to strike a balance' might be seen as sufficient, having more and better *legal aid* would make striking balance less difficult. **Judge U** added that there is room for reform[s]. He mentioned that:

> *We are doing everything to balance the unequal footings of the parties and ensure a fair trial. However, there is room for reform. We need to increase our efficiency of hearing and deciding state versus individual cases. How to do that will require further research, planning, and allocation of sufficient budget by the state.*

b. Legal Representation and Trial Outcomes

The majority of responses stated that the presence of legal representation in a case could make a difference, including making adjudication easier for the courts and often securing better trial outcomes for those represented. **Judge A** stated that 'even the educated parties are not aware of the law.' He thinks that as the cases are fought around the legal principles, doctrines and jargons, representation could bring about a better trial outcome. **Judge R** shared that in cases involving the question of *whether a drug falls under a list of controlled substance*, legal representation could have a direct effect on the argumentation and outcome of the trial. Specifically, **Judges B, H** and **N** stated that representation might make a difference, including inducing a positive outcome of the trial, though it might depend on the facts and circumstances of the case.

Judge D stated that representation could result in a better outcome for their clients. He illustrated that the *legal counsel* might be able to submit an effective explanation[s] in defence, including the pleadings of various mitigating circumstances. The *legal counsel* could create 'more chances for securing the minimum possible sentence or punishment, if not an acquittal' though 'this might depend on the facts and circumstances'. **Judge Z** also noted that representation could help the courts to reach to a fair conclusion according to the law though in some cases they might 'bring up issues which are not relevant to the case and in the process hinder the defendants' *right to an expeditious trial.'*

Some of the responses stated that though legal representation might ease the trial proceedings, it might not always be able to secure positive trial outcomes. **Judge E** conceded that legal representation could make adjudicating cases much easier and faster. However, he contended that legal representation might not always bring about a better outcome. He commented that:

> *It would not always be true to say that representation might secure a better outcome. At the end of the day, it is the court that must ensure a fair process and reach the objective or fair outcome. So long as we have the procedure coupled with the active court, I think the representation might not always bring a fair or positive outcome for the accused.*

Judge I believed that legal representation in certain cases could further complicate the case and result in more delay. He reasoned that 'when there is equal contestation about an issue and when every possible explanation or justification is pleaded either in prosecution or defence, the proceeding might take more time' [and it may] 'not always be good and add value'. However, he conceded that in cases where legal representation is required, it could help the court in examining the legal technicalities. *Counsel* could come with precise arguments and submit relevant evidence. The proceedings in these cases might not take that long. But he was not sure 'if

representation can affect trial outcomes'. He reasoned that 'ultimately, the court has to holistically hear the case and come out with evidence-based court findings'. **Judges Q** and **V** identified that the trial outcome might not always depend on representation though it can bring about a vast difference in the trial proceedings.

c. Managing SRCDs – Need for Coherence and Guidelines?

All responses affirmed that there are no standard practices, policies, guidelines, or uniform ways of managing the *SRCD*s in Bhutan. The Judges were divided about whether a guideline for managing the *SRCD*s would assist.

Judge A noted the procedural safeguards available to parties vis-à-vis *right to legal counsel* and a *fair trial* consists of asking whether one prefers to exercise his or her *right to legal counsel*, giving and allowing them to complete **Judicial Forms 11**, **12** and **13** at their discretion, and giving them a list of lawyers to choose for representation. **Judge E** mentioned that the litigants and cases are managed based on the general procedural law and the *Bench Book*. **Judge F** said that the courts adjust and adapt within the procedural law to manage the *SRCD*s. He thinks that 'the *Judicial Forms* and other initiatives of the individual courts serve as facilitating strategies.'

Judge V cautioned that the country is in transition and assessing the need for and working out any specific guideline might need more research and introspection. There were spliting opinion as to whether there is a need for a specific guideline for effective management of the *SRCD*s by the courts in Bhutan. Some of the responses stressed the need for specific guidelines to effectively manage the *SRCD*s. **Judge Z** mentioned that there are no clear guidelines or policies on how to deal and manage the *SRCD*s, and as such, there is a vacuum in the process.

Judge B commented that the courts are trying to be impartial and fair in the absence of a specific guideline. He thought affording procedural safeguards and requirements might be enough to ensure a fair trial as well as a uniform approach to managing the *SRCD*s but identified a need for a specific guideline to manage the *SRCD*s if the actions of the courts are not to be viewed as arbitrary.

Judge E felt that there is a need for a guideline to guide and facilitate the Judges in managing the *SRCD*s. He reasoned that 'with a precise approach, the courts could consistently, effectively and uniformly manage the *SRCD*s. For example, this guideline could institute a focal person or advisor in every court to assist the *SRCD*s'. **Judge R** thought that a specific guideline could help in understanding the *SRCD*s and how to appropriately manage them in their circumstances.

Judge U, supporting the need for a specific guideline, stated that 'the courts will have to be fair to the prosecution as well.' He added that Judges and the litigants need to be separated if any form or perception of bias is to be prevented. **Judge U** thought having a specific guideline could help the Judicial Officers to be aware of why certain criminal defendants represent themselves and accordingly respond uniformly and ensure a *fair trial*. **Judge X** also thought a guideline would be key to a uniform management of the *SRCD*s by the courts. He asserted that:

> *With the guidelines, we could follow a certain check and balance to ensure the rights and interests of the SRCDs are addressed and managed while not compromising the whole purpose of a criminal trial. This guideline can provide rules of procedure to ensure equal treatment by the courts and equal opportunity to effectively contest a case before the court.*

Judge F commented about some of the issues that a specific guideline on managing the *SRCD*s could address. He stated that:

> *There is a need for a specific guideline on dealing with the SRCDs. It will help the courts as well as the prosecution and defence. It will guide the court with specific measures and strategies to address their needs and difficulties without being concerned about its impartial functions. It will bring about uniform and strategic management skills and practice among the courts and judges. This will also inform the parties about what they can exactly expect from the court and what they cannot. It will inform them about what they need to know and do instead of trusting the court to intervene to do justice. It might be possible to know when the involvement of the lawyers is important or in what class of offences might the role of counsel be crucial.*

On the other side, some of the responses argued that there is no need for a specific guideline to manage the *SRCD*s. They found the procedural law, *Judicial Forms* and the *Bench Book* provides sufficient procedural safeguards to ensure a *fair trial* to the *SRCD*s.

Judge D contended that there is no need for any specific guideline on managing the *SRCD*s. He reasoned that 'the general procedural law and *Judicial Forms* provide procedures and the mandates to follow and maintain its regularity in both civil and criminal cases'. He added that 'the court ensures and is expected to ensure procedural regularity and fairness to both the parties. In that, the *SRCD*s are also well taken care of.' **Judge I** also asserted that the 'procedural law is simple and still evolving and getting shaped with the time'. **Judges I** and **N** noted that the *Bench Book* and *Judicial Forms* are supplementing and facilitating good procedural practices by the courts in the country. **Judge N** mentioned that the courts 'can intervene and assists the *SRCD*s whenever easily to ensure a *fair trial.'*

Judge Q cautioned that proposing the need for a specific guideline would be redundant if the state comes up with a broad guideline on *legal aid*. He argued that:

> *When we talk about having a guideline for a specific class of litigants, we must not forgo the overall guiding principle of impartiality and level playing field. Thus, I feel that if the state can have a broad guideline on Legal Aid and how courts should use the discretion to determine who cannot represent themselves, a specific guideline on dealing with the SRCDs will be redundant.*

Judge Y stated that having a specific guideline could only complicate the system. He argued that:

> *I think having a specific guideline may not be effective and serve the needs of the SRCDs as their needs are diverse depending on the place of the venue of the court. It might only complicate the system. I think as of now, the need for a specific guideline is not so acute as the Bench Book provides the necessary guidance.*

Conclusion

The Study found that more than 90 percent of criminal defendants represented themselves in the courts in Bhutan [for the period studied.] While it is not clear whether the number of the *SRCD*s is increasing or decreasing, this Study suggests that most criminal defendants are self-represented. Likely, the snapshot of self-representation collected is broadly representative of all criminal cases across the country and year. This finding is important evidence of the unequal trial proceedings in Bhutan and undoubtedly a *fair trial* concern. A large number of the *SRCD*s before courts raises the inevitable question if the *Judiciary*, was and is, as some Judges raised the concern, able to accord fair treatment and dispenses outcomes to the *SRCD*s.

Although this findings are also based on the *self-reporting of the criminal defendants* and *judicial perceptions*, it offers an important insight into who

[this] section of the society is, how vulnerable they in are in the criminal proceedings, and what their immediate needs are for the purpose of *fair trial* and *access to Justice*. Where represented, over half of representation was by the non-lawyers (para legal) – a family member or a relative. This suggests that where there is some representation of the *SRCD*s, it is generally not by a legal professional or by an independent defence. This raises the question of the legality of the 'representation[s]' by a family member or relative as the representation is technically not by legally trained lawyers or the *Jabmis.*

Judges suggested a range of reasons for self-representation. Judges said it depends on the nature of the case; the socio-economic backgrounds of the defendants and the context, to be least. Nonetheless, Judges perceived that some criminal defendants deliberately represent themselves for a range of reasons while others represent themselves as there are not a lot of options. Of this, the data suggests that most *SRCD*s might be forced to represent themselves rather than exercising it as a free choice.

Given the limited source of information about the *SRCD*s, data from the *Forms* and the judicial observations may differ for a range of reasons. Judges might be more likely to explain the system in favour of the *Judiciary*. For example, of the many reasons to self-represent, most of the Judges stated that some criminal defendants represent themselves due to open, friendly and accessible court procedure. To date, there has been no research or evaluations about how open, friendly and accessible the courts and their processes are to the *SRCD*s. The Judges' perspectives on the user-friendly trial procedure might not match the experience of the *SRCD*s. What might be a simple concept to a Judge could be the most technical and difficult concept for most *SRCD*s. Similarly, the Judges [may] believe they do their best to educate, guide and assist the *SRCD*s throughout the process. While the procedural compliance by the court may reasonably be assumed, it might not necessarily mean that all criminal defendants were and are able to and can understand and follow the procedure – and enjoy equal *access to Justice* and *fair trial.*

Whatever the reason for self-representation, Judges recognized that the *SRCD*s have a variety of needs and difficulties. Although determining their needs and difficulties might depend on the facts and circumstances of each case, and the background of individual defendants, generally, the Judges identified that the *SRCD*s need legal information, procedural advice, guidance, and direction[s]. To remedy this, most *SRCD*s ideally need *legal aid* and *pro bono* legal services, including the services of a public defence. Since they cannot afford to employ lawyers to advise them, the *SRCD*s face difficulties in understanding the law and court process; including challenges in conveyancing. Cumulatively, they face difficulties in defending the charges against them. Without financial support, legal advice and assistance, the *SRCD*s struggle to seek assistance to defend their rights and rebut the allegations, including the plea for a just sentencing. As some Judges opined that addressing the problem of self-representation by criminal defendants is a policy issue that invites suitable policy attentions and interventions from the state in addition to judicial interventions.

The Study found that there are no specific legal services solely designed for the *SRCD*s in the courts. Services rendered, if any, were shown to be informal, unfunded, and are the discretionary initiatives of individual courts. Discretionary provision of the legal services might not ensure effective management of the needs and difficulties faced by the *SRCD*s. If the courts are not uniformly mandated to provide certain specific or general services to the *SRCD*s, most of the *SRCD*s might not have access to such legal services. Differential treatment of the *SRCD*s depending on the courts and the sensibility of individual Judges could lead to a varying degree of treatment, procedure and outcomes. This may result in differential treatment; the *SRCD*s across the country might not enjoy the same fair treatment.

The findings also revealed that the Judges did not perceive any injustice in the criminal processes. These perceptions, however, does not minimize the likelihood of an *unfair trial* and miscarriage of Justice for the *SRCD*s. Not

all the needs and difficulties of the *SRCD*s can be addressed by the *Bench* or the court alone. As Judges felt, that the courts are determined to ensure a *fair trial*. However, the absence of functional *legal aid* system, including the office of the public defence, it might, as was and as is generally believed, pose a systematic and structural problem in the administration of *criminal Justice*. Addressing issues require more concerted action[s] by the state and the *Judiciary* as suggested below.

Firstly, there is a need for *judicial interventions* through *judicial measures.* The findings evidence the need for certain *judicial interventions* to support effective implementation of law vis-à-vis the right to legal representation as an aspect of a *fair trial* for the *SRCD*s. The Study found that the courts are responsible for ensuring that the trials they conduct are fair ones. The findings point to the need for certain judicial reforms to effectively manage the *SRCD*s and ensure *fair trial*, including but not limited to:

a) *Developing a Specific Trial Bench Book* to inform and guide judges in determining and taking any action necessary with the objective of balancing the interests of all parties involved in a case, including *SRCD*s. This *Bench Book* would complement the existing procedural law and the *Bench Book*[54] in facilitating and furthering Justice, reducing the chance of errors, streamlining practices and approaches that can coherently and consistently guide Judges in the conduct of trials, and ensuring equal treatment and fair trials to the *SRCD*s. In the absence of standard practices, policies, guidelines or uniform ways of managing the *SRCD*s to ensure them a *fair trial*, leaving the management of the *SRCD*s to the discretion of individual courts, to decide whether to intervene or assist the *SRCD*s, will result in inconsistent and arbitrary treatment of the *SRCD*s, thereby placing some *SRCD*s at greater risk of unfair treatment than others. Judges will need to be aware of

54 Judiciary of the Kingdom of Bhutan. (2007). *Bench Book for Judicial Process, Kuensel.*

the different circumstances and background of each *SRCD* to ensure a fair and equal treatment.

b) *Treating Legal Representation as a Norm or Requirement in Serious Cases,* which in our case, charges relating to the felony of fourth-degree and above[55] would support a *fair trial*. Judges conceded that the presence of legal representation could make a difference, ranging from easing the judicial process to the possibility of securing better trial outcomes. However, as some Judges mentioned during the interview, in the absence of a functioning *legal aid* system, taking measures like staying trials involving the *SRCD*s for the want of legal representation would not work in Bhutan. To this end, the *Judiciary* must take the *right to legal representation* seriously in certain serious criminal cases and not render it dependent on the availability of enabling institutional facilities like *legal aid* from the state, including public defence, and other forms of *pro bono* legal services. As most Judges believed, in certain serious cases a defendant must be represented by a *legal counsel* to ensure a *fair trial.* Under its inherent power and responsibility to ensure that the trials are fair, the courts should take measures to ensure a *fair trial.* For example, it would not be enough for the courts to simply comply with the procedural mandates of giving and collecting completed *Judicial Forms* without examining whether the *SRCD*s appreciate the consequences

55 *Penal Code of Bhutan 2004* under section 3 classifies crimes into four broad categories, namely, violation, petty misdemeanour, misdemeanour and Felony. Section 4 further classifies felony into four categories, namely, felony of first, second, third, and fourth felony. Under section 11, offences that fall under the category of felony of fourth degree are punishable with a minimum of three years and a maximum of less than five years imprisonment. Accused convicted of felony offences cannot make a payment of fine in lieu of imprisonment unlike those offence that fall under misdemeanour and petty misdemeanour under section 28. Felonious offences are also non-compoundable offences under section 70.

that may ensue. The courts might be seen to comply with the procedural requirements of the law, but that might not necessarily be fair to the *SRCD*s. The courts might have to verify if the implications of completing the *Forms* is understood by the defendant.

c) *Ensuring Fair Trials and Justice rather than focus on maintaining strict compliance with the Judicial Process and practices when a resulting trial may be unfair*. Judges shared their concern about the judicial practice of disposing of cases within one year. While this practice is good for ensuring timely Justice and is a relative requirement that depends on the facts and circumstances of each case, it nonetheless might pose a barrier to a *fair trial* in some cases. At present, a Judge might be reluctant to, for example, stay a serious case for the want of legal representation if it would mean that the case is pending or might remain with the court for over a year. *Justice must be rendered without undue delay*. But a time requirement should not trample Justice: Justice cannot be measures in the essence of time alone. A Judge could always explain the reasons for cases pending over a year before the court. Reasons are, in one way, an assistant for Justice. As such, addressing the needs of the *SRCD*s might be strained by the judicial or managerial assumption of an inefficient court or a Judge. Judges' concern over comparative judicial performance, which is reported annually and its likely effect on transfer and promotion, might encourage Judges to produce decisions on time *regardless of fairness*. The *Judiciary* must reconsider and manage this shared procedural concern by laying clear guidelines about discretion to hold back a case longer than a year, for example, when a criminal case involves serious charges involving the *SRCD*s and requires more time to render Justice. Justice is seeking the "unseen and valuing the invisible."

d) *Making extensive use of Information Technology as well as printed material to provide help and assistance to the SRCDs*, which could be of help to other litigants as well. This might include, for example, provision of information about representing oneself before the court, *legal aid* and lawyers, *pro bono* legal services, general procedural advice, links to other available services, and self-help information kits at the court. These resources will greatly assist not only those representing themselves but also legal professionals and private practitioners, non-government organizations, the police, and other institutions. While this may not be easily accessible to, for example, illiterate accused, these resources are more likely to become more important in the future when many more people are educated, able to access the internet and talk to others and increasingly seek information and assistance. For example, mobile cellular subscriptions in the country have drastically increased from 148,179 in 2007 to 736,002 in 2020 (first quarter)[56] of the projected population of 0.77 million population.[57]

e) *Incorporating Gross National Happiness as a part of Judicial Training and Continuing Legal Education Programs.*[58] The principles of *GNH* can and will guide and direct development of *fair trial* principles, help secure administration of all-inclusive Justice and broaden the conception of a *fair trial.* For that, for example, requires Judges to do more than their

56 Ministry of Information and Communication. (2020). *ICT, Telecom, Media, Postal, Aviation and Surface Transport Bulletin.* Retrieved from <https://www.moic.gov.bt/wp-content/uploads/2020/04/1st-Quarter-January-March2020.pdf>.

57 National Statistics Bureau. (2020). *Bhutan at a Glance.* Retrieved from <http://www.nsb.gov.bt/publication/files/pub1ip5024jn.pdf>. Macro trends projects about 0.77 plus population, a 1.12 per cent increase in 2020 (1 April) <https://www.macrotrends.net/countries/BTN/bhutan/population>.

58 The significance of *Gross National Happiness* [and also the *Raksha Mangchham]* on the administration of Justice will be discussed in the forthcoming article.

conventional role of a neutral arbiter to bring about fair and equal treatment of the parties to a case.

Secondly, there is a need for reforms that must be spearhead by the state, *Royal Government of Bhutan (RGoB)* – which will improve the evolving *Criminal Justice System* of Bhutan to support *fair trial* to the *SRCD*s. The findings evidence the need for, including but not limited to, the following, legal and judicial reforms:

a) *Instituting a functioning legal aid system*. To enable the *legal aid* system is functional, the Judges pointed out the need for the enactment of *specific law, rules* or *guidelines* for the administration of *legal aid*, including the establishment of a specific institution for that purpose is essential. Making *legal aid* available to those in need will facilitate a *fair trial* and enhance Justice to criminal defendants.

b) *Instituting a public defence as a part of its legal aid system*. This will contribute towards the protection of the rights and liberties of the people who may come in conflict with the law but might not necessarily have sufficient economic means to engage a lawyer to represent them nor be competent to initiate a criminal defence themselves. It will uphold the constitutional vision of according effective protection of criminal defendants' *right to legal counsel,*[59] and *equality before the law* and *equal and effective protection of the law*.[60] A public defence system would greatly contribute towards eliminating inequality that inherently exists in access to Justice, inspiring trust and confidence in the *Justice System,* and satisfaction with the judicial services – all of which are relevant contributions

59 *Constitution of Bhutan,* Art. 7(21).
60 Ibid., Art. 7(15).

towards achieving a holistic Justice based on the values of *GNH*.

c) *Appointing an independent officer at the court to assist SRCDs*. It would significantly assist courts in striking balance. This independent official would provide procedural guidance to the *SRCD*s, information about low-cost legal service providers and the risks of self-representation, and self-help kits.

d) *Allocating more budget for the Judiciary.* Most Judges stated that the budget allocated does not allow courts to provide more, better and special services to assist and support the *SRCD*s. There is a need for the state to assess and allocate a sufficient budget to the *Judiciary* to provide these services. With more money and special services in place, it would be easier for the courts to accommodate the *SRCD*s as a special group of litigants with special needs and difficulties requiring special attention of and services from the court. However, there is no data, for example, on conviction rates of the *SRCD*s to support the need for more budget. This might also be a limit of the Study as it relies heavily on judicial perceptions.

Despite the futuristic *Strategic Plan of the Judiciary* and so long the need for a concerted action mentioned above remains an aspiration, the *SRCD*s, as was and is, will remain a permanent component of the *Criminal Justice System*. Unless fair, a Judge should not allow a person to proceed to a trial irrespective of representation but more so when a criminal defendant is not represented or is unable to defend. No outcome can be fair and legally tenable unless the procedure leading to that outcome is *equal and fair to both the prosecution and defence*. Against the unattainable ideal of criminal Justice process, this article sought to offer a set of new knowledge it seeks to establish as evidence to suggest the *Criminal Justice System* must be governed in a way it becomes more holistic, responsive, inclusive, and fair – so that it becomes more functional to all the litigants, especially the

*SRCD*s, in all possible facts and circumstances. As much as we continue to feel, the need for active and accountable Judges on the *Bench* will remain relevant throughout. This precisely, in my humble submission, forms one of the noble calls for 'accountability' that His Majesty the King commanded 'must henceforth become the cornerstone of governance'.[61] Judges must 'deliver' and 'embrace accountability as a measure of … [judicial] service.' Judges must allow alignment of judicial process with special re-focus on delivering criminal Justice in all cases irrespective of legal representation and concerted action by the *Judiciary* at institution level and state at the governance level. The noble prowess of the thoughts- will rekindle the hopes and aspirations of many; and [this] will make the courts a respectable place- and trials as conduit to Justice enshrined on the principle of equal voice and representation.

61 *Translation of His Majesty's Address to the Nation on the 114th National Day.* (2021, 18 December). *Kuensel.*

The Intriguing Rule of Sothue[1]

Introduction

A formal legal education at the undergraduate level, in Indian Universities where most of existing lawyers in Bhutan were educated, included a study of sovereignty, legitimacy, and the sources of law. Therefore, the *Acts* originating from the *National Assembly of Bhutan*, which is a legitimate sovereign, are legitimate laws. The power of *Judicial Review* to *test the constitutionality of laws* implies that legitimate legislators might, at times, pass laws which violate the *Constitution*. In 2010, the High Court ruled that "23.3…that the *Constitution* is a *Supreme Law of the State* and that any act of the *Legislature* or the *Executive*, which is repugnant to the *Constitution* is void."[2] However, there was no means then of judicially reviewing the constitutionality of a laws before 2008.

There probably is a *rule of law* that states[3] that:

> *If the mother is found to have caused the divorce, the father must pay fifty percent and the mother must pay fifty percent of the Sothue the child is entitled to, till the child attains the age of eighteen.*

Encouraged by one of the Justices of the *High Court* and one of the Registrars of the Thimphu *Dzongkhag Court,* who on different occasions, asked[4] me to prove that the *rule of Sothue* cited above was enacted into the

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1 Contributed by Namgyel Wangchuk.

2 *Opposition Leader vs. Government, Case concerning constitutional validity of the tax revision by the Government,* Judgement rendered 18 November, 2010, Summary translated version, p. 67.

3 Translation of section *Kha* 7-5 of *Marriage Act, 1980* taken from *Consolidated Marriage Act 1980* (A), *Consolidated Marriage Act 1980* (B) and *Consolidated Marriage Act 1980* (C) respectively in the order the author acquired them since 2005.

4 The question was posed in informal discussions and not related to any case. The

law. I explored the public domain and surveyed the relevant literatures to determine the existence of an amendment of *Marriage Act, 1980* in 2005. It is not a critique of the substantive content of the supposed amendment. The probability that the *rule* may not have been enacted into the law was intriguing.

The Genesis

The political entity of Bhutan, as we know it today, was founded by *Zhabdrung Ngawang Namgyal*. The laws promulgated during his time and the rulers following him did not concern much with the issues of divorce, and even less so with *Sothue.* The laws were then compiled by *Gongsa* Mipham Wangpo, the Tenth *Druk Desi* as reflected in *The Discourse on the Legal Decree of Precious Palden Drukpa, Victorious in All Directions*. It was an important development in the promulgation of written temporal laws. Karma Ura and Jigme Thinley,[5] identify it as a "major window to pre-modern Bhutan" in the most recent translation of that landmark legal document. There are only two mentions about marriage and no mention has been made about divorce. Therefore, there was no discussions on the issue of *Sothue*. It may be assumed that the concept of *Sothue* may not have existed then or particularly in the form we know it today.

Pre-modern Legal Structures

The རྗེ་བཙུན་བསོད་ནམས་རྒྱལ་པོའི་ཁྲིམས་གཞུང་ཆེན་མོ། (henceforth ཁྲིམས་གཞུང་ཆེན་མོ། or the *Thrimzhung Chhenmo*[6]) enacted during the reign of the Third *Druk Gyalpo* is the codifica-

author did not have any matrimonial case before their courts either when the questions were asked the question or while writing this paper.

5 Ura, K., & Thinley, J. (n.d.). *Discourse on the Legal Decree of Precious Palden Drukpa, Victorious in All Directions*, *Gongsa* Mipham Wangpo (1709-1738) Xth*Druk Desi* (reign 1729-1736), p. v. (Translated).

6 *Supreme Land Law of Bhutan, 1959.* This translation of the title by the Centre for Bhutan Studies in 2018 when it published the *Thrimzhung Chhenmo* in e-book format appears to be erroneous. The *Thrimzhung Chhenmo* deals with more than just land laws. རྗེ་བཙུན་འབྲུག་པོའི་ཞབས་ translates as 'Bhutan'; གི་ translates as 'of'; ཁྲིམས་གཞུང་ translates as 'Law' and ཆེན་མོ། translates as 'Supreme.' While the cover page and front matter have ཆེན་

tion of the secular laws in pre-modern Bhutan. Various chapters in the *Thrimzhung Chhenmo*[7] of 1959 covered the following subject matters:

i) Land
ii) Marriage
iii) Inheritance and partition
iv) Entrusting and care of chattels and animals, lease of chattels and animals
v) Loan, mortgage, interests, and repayment
vi) Deceptive trade practices, substandard measures, and credit sales
vii) Possession and use of firearms
viii) Hunting
ix) Fishing
x) Construction, renovation, and handing-taking of temples
xi) Authority to adjudicate disputes and impose fine
xii) Fraud, forgery and fight
xiii) Theft and animals without owners
xiv) Robbery
xv) Murder [homicide]
xvi) Fugitives and those who harbour them
xvii) Treason and revolt.

Our focus will be on *Chapter Two* of the *Thrimzhung Chhenmo* which pertains to marriage. *Part 5* relates to *"divorce and partition of properties."* It states that children of divorcing parents have the right to one third of property after adjustments as per section *Kha* 5-9 and one fourth of property when the divorce was granted because of the fault of one spouse as mentioned in section *Kha* 5-10. The society or the lawmakers back then were not concerned with *Sothue*.

ཪ the title page and introduction have ཅེན་ཙོ། I use the more popular short title ཁྲིམས་གཞུང་ཆེན་མོ།

7 The Supreme Court of Bhutan. (2014). *Thrimki Zhi Ten Dre Mai Norbui Melong,* Research Division, pp. 158-160.

Modern Laws

In 1980, the marriage law was amended and enlarged. *Chapter Two* of *Thrimzhung Chhenmo* was passed as a separate *Marriage Act, 1980*. Unlike most *Acts* passed after 2000, this *Act* was passed only in *Dzongkha*. The original text[8] of section *Kha* 7-5 with its marginal heading reads:

ཉེས་སྐྱོན་བྱ་གཞིའི་མ་ལས་སོན་པ་ཡིན་ན་ གསོལ་འཚུལ་མི་སོོབ་ཡུགས། | ཁ། ༧-༥ གསལ་སྒེད་ཡབ་ལ་དགོས་པའི་གནད་དོན་དེ་བྱ་གཞིའི་མ་དེ་ལས་སོན་པ་ཡིན་ན་བྱ་གཞི་དེ་འབས་ དེ་དག་ལ་གསོལ་འཚུལ་ཟེར་བ་སོོགས་ གང་ཡང་མི་སོོབ། ཁེ་རྒྱུད་མ་གཅིག་པའི་བྱ་གཞིའི་གསོལ་འཚུལ་ནི་སྐལ་བ་བགོ་རྒྱའི་ཁྲིམས་ཡིག་ནང་བཞུག

The first sentence translates: *"If the mother is found to have caused the divorce, the child or children will not be entitled to any Sothue…"* We need not concern with the second sentence since it directs to the *Inheritance Act, 1980.*

Once again, the welfare of the children whose parents were divorcing did not appear to be important to society and the legislators then. On the contrary, it was a male centric law which appeared to *reflect the intention to chastise married women who caused the divorce.* The responsibility of the father to support his children was implicitly equated as penalty for his fault of causing the divorce. The legislators invented a novel way of punishing child[ren] for no fault of their own. And this was to be the law for decades that followed. The *Marriage Act, 1980* was amended a few times. Procedural aspect and relevant substantive changes made in every amendment will be examined next.

Amendments to Marriage Act, 1980

The *Marriage Act, 1980* was amended in 1988 and 1996. The supposed amendment of 2005 shall be discussed later under "A resolution to amend vs. amendment."

8 འཛུགས་གཏི་ཁྲིམས་གནུང་། ཁ གཉེན་འབྲེལ་ཐྲི་ཁྲིམས་ཡིག། གནས་ལོ་ཡུགས་སྒྲིལ་ལོའམ། སྤྱི་ལོ་ ༡༩༨༠ པ། ཁྲིམས་བཅའ་ཁྲིམ་རྩོམ་རྒྱུད། བཀའ་ཤིས་རྩེ་མཐོང་ - ཐིམ་ཕུག། ཤོག་གྲངས་ ༡༠༠ པ།

Amendment to Marriage Act, 1988

The erstwhile High Court made an announcement under the signature and seal of Chief Justice specifying the date on which the amendment would come into effect. Courts were directed to implement the amendment from first day of eighth month of Earth Dragon year. The *Amendment Act* bears the official emblem of the *Royal Court of Justice*, High Court. Although there is no record that the very first amendment to the *Marriage Act, 1980* was presented to the *Parliament* for deliberation, the announcement mentions the dates on which the *Draft Amendment* was deliberated by the *Cabinet Ministers* and when His Majesty the King granted His Royal Assent. Sections *Kha* 8-9 and *Kha* 8-10 were amended.

Amendment to Marriage Act, 1996

An amendment to the *Marriage Act* was tabled before the *Parliament* in 1996. From the record, it appears that there was discussion on the issue. It finally culminated in the decision or *Resolution:*

> *Since the majority of the members supported the adoption of sub-sections Kha 7.3 and Kha 8.1 as incorporated in the Draft Amendment, the National Assembly enacted the [Amendment] to the Marriage Act, 1980 and declared it to be in force from the 4th day of the 6th month of the Male Rat Year corresponding to 19th July, 1996.*

Two sections were repealed and six sections were amended. While the second amendment did not directly concern section *Kha* 7-5, it is relevant for the outcome and how it was disseminated when the parliamentary sessions concluded. *The Marriage (Amendment) Act, 1996* was published in *Dzongkha* and in English bearing the emblem of the *Royal Government of Bhutan*. It is uncertain whether the *Parliament* also deliberated on the amendment text in English and passed it as a law or whether the English text was a certified translation issued by either the *Parliament* or the

Government. It was unfortunate that the cover, and the *Title Pages* of both the *Dzongkha* and English text do not use the *'Short Title'* promulgated in the text of the amendment itself.[9] The heading to this section uses the erroneous title for the sake of consistency. Significantly, the date on which the amendment was to come into force was declared as 19 July 1996. It was then published and implemented.

Marriage (Amendment) Act of Bhutan, 2009

The most recent amendment to *Marriage Act, 1980* was done in 2009. The procedural aspect of the dissemination of the amendment appears to be consistent with the steps taken in 1996. The commencement date of the amendment was 15 March 2010. The legislators amended ten sections which did not include section *Kha* 7-5.

Inconsistency in the styles of publication

It would be very helpful to compare the print versions of *Acts* available in the market. The various approaches taken to publication and printing of *Acts* reveal inconsistent style of publishing the *Acts,* which went on till 2005 when the intriguing amendment was supposed to have been affected. The website of the *Parliament of Bhutan* does not have all the *Acts*. From 2006 to May 2021, about eighty-eight legislations appears to have been passed. From the commencement of the *Parliament* in 1950s to 2004, about forty-three legislations appears to have been passed. Four *Acts* were passed in 2005 including the *Evidence Act of Bhutan*, *Food Act of Bhutan, The Moveable Cultural Property Act of Bhutan*[10] and *Narcotic Drugs Act of Bhutan*. If there was an amendment to the *Marriage Act, 1980*, it was not posted on the website or on the websites of other government agencies providing similar online resources. Very few *Acts* were amended before 2005. The amendment of *Marriage Act, 1980* done in 1988 and 1996

9 *Amendment [1996]* to the *Marriage Act, 1980*, s. 1.1

10 Listed as *"Movable Culture Act of Bhutan, 2005"* under entry 'M' in the website of the *Parliament of Bhutan*.

are among them. Both these amendments are not listed on parliamentary websites. Other than that, laws as far as 1953 are found on these websites.

Some specific examples of the laws would be helpful to understand the current situation. *The Road Safety and Transport Act, 1999* and *Civil Aviation Act, 2000* bearing the signature of the Speaker right from the cover page (civil aviation) and the title page (road safety) through the last pages, was fortunate and timely change in style. It has *Dzongkha* text first and the English text following it. This is unlike the more recent practice of alternating between *Dzongkha* text and corresponding English text printed on opposite pages facing the *Dzongkha* text or the other way round. However, both the English texts do not bear the Speaker's signature. Was it suggestive that the *Dzongkha* texts had more authority than the English texts? *The Income Tax Act of the Kingdom of Bhutan, 2001* has a similar style. While the table of content of the aviation law of 2000 is attested by the Speaker, the income tax law does not bear the signature of the Speaker on the table of contents. It implies that the contents were the work of publisher, *Department of Revenue & Customs*, rather than the *Parliament*. *The Companies Act of the Kingdom of Bhutan, 2000* was published and printed by the *Kuensel* Corporation Limited but there is no foreword by the Speaker or his signature. *The Industrial Property Act, 2001,* by contrast, has no foreword, signature or an identified publisher.

As the last amendment to *Marriage Act, 1980* took place after 2008, there is an apparent change in method of publication and dissemination of the *Acts* and their amendments. New laws and amendments bear the seal and signature of the Speaker and most are published online. Sometimes the corresponding print copies are available in the market. The details regarding publisher is not always consistent. *The Civil Service Act of Bhutan, 2010*, *The Child Care and Protection Act of Bhutan, 2011*, *Consumer Protection Act of Bhutan, 2012, Alternative Dispute Resolution Act of Bhutan, 2013, Tenancy Act, 2014* and *Civil Aviation Act of Bhutan, 2016* bear the logo of *Parliament of Bhutan* on the front cover and declare the *National Assembly*

of Bhutan as the printer and publisher on the back cover. Their digital versions posted on parliamentary website are camera-ready manuscripts of the print versions—often bearing the cropmarks. *The Judicial Services Act of Bhutan, 2007* has a foreword letter signed by the Speaker and addressed to the *Chief Justice of Bhutan*. *Labour and Employment Act of Bhutan, 2007* and *The Road Act of the Kingdom of Bhutan, 2004* and *The Immigration Act of the Kingdom of Bhutan, 2007* have no signature of the Speaker and no publisher is mentioned. This variation proves that there is no reliable or consistent approach to publication and dissemination of the *Acts* passed by the *Parliament.*

Publishers of the Laws

Of the many *Latin* legal maxims law students have to learn, one is the legal concept expressed by *ignorantia juris non excusat*. It means that *"ignorance of the law excuses no one."* It is a legal principle that states that if a person has committed any offence out of ignorance of the law, he or she cannot claim ignorance that the law existed. If the ignorance of law is not to be excused, the State has the responsibility to publish and notify the ever-increasing number of laws.[11] The [laws] of *Zhabdrung* inscribed on slates displayed at the entrance to the *Dzongchung* at the Punakha *Dzong* is evidence of the awareness of such responsibility as early as 1729.[12]

While it would be false to accuse the State of not publishing the laws, it would equally be wrong to praise it for doing a good job at that. A lot is to be desired. The State has effective means of publishing them—slate inscription in the past centuries or the Internet, among others, in this digital age. Even private publishers are free to publish *Acts* passed by the *Parliament*, but profitability would either attract or repel them from such a venture. Therefore, the obligation falls on the State who has more important motive of "making the public aware."

11 Retrieved from https://kuenselonline.com/creating-an-environment-conducive-to-holistic-legal-education, *Kuenselonline.*

12 Kinga. S. (2009). *Polity, Kingship and Democracy: A Biography of the Bhutanese State*, Ministry of Education, Thimphu, p. 95.

A resolution to amend vs. amendment

In the English translation of the *Resolutions* of the 83rd Session of the *National Assembly,*[13] the proceedings related to section *Kha* 7-5 appear under the title "VIII. MISCELLANEOUS ISSUES" and the heading "5(iv) *Legislative Committee* of the *National Assembly*."

> *In a summary of the report, the Chairman of the Legislative Committee said that provisions Kha 7-1, Kha 7-2, Kha 7-3.2, Kha 7-3.3, Kha 7-4 and Kha 7-5 of the Marriage Act, 1980 and the provision Kha 7-3.1 of the Marriage Act 1996 were amended. In case the mother was found to be at fault in a divorce case, both the parents had to pay fifty percent as So-thue till the child attained 18 years of age. The objective of amendment was focused on the welfare of the innocent child in case of a divorce of parents.*

The numbering of the headings in the *Resolutions* jumps from "5" to "5(iv)". Roman numbers i) to iii) are missing. It is not sure whether it was a typographical error or deliberate omission. There is no doubt that the need to amend section *Kha* 7-5 cited above was discussed in the *Parliament* and a *Resolution* to that effect was passed. But the action taken following the 83rd Session of the *National Assembly* lacks clarity with regards the exact text of the amendment and when the amendment was to come into force.

Following the 83rd Session of *Parliament*, the *Royal Advisory Council*[14] submitted to the *National Assembly* that "the invalidations, additions and amendments made on the *Marriage* and *Inheritance Acts* have been

13 National Assembly of Bhutan. (2021, May 11). Retrieved from www. nab.gov.bt, pp. 30-31.

14 *Implementation Status Report on the 83rd National Assembly Resolutions Submitted by Royal Advisory Council* (submitted to the 84th Session of *National Assembly* (18 November 2005—1 December 2005)), p. 10

communicated to the people through television and radio and to the *Dzongkhag Courts* through a written announcement." It is assumed that implementation status of *Resolution Nya-5* is inclusive of *Resolution* 5 (iv). The report neither contains the exact text of section *Kha* 7-5 as amended nor the date on which the amendment would come into force.

An attempt to find the correct text of the supposed amendment to *Marriage Act, 1980* in 2005 was unsuccessful. Therefore, every published amendment to the *Marriage Act, 1980* [and digital versions on the internet][15] had to be perused. The variety of versions, layout and fonts only proved the inconsistent approach to publication of laws and amendments. Some older publications did have the emblems of the publishing agencies and front matter [1988 and 1996], but the others were like orphans. One version of *Consolidated Marriage Act*[16] contains the purported amendment of section *Kha* 7-5 with incorrect reference to the *Parliamentary Session* in which the supposed amendment was enacted into law.

Three versions of *Consolidated Marriage Act*[17] contain amended section *Kha* 7-5 with reference to the Parliamentary Session in which the supposed amendment was endorsed. With different texts of *Marriage Act*—of which there are more than four versions, there is no certainty that rule of *Sothue* was enacted into law. If that rule of *Sothue* was passed as a law, the *Parliament* was not clear about the basis on which fifty percent of *Sothue* was to be determined. If both parents have a salaried income and if one does not have income, the Court seized of the matter would have no clear basis to determine *Sothue*. Fifty percent calculated based on each parent's income might result in father and mother paying different amounts of *Sothue*. Taking the higher income as the basis would benefit the recipient but punish the parent with lesser ability to pay. Taking the lower income as the basis would disadvantage the recipient and ease the burden of the

15 On nab.gov.bt and *Druk Laws app* developed by the *Office of the Attorney General*.
16 *Consolidated Marriage Act, 1980 (B).*
17 *Consolidated Marriage Act, 1980 (C).*

parent with better paying capacity. A Judge could be forgiven for finding the average of incomes as the easiest, if not the best means of settling the issue.

The secondary source to get closer to the answer was the records of the parliamentary proceedings. The official English translation of the *Resolutions* of the 83rd Session of the *National Assembly* reveals that:

> *The discussion on the revision of child maintenance allowance was divided and no consensus could be drawn... Since majority of the members affirmed the revision… National Assembly endorsed the amendment made by the Legislative Committee.*

Without understanding section *Kha* 7-5 before the supposed amendment, the object of the amendment "focused on the welfare of the child in case of a divorce of parents" seems to challenge common sense. However, it must be acknowledged that section *Kha* 7-5 of the *Marriage Act, 1980*, was in favour of men divorcing from wives and ruthless towards child[ren] of divorcing parents (when the mother causes the divorce).

Another means of confirmation was accessing the parliamentary papers in the personal library of *Chimi* Thinley Dorji from Toebisa passed on to his successor Sangay Dorji and consultation with their colleague and a member of the *Constitution Drafting Committee*, *Chimi* Namgay Phuntsho. Mr. Namgay Phuntsho[18] confirmed that the *National Assembly* did amend section *Kha* 7-5: requiring fifty percent of *Sothue* to be paid by the mother who is found to be the cause of the divorce. While the *Rules of Parliamentary Procedure* applicable in 2005 could not be traced, the *Committee Act, 2004* and *Speaker Act, 2004* do not state that *Resolutions*

18 Phuntsho, N. (2021, July 6).[personal communication]. *Chimi* Namgay Phuntsho served as *Chimi* for more than 17 years giving way to the changes brought by the *Constitution* having served as a member of the *Constitution Drafting Committee* (2006-2008). He is owner of *Phenday Legal Firm*, Thimphu.

are equivalent to an *Act*. Neither the *Legislative Committee* nor the Speaker had the duty to publish *acts* of the *Parliament*. The terms of reference accompanying the *Marriage (Amendment) Bill, 2005* to the *Legislative Committee* could not be determined.

An attempt to get to the copy of the original text of *Marriage Act, 1980* as amended in 2005 through a senior Officer who served the *Parliament* for several years revealed another version of consolidated text of *Marriage Act, 1980.* While the style of documentation was different, the content was like the other versions referred earlier. It appears that a separate text in the form of *Marriage (Amendment) Act, 2005* specifying the date of commencement does not exist. The discussion on amendment of section *Kha* 7-5 was silent about the second part of original section *Kha* 7.5. It may be deduced that the reference to *Sothue* when the divorcing parents are ཕེ་རྒྱུན་མ་གཅིག་པ་ was already covered by section *Ga* 6-17 so there was no need for cross reference. Section *Ga* 6-17 provides that irrespective of the fault the father must pay the *Sothue*, if the divorcing parents are ཕེ་རྒྱུན་མ་གཅིག་པ། If this provision was deliberately maintained, it appears to contradict the supposed amendment. It is difficult to understand the need to differentiate the impact of ཕེ་རྒྱུན་གཅིག་ མ་གཅིག on *Sothue*.

Conclusion

The *Report on Harmonization and Consolidation of Laws Kingdom of Bhutan* prepared by the *National Law Review Taskforce* in June 2018 did touch the issue. The intriguing rule of *Sothue* finds its way into paragraph nine on page 79, under *Annexure II Comments* received from the stakeholders- *Judiciary, Legislative Committees of National Assembly* and *National Council, Local Government* and *Office of the Attorney General*. The *Report* took the alleged existence of such a provision for granted by stating that "according to the *Marriage Act* only 50% of child alimony is payable to the wife if the wife is at fault in the breakdown of the marriage; this is against the welfare of the child." The list of *Acts* in *Annexure III A. Existing Operative Acts in Bhutan* of the *Report* has just three relevant *Acts* in the fifty-fourth entry on page 98, namely: *Marriage Act of Bhutan, 1980*, *Marriage (Amendment) Act, 1996* and *Marriage (Amendment) Act,*

2009. There is no mention of the amendment to *Marriage Act* in 1988 or the supposed amendment in 2005.

The supposed *Marriage (Amendment) Act, 2005* fails to appear in any of the other lists in *Annexure III*:

A. Repealed Acts

B. Partially Repealed Acts

C. Redundant Acts Recommended for Repeal

D. Untraceable Acts Recommended for Repeal

If the *National Law Review Taskforce* with all the authority and resources at its disposal could not list an *Act* by the name of *Marriage (Amendment) Act, 2005* in lists A to D of *Annexure III* or and had seven *Acts* to list under list *E. Untraceable Acts Recommended for Repeal,* I may be forgiven for failing to find such a law or not being able to state with any certainty the total number of *Acts* passed by the *Parliament*.

Shall we rely on the wisdom of *Shantideva* in *The Bodhicaryavatara*[19] to conclude whether *Marriage Act, 1980* was amended in 2005?:

> *The Awakening Mind should be understood to be of two kinds; in brief: the Mind resolved on Awakening and the Mind proceeding towards Awakening. The distinction between these two should be understood by the wise in the same way as the distinction is recognized between a person who desires to go and one who is going, in that order.*

A *Resolution* to amend is not the same as amending the law. Resolving to amend is like the *"person who desires to go."* If the *Parliament* wanted to act on that resolution and be the *"one who is going,"* it would have defined the exact text of the amendment as it is customary to do and pass the *Amendment Act* to that effect.

19 Crosby, K., & Skilton, A. (1995). *Praise of the Awakening Mind*: *The Bodhicaryavatara*, translated with introduction and notes, *Shantideva,* Oxford University Press, p.6.

The *Parliament* would also have specified the date of entry into force in the *Amendment Act* like the *Amendments* in 1996 and 2009. Or the Government would be authorized to determine the effective date like in *The Industrial Property Act, 2001*. And finally, there is also no mention of His Majesty the King having granted Assent to that amendment. How do we, then, explain the multiple consolidated versions of *Marriage Act, 1980*? I believe it as an error by well-meaning enthusiast following the parliamentary debates to pick and add amendments into their collection for private use. They might have gained wider circulation from one friend to another. That is why they are orphans with no accountable publisher and printer.

In a stakeholders' consultation meeting on 10 November 2021 convened by the *Legislative Committee* of the *National Council*, the lawmakers and especially the eminent lawyers among them appeared to acknowledge that *Resolution of Parliament* did not have the authority of an *Act*. They expressed reluctance that if some redundant laws were to be repealed by *Resolution of Parliament*, the Courts may not recognize the repeal. The same could be said of the supposed amendment of section *Kha* 7-5 of *Marriage Act, 1980.* There might be a day when the highest Court of the land makes a *ruling* and settle the matter.

Sexual Harassment: A Socio-legal Perspective[1]

Introduction

Bhutanese society has always marked itself through a progressive spectre of change. A change in society is a change in people, their habits, the ways relations are made and idea of sex is viewed. "Men and women," in the modern progressive era, can be equal combatants for rights, sometimes both equal in power and domination. Sometimes the men may win, sometimes the women may win- and both of them, to our experience, intend to have both the power and the ability to cause equal harm to the other. The "concept of violence" is primordially a men to "women- directed force or an issue," with time, the directions of the force are susceptible to change. The median notion has to be observed. Women also has the power to inflict considerable harm on the lives of men; although this can be considerably low, [many] women has a spontaneous spurt of anger, intolerable characterization of treatment to men, and men on the other hand, can in many instances, be devilish too. For many instances, the spurt of anger cannot identify the differences of sexes- thus narrowing the purported differentials in the power between men and women.

Today, the views of the people, their outlook[s] and mindsets are effectively coerced by the changes around us - resulting in a diverse modern socio-legal environments. These has entailed the penetration of modern concepts of livelihood, lifestyle, rights, duties, personalities as well as "objectionable interpersonal interventions, approaches and social norms" altogether. This leads to change in the perspectives of the society; and social expectations- thus generating a new legal discourse. *Sexual harassment* has been a predominant socio- legal issue in the developed countries. It has reached Bhutan too. The offence had been generally defined by the distinct society they lived in, in relation to their social structures, norms of social

1 Contributed by Kinzang Chedup

interactions and the legal system. *Sexual harassment* was defined only in 1970s; and prior to that, the offence literally did not have legal name of its own.

Today, *sexual harassment* is a very descriptive and normative sexual offence. In some countries, *sexual harassment* has been described as a "chronic" social and occupational health problem.[2] And, in many countries, it has also become a universal legal belief – an ostensible violation of rights of women and human rights and human dignity. These doctrinal norms and views has been partly shaped, defined and legislated in the context that "man overpowers and disparages the modesty of women" and "women are always the perceptible victims of the offence." More so, *"sexual harassment"* is defined and interpreted as an exhibition of "male dominion" and the "eclipse of the rights of women." These legal conjectures and social opinions are [mostly] based on personal, social and gender-based ideologies; and the beliefs that are structured on social and gender differences, and equally fueled by ostensible acquisition of sexual rights by women. Most of these issues are overwhelmingly right-based and reflects the universal global legal and sexual ideologies that *sexual harassment* is not a personal, but an organizational, institutional, workplace as well as a national issue. These misdirects the issue to a different social and legal limelight. In short, the explosion of *sexual harassment* issues at any place is the orchestration of the progressive delimitation of the social, sexual, cultural, and legal values and "changing paradigm on the view of sex and sexual rights."

The ideation and the culmination of different responses to the *"Me Too Movement"*[3] across the globe has led to excessive information and allegations

2 Quick, J. C., & McFadyen, A.M. (2017). Sexual Harassment: Have We Made Any Progress, *Journal of Occupational Health Psychology,* American Psychological Association, *22* (3).

3 The *MeToo Movement* an effort to effect social change, organized primarily through social media, where it's often expressed as #MeToo. Originally founded in 2006, it became prominent both online and in the mainstream in late 2017, when several high-profile actresses opened up about their experiences with sexual harassment in

on sexual violence, *sexual harassment* and assault. This in one way, became a "wakeup call" and the harbinger of the generative issues associated with sex and women. These provided a platform to raise the voices and issues; and sharing of common experiences of *sexual harassment*. In the similar manner, the Bhutanese society has also transformed to a great extent. Every year, our social structures are changing, the beliefs of the people and the "social patterns" are giving way to new legal and "unthought-of" social dimensions. With replete communication tools, as well as the skills to use that, it has advanced people's access to information and provided them with a "ripe modus" to share their grievance[s] thus, marking a contrasting development in our social-legal values. In the past, when the level of education was low, with less urbanization and social changes, "sexuality" and "sexual opinions" were not only shielded away, it was restricted to personal spaces. It was the symbol of a *very* close-knit society. Most close relationships were marked by traditional practice of courtship that took place Bhutan.[4] These social institutions cannot be headlined as "primitive social institutions" or "violations of rights" as it was mutual as well as a consenting traditional social phenomenon. However, currently, with development of law and new legal insights borrowed from the legal and social ideologies of advanced countries, "sexuality" and "sexual encounters" can be easily termed as "exploitation of sexual rights and disparaging of personal integrity." Things have become extremely legalistic. Many things can quagmire up into controversies. The social character is becoming as dried as the mid-winter tinder; and a tiny tinder may set alight a wild fire.

Bhutan signed the *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)* in 1980 and ratified it without any *reservations*.[5] Further in 2019, the *Concluding Observations on the 8th*

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the film industry.

4 Penjore, D. (2010). Bomena, a Misunderstood Culture: Contextualizing a Traditional Courtship Custom Practiced in the Villages of Bhutan, *Asian and African Studies, 10*(1).

5 *Convention on the Elimination of All Forms of Discrimination Against Women,* Updated Summary of the Report of Kingdom of Bhutan.

and 9th Report of Bhutan, the Committee of the *CEDAW* pointed out the issues on *gender-based violence*.[6] In this light, the issues facing women and girls in the country are sceptered to the watchful eyes of the international organizations, which picks their observations from various documents, reports and the media reports. Conceptually, this generic issues facing women and girls, in some instances, [can] be unreported for men, and [can] be a "soul search" for different agencies, which views the issues through varying dimensions of law, social, personal, domestic and other associated rights. Violence can happen to men as well women; it is not definitively one lined. This, in one way, is the finding of the aperture of the problems as well as illustrating the Bhutanese issues, thus painting a *"no more than thou"* national picture. The situation can be succinctly described as:[7]

> *Roses have thorns;*
> *Silver fountains mud;*
> *Clouds and eclipses stain both moon and sun;*
> *And loathsome canker lives in sweetest bud.*

These statements are not the customization of the problem, but on the skills required to fight the issues of *"angel"* in the *"hell of others."*[8]

The proliferation of issues of *sexual harassments* cases[9] in the country represents a *Me Too Movement* like escalation and exposition of issues of sexual predation and "sexual appetite imbalances." The cases has been spiraling, popping up from one corner of the country to the other-representing a free cycle of exposition of "sexual truths," feeding a

6 *Concluding Observations on the Combined Eighth and Ninth Reports of Bhutan.* Addendum Information provided by Bhutan in follow-up to the concluding observations (2019). Para 19 (f).

7 Mowat, B.A., & Werstine, P. (n.d.). Shakespeare's Sonnets, Folger Shakespeare Library.

8 "Angels" in the "hell of others" is an epithet to describe "happiness" in "other's pains."

9 The *sexual harassment* case in various tertiary education institutions like Taktse College of Language and Cultural Studies, Sherubtse College, and other institutions.

question of "how safe our society is" and generating "a very pitiable" state of information to the Bhutanese society and to others outside Bhutan. It is arguably pertinent to understand the dynamics of "what" and "how" *sexual harassment* happens, thus underpinning the clash in the nexus of our traditional values and modern sexual and personal rights. This [may] also underscore the existence of power imbalances, the need for sexual gratification and hominization of the issues and other social and information related factors that fuels this information transition. It can be described as a self-engineered diagnostic of the issue; and the imbalances that is nurtured in the evolving and fast growing society like ours.

Characteristics of Sexual Harassment

The basic idea of *sexual harassment* stems from two-sided terminologies of "sex" and "harass" and "harass" and "sex." These dominant terminologies invigorates other definitions of human personality, basic human integrity, personal space, sexual preferences, intimidation, work life power imbalances, and other inexhaustible legion of rights associated with human dignity. The amalgamation of these bundle of legal, social and personal rights cascades to "basic human dignity" and "the freedom of choice." While advanced legal systems pinpoint *sexual harassment* as a serious violation of an integrity of a human person, they also point out towards subjugation of women, women's rights; and the prevalence of a patriarchal society. Their legal definitions and assertions are reinforced by individualism and excessive predominance of personal rights and values. These limits the concepts of shared and open social culture and mirrors the opaqueness of society. Therefore, over many years, legal experts have been researching to define *sexual harassment*. The complexity in the definition of *sexual harassment* can be based on personal and individual preferences and ideologies as well as the individual's mental capacity to incubate the approaches as "appropriate." While many legal experts describe *sexual harassment* as an issue from the lenses of rights and values, they hardly describe personal mental phenomenon as one of the guiding factors that

discern an "act" as "sexually inappropriate" and demeaning. First, it is the faculty of the mind and perceptions, that can describe an act as either *"sexual harassment"* or "molestation." The inappropriateness and modern right based culture of "inappropriateness" of an act is directly influenced by expanding perceptions and knowledge on sex, personal body integrity and the legal culture on sex.

In Bhutan, *Sexual harassment* is defined by the *Penal Code*[10] as:

> *A defendant shall be guilty of sexual harassment, if the defendant makes unwelcome physical, verbal or non-verbal abuse of sexual nature.*

If we look at other legislations on *sexual harassment*, it has completely captured a varying interpretation of what it actually is even in Bhutanese legal understanding. Although, every law which discusses *sexual harassment* capture the "basic idea" on what actually it is; its "legal paradoxes" either "add or completely delimit it" by either defining it restrictively or elaborately. These legal gensim also leads to "different" understanding of the issue; thus including or excluding some issues associated with it. Typically, it also spawns a question of "which would we accept as the accurate definition." Unless, we strictly abide by a stricter definition of what the offence is- the nature of the offence can become an emotional as well as a socially dynamic spectacle: since [all] understands *sexual harassment* from their singular legal doctrines, like *sex discrimination* and *women disempowerment*. These legal theories can lead to a different aspect of *"sexual harassment issue"* altogether. This is not to cover the underlying causes- but to balance the legal opinions and personal doctrinal beliefs geared upon the factual circumstances with our national values and identity. Objectivity and neutrality is important.

If we analyze the penal provisions on *sexual harassment* in the *Penal Code of Bhutan*, the definition mandates a "person," legally called as the defendant to make an *"unwelcome physical, verbal or non-verbal abuse of*

10 *Penal Code of Bhutan, 2004*, s. 205.

sexual nature." The legal ideation of the concept of *"unwelcome"* is a "free to interpret legal context" and "is a very malleable word." What has been *"welcome"* can easily become *"unwelcome"*- when influenced by superior legal thoughts and information.[11] The word can become "manipulative" as well as "exploitative" unless adequate circumstantial care and evidence are accrued in support of it. The notion *"physical"* is one way a legal barrier. *"Physical"* in nature involves the use of body, in which *"physical"* is an act where a person has been touched inappropriately against his or her will. The notion of "against the will" and "inappropriate" are very [subjective] and gives the victim a [right] that supersedes a defence. *"Verbal"* and *"non-verbal abuse"* of *"sexual nature"* in one way [may] seem protective of the victim; however, it juxtaposes the issue of *"abuse"* which may be clandestinely difficult to prove. The word *"abuse"* in a strict legal and understanding sense, can mean a state of very *serious misuse or manhandle.* However, in today's legal scenario, it is more palatably agreed, a simple violation as an *"abuse."* The terminology in its most strict sense can mean a "cruel and violent" treatment.

If we plainly understand this section of the law, it provides a "blanket opportunity" for women to allege for *sexual harassment*; and this [may] not achieve the purpose of the section and the prevailing conditions, that can be legally identified for an offence of *sexual harassment*. *Sexual harassment* can become an unhealthy medium through which women can exert their rights, in line with modern legal and social values. In the legal definition created in 1980s, *sexual harassment* is legally defined as:[12]

> *Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct explicitly or implicitly*

11 The "superior thought" concept can be levelled to information on laws, legal advice and other advices that opens up the thoughts of the persons- thus inculcating a new legal dimension to make up a case for sexual harassment and manipulation.

12 Quick, J. C., & Mc Fadyen, A.M. (2017). *Sexual Harassment: Have We Made Any Progress*, p.288.

> *affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment.*

The definitions are divided into legal, sociopsychological, the public and the lay – thus providing a varied interpretation of the matter giving focus on the subjective definition including the experiences. The phenology of sexual experiences and legal protections are spelled out in the *Constitution of the Kingdom of Bhutan* and emphasizes on the appropriate measures to prevent it. In Bhutan, the definition of *sexual harassment* is [seemingly] derived from the *Equal Employment Opportunity Commission, 1980 (EEOC)* in the United States. This was the consolidation of the narrow view of *workplace harassment*. The *EEOC* defined *sexual harassment* as:

> *Unwelcome sexual advances, request for sexual favours, and other verbal or physical conduct of sexual in nature.*

The dominion of the definitions of *sexual harassment* is influenced by notions of self-fulfillment, innovation and self-search. The need for respect and attention, personal interests, psychological comfort and social needs exert a decisive influence on how each individual define the whole corpus of sex, harassment and privacy.[13] The concept of "wage and salaries" as the economic and professional life denominator has been exterminated by need for sound workplace relationships, the protection for dignity, and respect.[14] All actions describable as *sexual harassment* have some [common] features.

a) It has *sexual overtones* or is *derogatory* or *degrading* in nature;

b) Creates *"undesirable"* and *"hostile"* working or *other environment* with sexual characteristics.

13 Sergeevna, L.K. (2020). *Sexual Harassment in the Workplace and Legal Methods to Protect Employees*, Kazan Federal University, Russia, p.143.

14 Ibid.

Most women wish to choose whether, when, where and with whom to have a sexual relationship. It is said that one aspect of control over the lives of women is their ability to control over their sexual choices. *Sexual harassment* is not contrary to show of affection, display of affection, compliments, but, in some western societies, they argue that *sexual harassment* is when it comes with strings attached.[15] In most cases, the concept of *sexual harassment* incidences are considered as trivial, natural, biological or social. So the definition of *sexual harassment* and the seriousness nature of it is made by the overtones of sex and workplaces; gender stratification and other aspects. It has to be viewed from many aspects of the lenses, thus catering an open understanding of the matter. This will inadvertently lead to "close-ended" and "open-ended" interpretation of the matter.

The Social Context

It is believed that *sexual harassment* is a product of social factors. In other countries, vertical stratification, income inequality, and sex-defined work perpetuates the concept of *sexual harassment* in workplaces. Lack of public information, social awareness, and formal data does not reflect the pathology of the issue. Until the 1976, even in the United States of America, the term of *sexual harassment* did not exist. Now, with expanding legal and technological tools across the world, it has uprooted the traditional norms of the society, the way[s] we communicate and exchange information. With changes in social and traditional mores in the society, today we can witness cyber stalkers, online *sexual harassment* and *sextortion* are taking place. The role of culture, and sociocultural perspectives perpetuates it.[16] The context of social norms and practices of sharing personal relations and experiences, heterosexual socializations, recreation and entertainment practices are also influenced by the society we live in.

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15 MacKinnon. C.A. (1979). *Sexual Harassment of Working Women,* Yale University Press, p. 10.

16 Merkin, S. R. (2012). *Sexual Harassment Indicators: The Socio-Cultural and Cultural Impact of Marital Status, Age, Education, Race, and Sex in Latin America,* The City University of New York, USA.

The understanding and experience of *sexual harassment* varies from society to society; and culture to culture. As awareness and disapproval of *harassment* increase, people may begin to perceive the previously tolerated behaviour as intolerable, unjust and illegal, leading to more reports of *harassment*, even as the actual rates of particular types of behaviour stay stable or decline. In other words, measuring *harassment* rates relies on people's reports [either through the legal process or on surveys], which are, in turn, shaped by changing attitudes of the people. This makes it difficult to compare rates of *harassment* over time, cross nationally, or across different populations.[17] In most societies, the perception of *sexual harassment* differs based on sex, race, national level factors, including organizational structures. These factors indirectly influence the legal aspect of *sexual harassment* and the legal remedies.[18] It also depends on the psychology of the society, how each [individual] society perceives and comprehends the issue of *sexual harassment*. From a sociocultural perspective, it inculcates a system of *vulnerable victim hypothesis.*[19] How the society, people and the law enforcement agencies respond also has a direct impact on the psychological and physiological wellbeing of the victim[s].[20]

Society and cultural traditions and norms heavily influence social-support mobilization[s] too. In collectivist cultures that emphasize on interpersonal orientation, and interdependence they give high value on social support.[21] The socio-cultural determinants of *harassment coping*

17 Rees, M.E., & Saguy, C.A. (2021). Gender, Power, and Harassment: Sociology in the #MeToo Era, *Annual Reviews*, Department of Sociology, University of California, *47*(417).

18 Ibid.

19 The *vulnerable victim hypotheses* states that people in low sociocultural positions and power suffer *sexual harassment*.

20 Zvi, L., & Bitton, S.M. (2020). *Is it Sexual Harassment? Perceptions of Sexual Harassment Among Lawyers and Undergraduate Students*, Department of Criminology, Ariel University, Israel.

21 Wasti, A. S., & Cortina, L. M. (2002). Coping in Context: Sociocultural Determinants of Responses to Sexual Harassment, *Journal of Personality and Social Psychology,* American Psychological Association, *83* (2).

and *resilience* depends on the processes of socialization, values, gender roles that is shaped by culture. It also determines the processes of social coping, avoidance, denial and negotiation.[22] Therefore, cultural and social contexts and orientations greatly influence the dimensions of mutability, and inharmonious personal relationships. While in some societies, the concept of a "mere gesture" of friendship may be "understood as *sexual harassment*," while in some countries, the concept of *sexual harassment* is expansive. Today, the misnomer of *"sexual harassment"* is identified with *"discrimination," "social stratification"* amongst other legal and social issues spanned around women's rights and gender issues. These social contexts, throws an array of views, and phenomenal legal and social assumptions, thus highlighting a different story and nature of rights, equivalency towards a gross violation of sexual rights and human dignity.

In modern social contexts, the "idea of *sexual harassment*," which is partly imported, depends, mostly on how other society views *sexual harassment*, and how we interpret them coalescing with our contexts. While the denominators of rights of persons are equally same, the concepts of rights are evolving as we interpret and it depends on "how we and the legal system" interpret it, thus [giving a unique] opportunity to define, relate and contextualize. In this matter, the ways to understand, interpret and accept things, will evolve and revolve around, how *sexual harassment* is defined, interpreted and analyzed in other jurisdictions. This, analysis is directly influenced by the legal systems of other countries; and how other countries, contextualizes and categorizes, *sexual harassment*. These legal phenomenon enables the globalization of the legal issues; but, it may require a national segregation of the facts, and details, which constitute *sexual harassment.*

In some cases, the boundary between sexuality, and the expression of values of Bhutanese culture to sex [may] be non-differentiable. This divides the two spheres of "humanity," and society through a "right-based womanistic

22 Ibid.

values" versus "individualistic man values" which represents the evolving nature of the legal and social culture based on individual rights, and segregation of the society. As the concept evolve, the concept and [such] offences creates "social divide" and "a man-fearing" society and catapults the image of the society as sexually aggressive. While the offence of *sexual harassment* is intolerable in light of the women and their families, with which she lives, it has to be weighed in our social contexts, by examining the "faulty lines" and "apertures" giving way to occult social norms, and individual sexual endeavours. Sexual predation, and "exploitation of rights of women" are categorically "very serious terms." An idea of right, and the concept of *"sexual harassment"* is deemed as a normal vocabulary for conversation; and "few determines" it as a social menace, that will illustrate a bad image for Bhutan, our society and the legal system.

In most countries, the perversion of *sexual harassment* exists and are studied through the legal dominion of women disempowerment, domination of woman, and prevalence of corruption in the workplaces. In most jurisdiction and societies, the issue of *sexual harassment* is pervasively dealt with workplace demands, and the need for sexual satisfaction or gratification through the emphasis of *quid pro quo* theory of "give and take." In such cultures or the society, they are [mostly] defined by individualistic lifestyles and [very] sensitive personal rights; and any microscopic issue[s] may be determined based on the psychology analytics of an individual, which is further perpetuated by individual experiences; and a right-based sexual culture. It is mostly viewed as an "unacceptable difference" between "men and women" which are expressed through the common legal issues of *sexual harassment*.

As society changes, which is further reinforced by values akin to our rights, and internationalization of the issues based on a right-based perspective, *sexual harassment* is going to become a very sensitive social and legal issue. The perpetuation of right- based society; and the indirect indoctrination of various legal and social constituents, fed in by morally right view,

makes *sexual harassment* as an offence degrading personal sexual integrity, personal rights, family rights and other values attached to a woman. One of the elements of *"sexual harassment"* is the effective coexistence of power imbalances between men and women. In this context, the requirement for sexual needs, although, inexplicit remains to both the sexes. With different people in the society, the sexual ideation and craving for each individual is affected and influenced by the mental habitus and dispositions.

The Legal Context

Sexual harassment is a personal, social as well as a fast expanding legal issue. The personal issue of *sexual harassment* becomes social, when its prevalence is gauged through the different social indicators, and becomes a legal issue, when it is defined and [understood] in our laws. The context how [each] law interpret and define such sexual offences, depend on how each legal system comprehend and understand the nature of the offence. Now, it has become imperative that each legal system and the society understand and comprehend this offence, as it involves not only a legal issue; but a cascading and turbulent emotional, personal, family, social and other associated issues. The legal context, unless it defines, clearly capturing the evolving manifestations of the offence, [may] eclipse the holistic nature of the offence, which sometimes have an *innuendo effect.* Today, legal experts across the world and in Bhutan, have become both intelligent as well expressive. They will not only argue or defend based on the legal definitions of the offence, but also play on the differing notions generated by the legal definition. While the definition of *sexual harassment* under the *Penal Code of Bhutan* is not as modern as it sounds, it [may] open up an atmosphere of various reasoned interpretations as it exclusively identifies various approaches including an *unwelcome physical, verbal or non-verbal abuse of sexual nature.* This definition does not identify and curate the [main] underlying causes of *sexual harassment* and [may] stem the superficial conditions, leading to the offence, thus leaving the problem to be rooted.

For legal experts, the idea of the offence of *sexual harassment* stems from the following socio-legal origins as studied in other jurisdictions, including women's rights, place of women in the society, sexual discrimination, gender biases, inequality, and other aspects of irrational relationships.[23] Constitutionally, women in Bhutan are grounded on fair principles of *"all persons are equal before the law and entitled to effective protection of the law"* without discrimination.[24] Further, human rights and human dignity are sacrosanct and are protected through highest constitutional mechanism[s] to promote a life based on respect, *rule of law*, freedoms and universal human values.[25] These constitutional legal protections mirrors the highest national commitments to protect the citizens, so that they are able to lead a life with values and of values.

Sexual harassment is a legal issue that can be accompanied by psycho-social implications. While the offence is a categorically legal one since the laws have captured it as an offence, it can lead to unseen psychological and social consequences. Unless a strict legal scrutiny of the facts, which constitute an offence of *sexual harassment* are construed, interpreted, and analyzed in the context of each women individual for now, it may inadequately prepare for combating the various variables of the offence including the type of *incident or advance, the form of response,* the kind and *degree of damages* attributable to it.[26] In such circumstances, unless legal expertises are applied, it may lead to telescoping of the elements, which reflects:[27]

a) Sexual incident or advance;
b) Some form of rejection or compliance; and
c) Some employment [or] other consequences.

23 MacKinnon. C.A. (1979). *Sexual Harassment of Working Women,* p.102.
24 *The Constitution of the Kingdom of Bhutan, 2008*, Art. 7(15).
25 Ibid., Art.9 (3) (17) (18) (20).
26 MacKinnon. C.A. (1979). *Sexual Harassment of Working Women,* p.31.
27 Ibid.

These legal doctrines enunciated by Catherine A. MacKinnon[28] mostly circle around sexual abuse due to reasons of sexual discrimination, and male dominated workplaces. However, the theoretical as well as the legal dominion on the subject is fast changing. The factors fueling *"unwelcome sexual advances…"* may be a result of changing dynamics of women, their rights and non-acceptability of treatment which is sexually degrading and unwelcome in their own expressions. The critical issues, in identifying the legal principles of *sexual harassment* as a legal cause of action has to be explored in the eyes of women's experiences, centred upon the definition of and relationship among three events: the advance, the response; employment or other relatable consequences.[29] Most typically, the *sexual harassment* should stem from an *inappropriate* as well as *unwelcome* sexual behaviour. In such circumstances, an *"unwelcome act"* directly becomes *"inappropriate"* as the logics of *appropriateness* of a behaviour is a circumstantial one. These are legal variables and it constitute as an important element of the offence, based on how each element is perceived between the two individuals. In such cases, as rights of persons with other sexual and gender orientations, are slowly creeping into the social atmosphere, we [may] not have to wait long to see issues of such nature, amongst the [above] sexes, thus definitively tilting the concept of sex within our own legal dimensions. It will require to overcome the innate and existential concept of what constitute a "sex" – which may in one way, derogate the basic ideology of a sex crime. Now, the basic belief on what and who are involved in *sexual harassment* is evolving at a very fast rate. The conceptual underpinning of the issue to power dominion, workplace and other factors are changing. In basic simple terms, *sexual harassment* may take place as far as there is a *coexistence* of two sexes,

28 The concept of modern *sexual harassment* were mostly derived from her definitive work on the subject of *sexual harassment.* It is through her works that the concept of *sexual harassment* was identified and proliferated by the people. She was prominent feminist legal theorist and professor of law at the University of Michigan.

29 While the concept of *sexual harassment* may differ, the different criterion for *sexual harassment* may also differ and evolve with time.

unless man and women delimit their behaviours, including pre-existing probity that [may] invite an opportunity of a sexual advance. One of the most determinant element that may influence *sexual harassment* is on the development relationships.

A relationship is a process of interaction between two individuals and the factors influencing that relationship[s] are crucial to identify the uniqueness of the act. In any official, personal or other interactions, it is mostly determined by personal or official relationships that has been established over time. Unless an act is both abrupt and illogical, most *sexual harassment* issues [require] an incubation time for building relationships. Unless for an offence of rape, which is a direct assault, *sexual harassment* in many cases will require, a relationship building incubation time, unless, it is a spontaneous show of affection or a spurt of sexual emotions. In most cases, it can be surmised that an offence of *sexual harassment* can be a result of bearing an *unwanted protrusion of a relationship*. Generally, an offence of *sexual harassment* is characterized by, in most cases,

a) Sexual advance;
b) Concepts of *quid pro quo*;
c) Conditions of works and others or hostile working environment;
d) Coercive in nature[30] or non-verbal.

Sexual Advance

The contours of *sexual harassment* are definitely evasive and can be very subtle. In any working or other environment, an interaction of relationships are confined to personal sandboxes; and are self-consciously non-orchestrated. In defining the self-concept and the self- conceptual sexual ideology, unless a person is out of his moral boundaries, any act of sexual in nature, in most societies, are a confidential interaction. In this, identifying the underlying latent expressions of *sexual harassment* resulting

30 Legal theory developed by the *International Tribunal for Rwanda (ICTR),* which states that sexual violence may not be limited to physical invasion of human body.

from an interplay of different dynamics are essential. The concept of *sexual advance* is a very "spacious term" that can include the fast evolving sexual orientations and displays. While calculating a sexual advance, its nature, or other forms of expression[s], which may tantamount to a sexual advance, the condition here is to examine if it is unwelcome or the women may have been an accessory. The question here is: "Are we concluding it as a proof against whatever a woman says" or examine "if the relationships have been a cohabiter," in which a woman would have opened the unwanted cans of worms, and it has become a problem. The concept of sexual advance, has to be viewed in the context of how the other person receives it; if possible the strength of the refusal. The strength of refusal is of categorical importance since it determines the concept of "consent" and "agreement." Unlike in normal execution of a legal contracts, agreements under this topic has to be inferred in the context of perception, and indirect or direct inference through a mutual agreement, in which both the parties agree to abide through the terms of a relationship.

In this context, many legal experts may define the scope and the applicability of a relationship. In this terms, a relationship, in most cases, is an indeterminate expression, and there are few conditions, which forbids the development of relationships, unless a law specifically states that two persons cannot develop relationships on various grounds of ethics and institutional morality. So, in one sense, a relationship can be of [any] nature, and it is the branches of the relationship, which may distort the health and contours of the relationship. These relationships will specifically point out the various underlying grounds, which has nurtured the fertile grounds leading to *sexual harassment*. In the *Penal Code of Bhutan,* although it defines what a *sexual harassment* is, it pertains to an act as an indicative of sexual in nature, but does not provide conditions for the *harassment* to exist. In plain terms, *sexual harassment* can mean a culmination of two acts: *"sex"* and *"harassment."* Definitively, the classification of *harassment* involve behaviours that annoy or trouble someone. In one sense of a term, *harassment* can be one time or repeated overtime… thus infiltrating and

destabilizing the emotional element of the person. Although, *harassment* may be one time, but mostly, it can be perpetuated over a time, since it involves a requirement for sexual gratification- which is driven by emotional and sexual impulses, which may not die down immediately.

Concepts of *quid pro quo*

The concept of *quid pro quo* centers on the nature of *"give and take."* Most writers allege that *sexual harassment* involve a dynamics of power; and an interplay of the power processes. While it is relevant that *power dynamics* is one component of *sexual harassment*, it may not hold true for all the cases. Sexual desire and appetite does not require power imbalance to express itself; and while the concepts of power interplay can hold true, its subtleties, are slowly giving way. In most cases in Bhutan, the reports on *sexual harassment*, including the *Nganglam Case*[31] has happened within the ambit of power play. In such institutions, besides others, power play, especially between the students and teachers, lecturers and students, and amongst the personnel in military institutions are undeniable. In most cases, these power plays are exhibited and interacted through the process of *quid pro quo.* In most cases, a woman is forced for a less explicit exchange. *Quid pro quo* takes three possible shapes:

a) The advance is rejected and the benefit is forfeited.

In this category, it involves three connections with clear patterns- *sexual advance*, *non-compliance* and *retaliation.*

b) In the second situation, the woman complies and does not receive the benefit.

In this issue, is compliance a consent or was sex, employment or "conditionally coerced"? These leaves a very small margin requiring a

31 Tshering, P. S. (2021). *Police Officer accused of sexually harassing female constable at Nganglam, Pema Gatshel.* Bhutan Broadcasting Service.

both judicial and legal scrutiny, and examination of various conditions prevailing before the engagement.

c) The woman complies and receive the benefit.

In this case, it is questioned "if she has the injury" to complain of and does it merit to become a case of *sexual harassment* since it appears as mutual and not unwelcoming. In this matter, the concept of *quid pro quo*, and the demands [may] differ from person to person; and the injurious nexus between imposition of sexual requirement and employment or other retaliation following its rejection may also differ. In such instances, the ability to identify the "closer personal relationship" is also important.[32] In this issue, it is pertinent to examine, identify and establish credible circumstances that led to *sexual harassment* so that, we are able to justify the negotiations of judicial prudence.

Conditions of Work and Hostile Work Environment

In many instances, *sexual harassment* is preoccupied with power distinctions and can happen in an environment of interaction. While studies suggest of *sexual harassment* about working women, this presumably identifies *sexual harassment* as a workplace phenomenon. Since, the offence is centred in the working environments that generates an inter-personal interaction phase, the writers, normally conclude that *sexual harassment* is a workplace occurrence. In many instances, the concept of sexual fantasy and idiosyncrasy stems from the defiled mental state of people. Most sexual fantasies are coupled with sexual satisfaction that is both personal and hormonal. If the *quid pro quo* approach does not result in successful sexual advance, it is susceptible to generate "adverse working environments." In most cases, working environment[s] are moulded around how "superiors react" and "define the fate of the day." The caveat that work conditions for the day and over long prolonged periods can be

32 MacKinnon. C.A. (1979). *Sexual Harassment of Working Women,* p.35.

manipulated to in such a way to show work conditions, that are implicitly influenced by dissatisfaction of the employer or the immediate superior. These [may] invigorate subtleties that is more subtle, thus establishing a visibly invisible vicious circle of confrontations.

Conditions of work, and working conditions are susceptible to the orders of the superior and the legal theory of *superior respondent.* In this, a "hostile working environment" may mean an "aggressive working environment" or a "poisoned working environment" that is dictated by the conditions of work manipulated to ensure that "work conditions" subtly harass the workers, thus giving them an indirect indication of workplace cruelty. The conceptual underpinning theory of reward and regrettable "acrimonious recourse" may be stipulated. This may result in inferiority, insecurity, incompetence and lose the mentality of hard work and progressive mental dynamism. These are general interplay of various stipulated working conditions that may appear in the context of *sexual harassment*.

In Bhutan, the *Labour and Employment Act of Bhutan, 2007* and various *Rules and Regulations*[33] stipulate working conditions that promotes amicable working circumstances with systematic procedure for complaints and redress. However, in these system[s], *sexual harassment* has become a negotiable legal offence, and the rules have prescribed its own penalties, thus conflicting with the intent of the *Penal Code of Bhutan,* making it a murky legal quagmire. A penal offence is a non-negotiable offence. The problem of enforcement and invisible existence of the laws; and the "behind the wall" existence may veil the purpose, intent as well as the application of the laws. Some laws may exist *defacto* and its *dejure* impact may be both futuristic and inapplicable. A hospitable working condition [may become] a hostile working environment, as soon as the "third person" exits from the scene, a drama behind the veils. There are ambiguities in the *Penal Code*, 2004 and the *Labour and Employment Act, 2007*.

33 *Sexual Harassment Regulations, 2009.*

Coercive in Nature

In common legal parlance, sex is a hormonally driven fantasy. It involves the use of heart, determination, wit and sensibly forcible use of ingenuity and parody. These may be a "closet issue." Sexual coercion consists a broad range of non-consensual tactics. Broadly, sexual coercion is defined as the use of physical force, harm, authority, blackmail, verbal persuasion, manipulation, pressure, or even alcohol or drugs used for the advancement of sexual behaviour.[34] As *sexual harassment* comprises of the "intent to obtain and use sexual favours," *sexual harassment* can accompany coercion and other methods of informal or formal power dominance. Coercion is a method of victimization, in which a person "may employ coercive techniques" to obtain the gratification, thus directly or indirectly using sexual coercion as one component of *harassment*. Legally, the conceptual underpinning of *sexual harassment* is the employment of various methods to obtain the benefit of sexual gratification. Unless the nature of the act is non- sexual in nature, it may not involve coercive nature; while sexual gratification can be a no easy task. It will require the victim, susceptibly women to agree and oblige to the wanton act, thus, requiring an approach that is both persuasive and coercive. In other countries, people normally use verbal coercion, manipulation, peer pressure, and substance coercion.[35] One of the defining aspect of *sexual harassment* or *sex-based harassment* (SBH) as some say, include sexual coercion or sexual assault.[36] Therefore, coercion is one of the quintessential element of *sexual harassment* as per the legal experts.[37]

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34 Malebranche et al. (2015). Sexual Coercion and Context and Psychosocial Correlates Among Diverse Males, *Psychology of Men & Masculinity, 16* (1).

35 Ibid. p. 46.

36 Raver, L. J. & Berdalh L. J. (n.d.). *Sexual Harassment,* p. 643.

37 Siegel, B.R. (2003). A Short History of Sexual Harassment, *Directions in Sexual Harassment Law*, Yale Press.

The Analysis of Legislative Endeavours

Bhutan has made commendable progress in both legislative and administrative machinery to fight *sexual harassment* in all forms.[38] While laws are a representation of best human intellectual and moral aspirations, it also represents the "common will" to combat and stem *sexual harassment* at various places.[39] Laws are one of the best method to combat the intense social heat generated by *sexual harassment* claims overtime; and unless laws and legal norms are put in place, social denominators and factors to combat social problems, may not be an effective recourse. While laws can represent the wisdom as well as the method to combat issues arising between men and women, laws have to be constructed to perpetuate a socially balanced approach so that we are able to enhance a society based on best social and cultural ideals. If the laws reflect a [very] non-traditional approach to *sexual harassment*, it has the tendency to invite "non-Bhutanese" values, thus compounding an alien legal and social value; altering our legal and social contexts altogether. Laws need to reflect the social as well as the cultural values of the nation; and [any] new approaches to our laws, has to be based not only on sound legal reasons, it has to be punctuated and defined by human reasons- contested through rigorous consultations. Laws can alter the social, political and cultural contexts of our values and – enshrine a very new concept- which instead of stemming the issue, may set afire a new set of issues- that generates a non-ending cascading problems in the nation. When laws enter the field of legal play, they have to be the actors of conscience; attired relevant to the stage; and play the game that is dictated by the nation.

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38 *The Constitution of the Kingdom of Bhutan* and the labour laws specifies various institutional administrative machineries.

39 We cannot confine the *sexual harassment* issues [only] within the work places, but *sexual harassment* is a branch of human psychology, which is influenced by [his] easy proclivity towards his sexual desires; and such [acts] cannot be confined to the walls of the office. *Sexual harassment* can happen at any place when it is fueled by desire for unethical sex drives.

Sexual harassment laws in Bhutan are a concomitant reflection of our national desire to usher a respectful society. Bhutanese society is always based on values of equality. If our social mores are checked, many say that Bhutanese social mores are non-committal to rights of women and girls.[40] In most cases, why people see differentiation in social values between "men and women" has been a result of "true respect of our values and service." One of the underlying factor that positively delineates a small line between "men and women" is based on "positive affection."[41] While "positive affection" cannot be interpreted as the existence and mutual reinforcement of "always positive" social values, but it underscores the unique Bhutanese social values.

Most of our legislative endeavours, especially the provisions under the *Penal Code of Bhutan, 2004* are in fact based on the *Model Penal Code*[42] or others. Different drafters of the laws can mean totally very different things- a perplexing array of legal dimensions. For some *sexual harassment* is legally viewed through the legal lenses of "sexual discrimination" and "women inferiority," while others view that as "gender stereotyping," "sexual violence," "inequality," "women segregation" and many other descriptive anecdotes that describes *sexual harassment* as a men opposed to women issue.[43] These are various "imported legal concepts" which does not have strong roots either in the Bhutanese legal system or in the social mindset of the people. A woman is viewed as a different human being

40 The claim that rights of women is non-equal in some legal and social instances are a product of non-understanding of our deep cultural values and the associated reasons attuned behind it.

41 "Positive affection" can be and has to be interpreted to indicate a non-sexual affection, which exists within the family as brothers and sisters. *Sexual harassment* can be an exposition of negative affection based on sexual desire, gratification and discrimination.

42 These is inferred from different perspectives and the use of similar language in the *Penal Code.*

43 The legal and social theory on *sexual harassment* is based on the sexual discrimination and portrayed as a very diseased social phenomenon with extreme social differences between men and women.

from the perspective simple human anatomy and does not attach any "extra social or legal connotations." So in these context, unless we are wise in legislating such sensitive sexual offence issues, it may catapult into a domain of "rights issue"- which may alter the legal discourse anew.

The Constitution of the Kingdom of Bhutan is the apex or supreme law of the country. The *Constitution* presupposes a nation based on Buddhist ethos and values for a progressive society. It is guided by incomparable values of *Gross National Happiness (GNH)* and pursuit of best social and national ideals. The *Fundamental Rights* aspire the nation and its people to follow the best legal, social and highest ideals on interaction, with highest regard to personal honour and reputation.[44] It encapsulates the strongest legal standards to prevent "abuse of women"[45] and this is further reinforced by the *Principles of State Policy.* The plethora of legal provisions provide a firm basis for protection, respect, *rule of law*, community resilience and more importantly protection against violence, *harassmen*t and other conditions that affects the society both in private and open spheres.

These constitutional-legal conditions put a strong systemic framework for protection of personal dignity and advancement of a safe society. Drawing legal empowerment as well as inspiration from the *Constitution,* and in line with the social, political and legislative mandates, Bhutan has enacted various legal instruments to protect its people from *sexual harassment*. While *sexual harassment* cannot be endemically viewed as a social pandemonium for a weak society, but a vigilant as well as visionary steps to prevent the "mischiefs of imported social culture is crucial." Since in other countries, the issue of *sexual harassment* has arose out of employment and employment vulnerabilities, the Ministry of Labour under the *Labour and Employment Act*, *2007* has elaborately mentioned about prohibitions against *sexual harassment.*[46] These sections provide a

44 *The Constitution of Bhutan,* Art. 7 (19).
45 Ibid., Art. 9 (2) (3) (12) (17) (19).
46 *Labour and Employment Act of Bhutan, 2007*, s. 16.

wide definition of *sexual harassment.* It further defines *"conduct of sexual nature"* which provides limited commentary on what *"conduct of sexual nature means."* It also advances a step from the provisions of the *Penal Code of Bhutan,* since it provides *compensatory damages.* As stated earlier, it is encapsulated in the various *Rules and Regulations* as stated earlier. Other laws and mechanism[47] on the matter[48] provide a comprehensive strategy to combat and eliminate changing gender relations in the country.[49]

The Social Praxis

Contemporary transformation in the practice of *sexual harassment* and legal praxis on the matter, shows that it is becoming a relatively stable social practice.[50] As it increasingly becomes a social stupor, it is paramount to see "where the engines of the society fail?" Is it the men, is it the women or for the interest of Justice, what is fueling these predicaments? Any laws, and interventions has to be realistic so that it fulfills the aspirations of the people and the goals of the nation to secure its people. The concept *social praxis* here is to determine, what causes the *sexual harassment* in particular. In Bhutanese and in the context of others, the causes of *sexual harassment* is directed towards stratification of the society, gender imbalances, and writers like MacKinnon and others associated *sexual harassment* as a segregation problem and as *sexism*, or *gender discrimination*, thus pinpointing a very systemic social disorder. These "social ills" identified in western social cultures is purportedly a significant western ideologically influenced social opinion. In Bhutan, our social and legal environments

47 Gender Persons Network, Gender Focal Persons, Women and Child Protection Desks, Women and Child Protection Units based on the *National Review Report on the Implementation of Beijing Declaration and Platform for Action.*

48 *The Civil Service Act of Bhutan, 2010, Civil Service Rules and Regulations, 2018, and Domestic Violence Prevention Act of Bhutan, 2012.*

49 Verma, R. & Ura, K. (2015). *Gender Differences in Gross National Happiness in Bhutan: Analysis of GNH Surveys*, International GNH Conference, Centre for Bhutan and GNH Studies, Thimphu.

50 Siegel. B.R. (2003). *A Short History of Sexual Harassment*, *Directions in Sexual Harassment Law*, p. 14.

are characteristically different than others, and this can partly influence the psychology of sexual offences.[51] The instances of *sexual harassment*, as in the *Bhutan Power Corporation Case*[52] represents not as *sexual harassment per se* but an *attempt to rape* looking at the time and the nature of the offence; and time of the occurrence. These "small picture" of the problem shows the existence of power imbalance as well as ethical and institutional problem that has went unnoticed. These provides us with little glimpses on what causes *sexual harassment* in the country and the issues that generates with it.

In the recent media reports on sexual offences in the country,[53] they have pointed out that alcoholism, drug abuse were the factors in addition to few others. In other countries, it is termed as *drug facilitated sexual assault* (DFSA)[54] and moreover studies[55] undertaken indicate that violence at workplaces, including *sexual harassment* are caused by age, gender, level of education, professional competencies, personality traits, work environments, professional autonomy and work perceptions.[56] In 2020, 12 *sexual harassment* cases had been registered with the *Royal Bhutan Police.*[57] The prevalence of *sexual harassment* and *harassment* as criminal incidents are not meagre[58] in relation to other offences. It is reportedly

51 Sexual offences are partly psychological offences that is perpetrated through desire and want.

52 Dema, T & Rinzin C.Y. (2021, September 18). Sexual Harassment Rampant in Offices, *The Kuensel*.

53 The media has been not very calculative in reporting certain issues of national interests.

54 Olszewski, D. (2008). *Sexual assaults facilitated by drugs or alcohol,* European Monitoring Centre for Drugs and Alcohol Addiction.

55 Cheki, T. (2020). *Factors influencing workplace violence as perceived by Nurses in Bhutan,* Burapha University, Thailand.

56 Although her Study indicates violence against nurses in Bhutan, these conditions or factors can be representative of the causes of *sexual harassments.*

57 *Royal Bhutan Police Statistical Yearbook 2020,* Crime Record and Analysis Unit, Thimphu.

58 Although offences like battery is predominantly reported in the country, the statistics on *sexual harassment* and *harassment* can be considered as on average comparatively

high.[59] In these cases, although media reports indicate and blame Bhutanese gas lighting or character assassination culture and aggressive flirtations as cause of *sexual harassment,*[60] unless the root causes of the issue are not studied, it [may] remain as conjecturing and opinion based information model. Even amongst the youth, young people look at sexual affair as a source of fun, pleasure, enjoyment, and of course, a biological necessity rather than as a serious matter needing more proper conduct to avoid adverse consequences.[61] Instead of conjecturing and imagining that the issue is a ballooning social issue, it is crucial to have an evidence based interventions, estimating the *causality* of the issue and determine appropriate interventions based on inter gender respect, *rule of law*, social protection and security. Empirically-driven research is needed to understand the phenomenon of *sexual harassment*. This is to fight the growing ambiguity, visibility and contestability of the issue in public, media and legal debates around it.[62]

In Australia,[63] the main causes of *sexual harassment*, including *sexual harassment* at workplaces are caused by "community issues," and they acknowledge that it is caused online, in various settings. S*exual harassment* is caused by differences in gender, amongst others. When we study socio-ecological model[64] of *sexual harassment*, it is influenced by individuals, their attitudes and beliefs, are at the core of the ecological model. This

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higher in comparison to other offences.

59 87 criminal incidents of *harassment* was reported for 2020.

60 How do we tackle *sexual harassment* (2021, September 22). *The Kuensel*.

61 Gurung, A. et al. (2016). College Youth and the Prevalence of Responsible Sexual Relationships: A Mixed Mode Study of the Development, Challenges and Prospects of Youth Sexual Behaviour in the Colleges of the Royal University of Bhutan, *Journal for Bhutan Studies, 35,* p.49.

62 McDonald, P. et al. (2019). *Academic Evidence on the Causes, Manifestations and Responses to Workplace Sexual Harassment,* Queensland University of Technology, Australia.

63 The Australian context here is referred due to their extensive studies undertaken in the field of *sexual harassment.*

64 Campbell, H & Chinnery, S. (2018). *What Works? Preventing & Responding to Sexual Harassment in the Workplace, A Rapid Review of Evidence,* CARE Australia, p.9.

includes attitudes and beliefs about women and men, their identity, their roles and how they should behave between and amongst one another. In this model, the causes of *sexual harassment* is influenced by social practices, social norms and social structures. Social norms include empirical and normative expectations. Therefore, *sexual harassment* as an issue is further caused by factors like:[65]

a) Power differentials;
b) Culture of acceptance;
c) Non understanding *sexual harassment* ;
d) Poorly managed policies;
e) Excessive stress;
f) Errors of Judgment in Thinking;
g) Sociological;
h) Socio-psychological; and
i) Biological.

We cannot concentrate on the causes of *sexual harassment* within the "pure domains" as reflected in other jurisdictions, but it has to be adapted to our national social settings. This will enable us to reflect on the basic normative social and gender norms that supports attitude and gender framework. Unless, we take a very careful approach to study the causes and conditions, it may not import good and successful interventions and in the similar way, importing foreign ideas on the matter, my not do much Justice as well. It has to be practical, socially relevant and provide a strong nexus and praxis to the issue.

Effects of sexual harassment

Sexual harassment is a social, personal, institutional as well as a national image defacing ideology. In short, *sexual harassment* issues are derogatory

65 Huber, C. (n.d.). *Identifying Sexual Harassment Complaint Causes to Improve Workplace Safety*.

to the image of the nation, its people and the society at large. *Sexual harassment* is a contagious social issue. When the issue is brokered in the face of media, and others, it publicizes the social and "gendered based" issues in the country- and it is instantly captured as women issue and derogation of rights of women in the country. Practically, *sexual harassment* issue[s] can be detrimental to the concepts Bhutan has professed as vibrant nation based on values of *Gross National Happiness*. Therefore, the impact of *sexual harassment* issues has to be determined in the following social, legal and national compartments. While in many studies, it shows that *sexual harassment* is deciphered from the views *inter alia* inter and intra-personal effects, thus illustrating a personal, sexual and other associated issues of law and gender; rights and gender, discrimination and gender amongst many other social issues that follow.

a) National Issue and Image

Bhutan is a nation that is based on the perceptions of gender neutrality and equality of gender indexes. Gender issues cross cut the *GNH* domains and Bhutan has proactively taken gender issues as a backbone of research, policy and living practice.[66] The *GNH* principles not only elucidates the alternative development approach, it also enunciates a principle of respectful relationship, correspondence and living based on values of mutual respect and coexistence. Principally, philosophies of *GNH* illustrates the strong desire and the commitment for social wellbeing and progressive human development.[67] In this realistic context, *sexual harassment* in the recent times has become an analytical national social and legal issue. The information[68] about *sexual harassment* has been proliferating; and has been literally "popping up" from various parts of the country, a process as if involving an active fermentation. This does not

66 Verma, R. & Ura, K. (2015). *Gender Differences in Gross National Happiness in Bhutan: Analysis of GNH Surveys*.

67 Ibid.

68 The information covered by national media houses.

mean to "hide the issue" and "slide it under the carpet," but such issues can be detrimental to national image and the image that has been nurtured through the principles of *GNH*. Any media report[s] cannot conjecture on what could have, rather than what was… thus informing our people through an unbiased and principled approach to ensure that we recognize it as a problem, rather than "generating emotions of the people about it." More importantly, when issues of *sexual harassment* arises, it can be detrimental to how others view Bhutan as a society; our values, principles and timeless social heritages. Many view it as a right based issue. In this light, sexual *harassment issues* can be detrimental to the image of our legal infrastructure, social norms and principles, and may erase the prestigious image of Bhutan as a happiness generating and reverencing nation.

b) **Experiences**

In many jurisdictions, the experiences of *sexual harassment* is a result of the social, legal and economic criterions of that [particular] society. While some societies look to the issue as gender-based discrimination, others look to it from a completely differing perspective. With global influences and the endeavour to frame it as an *enforced sexual exploitation*, which different writers uses different terms lavishly, *sexual harassment* is beginning to be understood a serious right-based issue. The use of terms like survival of *sexual harassment* and *sexual violence*, international community has "pitted a serious notion of individuality and individual preferences in the issue." In general conditions, the concept of "survivor" may mean "a person who has been seriously threatened to his or her life; who has by a serious cult of fate" obtained the invaluable opportunity to survive. These terminologies are predictably an orientation of ostensible sex-segregated bio-analysis that makes woman a typically different social genre and species. Therefore, experiences of *sexual harassment* is genetically influenced by how each society perceive *sexual harassment*. It can be analogous to how an "unclothed tribe may feel and talk about nudity" and "how Muslims consider blasphemy as a serious religious offence."

In the same way, partaking different researches undertaken in the field of *sexual harassment*, the feeling of *sexual harassment* on the general life of a person is described as embarrassing, demeaning, and intimidation. They also afraid, despair, alone and complicit.[69] The nexus of the specific injury of *sexual harassment* can be conditional- based on different settings. It may be different if it occurs at a workplace or if the offender is the immediate supervisor or otherwise. The impact of experiences can induce traumatic experiences" and affect the personal lives and affect working relationships, family relationships and fuel causes and conditions for family breakup and social breakdowns.[70]

c) Impact on Career and Financial Stability

Recent studies show that *sexual harassment* affects a person's psychological heath, physical wellbeing and career development.[71] It has scarring effect with career interruptions with job changes and displacements precipitating life event that entails a sequence of stressful experiences, from unemployment, to job search, retraining, and reemployment, often in a job of inferior quality and lower earnings relative to the job lost.[72] Immediate effects of job exit on earnings and financial stress, also shifts women's careers. It also changes the career trajectories of the victims and reduce human and firm- specific capital.

d) Personal Morale

Research has documented some of the negative effects of harassment experiences, including decreased morale and increased absenteeism. Since 1980s, researchers have carried on extensive studies on the impacts of *sexual harassment.* With deteriorating relationships with the

69 MacKinnon. C.A. (1979). *Sexual Harassment of Working Women,* p. 27.

70 These Studies were carried out many decades ago and it now illustrates a more gender specific issue and experiences.

71 Blackstone A., & Uggen C. (2017). *The Economic and Career Impact of Sexual Harassment on Working Women*, Research Gate, p. 344.

72 Ibid., p. 345.

co-workers, women who had experienced unwanted sexual attention or sexual coercion at some point during their careers were more likely to be experiencing current depression and symptoms of *Post-Traumatic Stress Disorder (PTSD)*.[73] It also reduces personal morale and induces stressors and generate depressive symptoms.[74] These impacts are determined or more based on the vulnerability of the targets. Some groups may be more vulnerable to the psychological impact of stressful experiences, especially if the stressors are chronic or if they have insufficient resources to buffer stressful life events and circumstances.[75]

e) Mental Heath

Drawing from the stress literature, several individual characteristics are expected to moderate the psychological impact of *sexual harassment*, including prior *sexual harassment*, prior mental health conditions, and gender. The Fitzgerald's model suggests that those who were harassed before may react more negatively to harassment than first-time targets because past experience diminishes one's ability to cope. Similarly, stress theory and the life course perspective assume that stressful experiences create a generalized vulnerability to stress, so that stressors have stronger effects on mental health for those who experienced earlier life stressors. Negative experiences at work may be especially deleterious to mental health if they occur repeatedly through the career, as the accumulation of workplace stressors may exert larger effects than a single isolated incident.[76] It is further studied that persons who are having prior mental issues are affected the most.

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73 Fitzgerald, F. et al. (1997). Job-Related and Psychological Effects of Sexual Harassment in the Workplace: Empirical Evidence From Two Organizations, American Psychological Association, *Journal of Applied Psychology*.

74 Houle, N. J. (2011). The Impact of Sexual Harassment on Depressive Symptoms during the Early Occupational Career, American Psychological Association, *Social and Mental Health 1* (2).

75 Ibid., p. 92.

76 Ibid.

In short, there are replete research on the negative effects of *sexual harassment* prevalent by social contexts, including individual, job attitudes, work withdrawal turnover, group and organizational turnover, societal outcomes, amongst others.[77] The contexts of the impacts has to be analyzed through a targeted research. Different outcomes and impacts may differ based on social, personal as well and the community we live. Unless, we have our own study on the subject matter, drawing other researches may not serve a very contextual purpose; and may not be relevant. Cultural diversity and resilience and gender attitude also affect how *sexual harassment* is perceived and believed.

Prevention and Interventions

Sexual harassment is becoming a social as well as women issue nowadays. *Sexual harassment* is an unacceptable and gender centric intervention that correlates to common causes, with increased insights into its nature and prevalence. The rapid review of the evidence of the problem indicates that it is an outcome of shared assumptions on social norms, organizational culture, targets, and gender norms. These evidences occurs at a time of change and a movement globally to stop *sexual harassment*. The effects of the issue has debilitating results that may consequently portray Bhutan as a country paradoxical to our national and social values; and put in the culture of social, legal and personal accountability to ensure the health and safety of women and girls. The prevention has to be set in the background of the *Ecological Model*.[78] The *Ecological Model* is based on:

a) Society;
b) Community Engagement;

77 Raver, L. J. & Berdalh L. J. (n.d.). *Sexual Harassment,* p. 468.

78 The ecological model studies the "whole system" approach and articulates how leadership can address *sexual harassment* in the workplace through systemic and sustainable efforts. This *Model* is based on Helen Campbell and Suzi Chinnery from CARE Australia, a *Gender Action Platform and the Australian NGO Cooperation Program (ANCP).*

c) Organizational Policies;
d) Organizational Leadership; and
e) Workplace Norms and Practices.

In this practice, it first identifies what *sexual harassment* means and understanding it within the *Ecological Social Model* concomitant to Bhutanese social, descriptive, injunctive and learned social practice norms. As the problem is understood to be multi-layered and multi-faceted, there is growing evidence that its prevention requires similarly multi-layered interventions. Where preventions are considered, it should be effective, promising, including long term programs to support the prevention. For example, in 2016, the UN Women published a *Compendium of Good Practices in Training for Gender Equality*. This publication offers in depth information on ten different good practices of feminist programming, including detailed outlines of training courses, examples of dealing with challenges that arise in training for gender equality and a collection of tools and activities for use in such training initiatives. It gives insights into the modalities of training and how this affects outcome, participatory planning considerations, examples of how theories of gender effect training, and the need to embed training in long-term programs for change. The *Compendium* underlines the importance of adapting training to cultural, political, and sectoral context. Moreover, the UK *Department for International Development (DFID) Framework* provide the evidence of good social practice that is centered on:

a) Changing social expectations;
b) Publicizing the change; and
c) Catalyze and reinforce new positive behaviours and norm.

a. **Changing social expectations**

Social expectations are centred on "empirical expectations" and "normative expectations" which results in "descriptive norms" and "injunctive norms." "Descriptive norms" posits "What I think others do." The

"normative expectations" postulates "what I think others expect me to do or what I should do according to others."[79] These social expectations nurtures an attitude that supports violence due to external factors, and shifts blame to the victim from the perpetrator. In this, the individual behaviour has to be framed within the social context. In this, three ways are proposed in which community-level understandings influence the extent to which *violence against women* is or is not tolerated.[80] This include changing social practices- individual and collective patterns of behaviour, including everyday interaction, sexual behaviour, child-rearing practices, gendered divisions of labour and patterns of decision-making in families, in organizations and at the societal level. Evidence suggests that working with social norms offers the most promise for bringing change. It also requires changing expected social norms and structures.[81]

b. Publicizing the change

One of the important factors that enable an informed change is to publicize the change. In this, it is expected to publicize the positive roles and benefits of new behaviour; avoid reinforcing negative behaviour. It is important to develop a strategy to extend norm change beyond people directly involved in the program.[82]

c. Catalyze and reinforce new positive behaviours and norms

It is found out that interventions are more likely to be successful if they provide clear guidance on the new or presented norm and also provide opportunities for people to put it into practice. As noted above, social

79 Campbell, H., & Chinnery, S. (2018). *What Works? Preventing & Responding to Sexual Harassment in the Workplace: A Rapid Review of Evidence,* Gender Action Platform and the Australian NGO Cooperation Program (ANCP), CARE Australia.

80 Ibid. p. 10.

81 Ibid.

82 *The DFID Framework* notes that where social support for a norm is strong, a preliminary focus on attitude change may be required to enable subsequent attempts to weaken and replace the norm. It sets out some ways to do this.

norms are dynamic and evolve. As norms begin to shift, it points to the need to establish appropriate rewards. For individuals who are adopting new norms, their reward might be a personal sense of self-esteem and belonging, or there might be external recognition of their contribution. For sanction, the legal and policy changes that might create sanctions, as well as send a signal to recalcitrant individuals.[83]

The Bystander Approach

In other countries, there are evidence – based bystander approaches to prevent offences of sexual in nature. The bystander approach aims to stop initial occurrence of the offence by promoting social norms supporting victims and tolerating no violence.[84] All individuals can influence norm perception and behaviour by calling attention to the existing norm in a situation, and, either reinforce it with the positive observation of compliance with the desired norm, or, punish a person deviating from the expected norm. Adopting a bystander approach broadens the possibility of roles that may be played by a group – from either target or perpetrator to provide a positive role and identity for participants. Highlighting the diversity of possible roles may reduce backlash. There are generally two types of bystanders – *active* and *passive. Active bystanders* intervene or take action in response to an observed situation, while *passive bystanders* do not intervene or take action when observing a situation. The bystander approach at an individual level ignites the perception of responsibility to intervene, with the empathy for and desire to support targets. It is also a method of self-validation, catharsis – expressing anger and disapproval

83 Scott, A. et al. (2016) as cited in Campbell, H., & Chinnery, S. (2018). *What Works? Preventing & Responding to Sexual Harassment in the Workplace: A Rapid Review of Evidence.*

84 Ozaki, R., & Brandon, A. (2020). Evidence Based Bystander Programs to Prevent Sexual and Dating Violence in High Schools, *The Journal of the Ohio Council of Professors of Educational Administration (OCPEA),* Leadership and Research in Education, *5* (1).

of the matter.[85] At the community level, it models a respectful behaviour with prosocial norms that support accountability. While bystander intervention in *sexual harassment* is complex, there are opportunities for intervention. There are [two] by stander opportunities for interventions: proactive bystander intervention and reactive bystander intervention[s]. These intervention strategies are further bifurcated into:[86]

a) Primary prevention (before the offence);
b) Secondary prevention (during the offence); and
c) Tertiary prevention (after the offence).

People need to be supported to challenge behaviours since there are perceived costs to intervening and because there can be uncertainty about what to do. Steps identified for bystanders, in a workplace context, need to be realistic, achievable and appropriate to the personnel level in the organization, their roles and responsibilities and ability to effect organizational and attitudinal change. There are evidence gaps on the impact of bystanders in workplaces on perceived norms about the point, on continuum of behaviours, at which *sexual harassment* becomes unacceptable and bystander intervention acceptable; and the conditions in which bystander intervention is consistent with social norms.[87]

In developed countries, there are effective strategies and evidence-based on social norms that conditions "institutional signals" such as the development and implementation of a *sexual harassment* policy to result in a positive shift of employee norms about *sexual harassment.* These strategies include raising awareness, change in institutional norms, innovation on the perceptions of the norms, including organizations and workplaces can play a significant and shared role in responding to preventing violence against women, and specifically *sexual harassment*; provides a framework to guide organizations and workplaces in their efforts to respond to and

85 Campbell, H., & Chinnery, S. (2018).
86 Mc Donald. et al. (2015). *Bystander opportunities for the prevention of sexual violence.*
87 Ibid.

prevent *sexual harassment* from occurring in the first place; and provide a scope to engage with people at all levels of the social ecology.[88]

Sexual harassment at workplace is one of the aspects of *sexual harassment* in which many reports are coming in. If the offences occur at the workplaces, organizations and organizational culture have the potential to influence social norms, by modelling gender equitable workplace processes, practices and policies. Hunt proposes an organizational intervention model to address *sexual harassment* with interventions, which in summary are implemented in the following stages:[89]

a) Primary level – Effective policies and procedures including education about sexual harassment and responding to it in a workplace;
b) Secondary level – effective complaints procedures and employees support, and
c) Tertiary level – legal action, rehabilitation and follow-up stage in line with the established procedures.

This is further bifurcated into message, management and monitoring. As per McDonald, it requires the supports of these steps, which reinforces the need for a strong understanding of what constitutes injustice and wrongdoing by senior management and throughout the organization, high visibility of expected behavioural norms, organizational resourcing for message communication and training and incentives for good practice and commitment to broader gender equality goals.[90] This approach has to be supported by comprehensive "whole organizational" approach, address structural factors, engage staff as corroborators at workplace, and secure the commitment of leaders and the staff. There should be leadership, strategy, norms and practices; training and capacity building programs. The organizational change process called as the *"enabling zone"* and

88 Webster & Flood. (2015).
89 Campbell, H., & Chinnery, S. (2018), p.33.
90 Ibid., p.35.

the *"engagement zone."* There should be policies on *sexual harassment*, communication of the policy, complaint management and procedural reporting mechanisms and commensurate sanction. There should be community and society engagement so that "every part of the society" understand the issue of the matter.

Conclusion

Sexual harassment is both a social as well as a legal problem. As more people understands the letter and the spirit of the laws; and use laws as a tool for both safeguards as well as for the purpose of defence, *sexual harassment* issue, unless appropriate solutions are taken, can remain as a pervasive phenomenon. The issue of *sexual harassment* has been similar to the COVID- 19. Once the case emerges from one side, it begins to emerge from different corners, thus invigorating a social response about the presence of a "wave" of the issue. The problem has to be understood, our legal norms revisited and organizational and systemic procedures are put in place to ensure that the issue is best understood, and best attempted to rein it. The matter has to be best understood in our contexts, and reflected in our own social ways to ensure that "it is both indigenously tempered" and "uniquely" counteracted within the values as Bhutanese society. It has to be countered through a social, legal and ecological model so that it is both responsive as well as the interventions respects the sentiments of the Bhutanese people and our legal and social values.

The "Umbrella Clauses" under the International Investment Treaties[1]

Introduction

International Investment Law (IIL) is known for its uniqueness and puzzling features unlike any other field of the larger international law.[2] The three main features that define *IIL* are that it is constituted with a decentralized composition with no central organization; natural emergence which was neither planned nor foreseen, but was a spontaneous process of small and inadvertent steps; and extremely disputed with claims that *IIL* favours the private investors more than it protects the contracting states, but continues to be utilized all the more by the states.[3] Owing to the manner in which the *IIL*s have evolved, and numerous aspects of which the *IIL* are constituted by *Investment Treaties*, including multilateral treaties such as the *Energy Charter Treaty (ECT)* and the *North American Free Trade Agreement (NAFTA)* and *Bilateral Investment Treaties (BITs)* are controversial.[4]

*BIT*s are agreement[s] between two countries that govern the *"treatment of investments"* made in their respective territories by individuals and corporations from the other country[5] with the underlying desire to attract foreign investment,[6] and now it has become the basis for majority of the

1 Contributed by Namgay Om.
2 Douglas Z., Pauwelyn, J., & Vinuales, J.E. (2014). *The Foundations of International Investment Law: Bringing Theory into Practice,* Oxford University Press.
3 Ibid.
4 Lim, C.H., Ho, J., & Paparinskis, M. (2018). *International Investment Law and Arbitration,* Cambridge University Press.
5 Dolzer, R., & Stevens, M. (1995). *Bilateral Investment Treaties,* Kluwer Law International.
6 Wong, J. (2006). Umbrella Clauses in Bilateral Investment Treaties: Of Breaches

investment arbitration.[7] *BIT*s are an important aspect of international commercial transactions and investments; and it perpetuates a more complex "international legal issue." Many clauses under the *BIT*s has been interpreted differently by various arbitral tribunals[8] including on *"umbrella clauses."*[9] In addition to an *Investment Treaty*, a *Contracting State* will always enter into contracts with the foreign investor[s] wherein the specific details of the investments are stipulated including dispute resolution mechanisms. The dispute with regard to *"umbrella clause"* has arisen in this context, particularly with significant number of tribunals construing that the application of *"umbrella clause"* under the treaties that covers breach of contract provisions as well.

This article will critically evaluate whether, despite some reservations in the past, for treaties containing *"umbrella clauses"* now, any breach of contract between the *Contracting State* and the investor of the other *Contracting State* is considered without exception to be a breach of the *Investment Treaty* itself. In order to reach a sound analysis, this article will take into account the definition of *"umbrella clause"* and rationale for its emergence; the interpretations rendered by various tribunals on the latitude of *"umbrella clause"* in correlation with inclusion of breach of contractual obligations; the analysis on what the foregoing parts indicate on the trends in *"umbrella clauses"* and the lesson[s] to be learnt.

1. Definition and rationale of the "umbrella clause"

Through the *Investment Treatie*[s], the role of the arbitral tribunals [including] mostly constituted through *International Centre for Settlement of Investment Disputes (ICSID),* and others such as the *United Nations*

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of Contract, Treaty Violations, and the Divide between Developed and Developing Countries in Foreign Investment Disputes, *George Mason Law Review, 14*(135).

7 Schreuer, C. (2004). Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road, *The Journal of World Investment & Trade, 5*(2), p. 231.

8 Ibid.

9 Dolzer, R., & Schreuer, C. (2012). *Principles of International Investment Law*, Oxford University Press (2nd Ed.).

Commission on International Trade Law (UNCITRAL) has become important facilitator[s] in the dispute settlement.[10] In view of the jurisdiction of tribunals, containing an *"umbrella clause"* under the treaty has significant impact in determining whether the extent of the jurisdiction is only regarding commitments under the treaty or additional obligations concerning investments within the *investment contract*.[11]

Numerous *Investment Treaties* normally include an *"umbrella clause"* which provides that "each *Contracting Party* shall observe any obligation[s] it may have entered into with regard to the treatment of investments of nationals of the other *Contracting Party*"[12] which synonymously translate as *"pacta sunt servanda"* or *"respect for contract clause."*[13] Schreuer points out that the rationale for the usage of *"umbrella clause"* under treaties are explained by different scholars: to turn the obligations to perform the contract between the *Contracting State* and a *Foreign Investor* into an international obligation; to guarantee the success of the investment; and to protect the investor's rights guaranteed under the contracts from the obstruction of the host state. Schreuer also expounds that even the discussions on the United States and the German *BIT* practice arrives at the invariable opinion that *"umbrella clause"* purports to embody infringement of contract responsibilities under the ambit of the *BIT*s.[14] Whether this rationale holds true may be contestable as discernable from interpretations rendered by some tribunals. In the context of *BIT*s, it

10 Schreuer, C. (2004). Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road, *The Journal of World Investment & Trade,* p. 231.

11 Ibid.

12 Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Republic of Venezuela, signed 22 October 1991 and entered into force 1 November 1993. The *Dutch-Venezuela BIT*, Art 3(4).

13 Schill, S.W. (2009). Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties, *Minnesota Journal of International Law*, p. 10143.

14 Schreuer, C. (2004). Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road, *The Journal of World Investment & Trade,* p. 251.

first appeared under the Germany-Pakistan *BIT* in 1959.[15] However, the application and scope of *"umbrella clause"* has neither received any deliberations nor was subjected to disputes before an arbitral tribunal until 2003.[16]

2. Interpretation of tribunals

a) Identification of the issue in umbrella clause

The wide construal on the latitude of *"umbrella clause"* by arbitral tribunals has surfaced as one of the most contested issues[17] which might lead to the belief that it is normal for *contract violation* to be treated as *treaty violation*. The range of decisions of the tribunals indicate that the stance[s] are divided. The contrary decisions rendered by tribunals on the extent of *"umbrella clause"* in *SGS v. Pakistan*[18] and *SGS v. Philippines*[19] first stirred the issue; and with it, two different approaches towards the issue emerged. Prior to these two cases, in *Vivendi v. Argentina,*[20] wherein the *"umbrella clause"* specifically states *"relating to investments made under the Agreement between one Contracting Party and an investor of the other Contracting Party,"* the *ad hoc* Committee concluded that reading of the *clause* is broad enough to encompass within its ambit any investment made under the *BIT*. This case, hence, already deliberated on the issue even before the above two cases.

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15 Walde, T. W. (2005). The Umbrella Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases*, Journal of World Investment & Trade*, *6*(183).

16 Ibid.

17 Wong, J. (2006). Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide between Developed and Developing Countries in Foreign Investment Disputes.

18 *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan,* ICSID Case No ARB/01/13, Award (27 August 2003).

19 *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No ARB/02/6, Award (29 January 2004).

20 *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No ARB/97/3, Award (28 May 2003).

b) Restricted interpretation

In *SGS v. Pakistan*, the tribunal decided that a widely drafted "disputes with respect to investment"[21] clause under the *BIT* does not encompass investment contract claims. The tribunal opined that the *"umbrella clause"* with the wordings used is *not adequate to imply that it applies also to contractual claims*, and hence, concluded that *it did not possess jurisdiction over breach of the investment contract claims*. Further, the tribunal also cited the ripple effect of extending the jurisdiction to contractual claims through the *"umbrella clause:"* unlimited number of contracts executed by states would be elevated to breach of *BIT*s. Ensuing the same assessment, the tribunal in the subsequent case of *LESI-Dipenta v. Algeria,*[22] also construed that *breach of investment contract which are not unjustified or discriminatory does not necessarily amount to breach of the BIT*. Such interpretations take a more balanced and fair approach towards both the host state and the investor: minor contractual breaches may be solved according to the host state's domestic law to honour the contract provisions with substantive *BIT* violations resolved according to the *BIT*.

c) Broad interpretation

In a divergent view in *SGS v. Philippines*, in interpreting *'disputes with respect to investments*[23] under the *Swiss-Philippines BIT*, the arbitral tribunal gave a wide construction stating that *it would also extends to an investment contract.* However, the arbitral tribunal refrained from exercising its jurisdiction and instead chose to sojourn the proceedings by referring the parties to observe the dispute settlement apparatus

21 Agreement between the Swiss Confederation and the Islamic Republic of Pakistan on the *Promotion and Reciprocal Protection of Investments*, signed 11 July 1995 and entered into force 6 May 1996. *Pakistan-Switzerland BIT,* Art 9(1).

22 *Consortium Groupement L.E.S.I. - DIPENTA v. People's Democratic Republic of Algeria*, ICSID Case No ARB/03/8, Award (10 January 2005).

23 Agreement between the Republic of the Philippines and the Swiss Confederation on the *Promotion and Reciprocal Protection of Investments*, signed 31 March 1997, and entered into force 23 April 1999. *Philippines-Switzerland BIT,* Art VIII (1).

under the investment contract based on the rationale that: the contract contains a jurisdiction clause for dispute resolution, and that the *BIT* in question does not have the effect of overriding or waiving that jurisdiction under the contract.[24] Similarly, in *Eureko B.V. v. Republic of Poland,*[25] the *adhoc* tribunal of the *UNCITRAL* desisted from exerting its jurisdiction regarding breach of contractual arrangements despite concluding that the *"umbrella clause"* under the *Dutch-Polish BIT* subjected the host state to uphold the contractual commitments as well. The reluctance of tribunals in both theses case may be an indication of an apprehension of the likely impact of their reasoning if executed.

d) The divided stance

Other cases that followed inclined either towards *SGS v. Pakistan* or *SGS v. Philippines*, as already explained above. In one such case, *CMS v. Argentina,*[26] exhibited *both the interpretations rendered through the tribunal and the Annulment Committee*. Here, the tribunal held that Argentina has failed to observe its obligation with regard to two clauses under the investment contract entered into with TGN, a transportation gas company, in whom CMS held shares, and hence breached the *"umbrella clause"* which broadly stipulates the host state's requirement to adhere to *"any obligations it may have entered into with regard to investments."* Conversely, the *Annulment Committee* reversed the view, emphasizing that *the requirements mentioned under the "umbrella clause" is concerned with consensual obligations between the host state and the concerned investor and not generally under the contract*, while also pointing out the *vagueness in the reasoning of the tribunal*[27] which is another issue altogether.

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24 *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*.

25 *Eureko B.V v Republic of Poland*, Partial Award and Dissenting Opinion, ICC 98 (2005) Award (19 August 2005).

26 *CMS Gas Transmission Company v. Argentine Republic,* ICSID Case No. ARB/01/8, Award (17 July 2003).

27 Ibid.

Amongst the decisions rendered after 2010, with propensity towards a broader construal, *SGS v. Paraguay*[28] has preferred the view that *violation of contract is tantamount to infringement of the BIT* deriving legitimacy from the *"umbrella clause."* At an even grosser level, in the more recent case of *Supervision v. Costa Rica,*[29] the issue before the tribunal was whether *"umbrella clause"* contained under *Costa Rica-Spain BIT*[30] could be utilized to encompass contractual claims of an entity being controlled by the claimant. The tribunal ruled in favour of the claimant, rendering a broad interpretation of the *"umbrella clause"* to cover breach of contract assertions of the parent company of a subsidiary with whom the contract was entered into. Hence, it shows the extent of misuse of the *"umbrella clause"* which extended even to those contracts where the investor was not a direct party.

Such interpretations clearly indicate the need to draw a boundary to ensure that investment contracts are not rendered toothless in certain aspect[s]. It appears that the investors are using those provisions that best benefit them. The ramification is gross: breach of an investment contract is asserted and yet to remedy the breach, the reliance is on the *BIT* rather than the concerned contract wherein the recourse procedure is specified. The investors are conveniently utilizing the most *favourable clauses* under both the *BIT* and the contract. According to the *Vienna Convention,*[31] in correlation to construal of treaties, it is crucial to interpret the wordings of the treaty [*BIT* in the current case] in the light of its overall objective and context.[32] If the broad interpretation continues, the line between a

28 *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Award (10 February 2012).

29 *Supervision y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award (18 January 2017).

30 Signed 8 July 1997 and entered into force 17 July 1999. *Costa Rica-Spain BIT*.

31 *Convention on the Law of Treaties between States and International Organizations or between International Organizations*, signed 23 May 1969, and entered into force 27 January 1980. *The Vienna Convention.*

32 Hartmann, T. (2007). *Umbrella Clauses-An Analysis of ICSID Decisions and Scholarly Opinion*, Research Paper, University of Wellington.

treaty breach and *contract breach* is increasingly dimmed causing further confusion in an already uncertain area of law.

3. Analysis of the trends in *"Umbrella Clauses"* and lessons

a) Decreasing usage of *"Umbrella Clause"* in the recent BITs and other multilateral instruments

Taking note of the contentions around *"umbrella clause,"* many countries seems to abstain from including an *"umbrella clause"* under the *BIT*s. This is discernable from the model of *BIT*s framed by the United States and Canada among others.[33] In addition, while analyzing the data released by *United Nations Conference on Trade and Development* (UNCTAD), comparing the total number of *BIT*s signed and those *BIT*s that included an *"umbrella clause"* for three different time periods, it revealed that between 1959-2000, 1711 *BIT*s were signed with 953 (56 %) without an *"umbrella clause;"* within 2001-2010, 717 *BIT*s were signed with 336 (47 %) without an *"umbrella clause,"* and finally 110 *BIT*s were concluded between countries from 2011 to 2016 with 83 (75%) without an *"umbrella clause."*[34] From the above analysis, in the years between 1959 and 2000, most of the *BIT*s contained an *"umbrella clause"* which may be attributed to lack of any controversy surrounding the issue.

Further, 2001-2010 saw the same pattern with slightly more than 50 % of *BIT*s with *"umbrella clause"* and this is also the period when the issue regarding *"umbrella clause"* started gaining attention with tribunals leaning towards either of the two approaches described above. However, after 2010, the trend has shifted with more than 75 % of the *BIT*s signed

33 Fleury, S. (2017). *Closing the umbrella: a dark future for umbrella clauses?* Wolters Kluwer, 13 October 2017). Retrieved from < http://arbitrationblog.kluwerarbitration.com/2017/10/13/closing-umbrella-dark-future-umbrella-clauses/> (Accessed on 22 December 2019.)

34 *'Mapping of IIA clauses'* (UNCTAD 19 December 2019). Retrieved from <https://investmentpolicy.unctad.org/pages/1031/mapping-of-iia-clauses. (Accessed 19 December 2019.)

without an *"umbrella clause."* Further, even *Multilateral Investments Agreements* including the *NAFTA* and the *ASEAN* are exhibiting the same practice.[35] Thus, the original intent as well as rationale of *"umbrella clauses"* from the perspective of most contracting states are apparently clear in contrary to the deduction of numerous arbitral tribunals.

b) Continuance of the divided stance among tribunals

The assumption that for treaties containing *"umbrella clauses,"* even the *breach of investment contract* is considered a *breach of the treaty* itself may be manifesting at least partially true, as the decision of the tribunals has particularly after 2010 pushed the states to adopt a new tactic of not including an *"umbrella clause"* as explained above. The dynamic nature of the *IIL* could not have been stressed enough yet again with another new shifting trend. However, this dynamism may not apply to existing *BIT*s that are in force containing an *"umbrella clause."* In such cases, the prudence and wisdom of the tribunals have to be trusted to ensure a balance between the *legitimate interest of the investor* as well as the *genuine concerns of host states* despite the challenging nature of the task.[36] However, to state that without any exception, now *breach of contract* is to be treated on the same level as *breach of BIT* owing to the *"umbrella clause"* may be an exaggeration, as there are have been considerable awards rendered by tribunals that stipulated otherwise. Hence, the divided stance continues.

c) Importance of clear treaty language

The emergence of two stance on the *"umbrella clause"* with the broader interpretation opining that the scope of *"umbrella clause"* encompasses *breach of contract provisions*, has the implication of rendering dispute resolution mechanisms under the specific contracts useless. Objectively, the wordings of most of the *"umbrella clauses"* under the *BIT*s are broad

35 Fleury, S. (2017).

36 Schreuer, C. (2004). *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road.*

giving much leeway for tribunals to render their interpretations.[37] Therefore, clarity in language can remove the ambiguity and contestation surrounding the issue, or altogether not inserting an *umbrella clause* in the *BIT*s at all. To achieve that, the contracting states to *BIT*s must be clear about what they are pursuing. For instance, the *India- Kuwait BIT* of 2006 is very specific and clear in its language: *"observe any obligation or undertaking it may have entered into with regard to investments in its territory by investors of the other Contracting State with disputes arising from such obligations being only redressed under the terms of the contracts"*[38] Unambiguity of such language reduces the scope of the clause considerably, and less prone to varied construction by tribunals.

Conclusion

Based on the foregoing parts under this essay it can be fairly assumed that *"umbrella clauses"* are controversial, and tribunals are divided in their position. In the absence of precision and conciseness of language, as regards widely drafted *"umbrella clauses,"* varied interpretations are naturally bound to ensue. Hence, the contracting states must henceforth while negotiating treaties deliberate on each clause and examine their prospects. As for the existing treaties, the role of the tribunals will be pertinent to reach a just and equitable decision: the facts and circumstances of each case may dictate and guide the tribunals in reaching better decisions.[39] Actions of states that does not constitute expropriation, or unfair and inequitable treatment must be left to be resolved according to the specific contracts. Scholars effectively contends that broadly drafted *"umbrella clauses"* developed with the purpose to embraces violations of contractual obligations.[40] Yet, the impact of such interpretations may nullify the specific dispute resolution mechanisms under the contracts resulting in

37 Ibid.
38 Ibid.
39 Schreuer, C. (2004).
40 Ibid.

unfair situations wherein the individual investors reap the benefit of both the treaty and the investment contracts whereas the states are unable to do the same despite the contract provisions being clear. States have consistently in most arbitrations maintained that the intention is not to have such broad application of *"umbrella* clauses" beyond the substantive provisions of the treaty itself. Accordingly, in the *BIT*s concluded recently, increasingly a smaller number of states are including umbrella clauses. The quandary, however, is regarding existing treaties that will continue to lounge on the shoulders of the tribunals.

Although it appears understandable that tribunals are exhibiting valour to be able to rule against a nation state, and favour individuals. If the trend continues for long, it will naturally coerce states to rethink their position and withdraw from such system. The submission of a state's sovereignty to a tribunal in case of treaty breach is a big sacrifice but if even minor contract breaches are submitted to tribunals, the advantages are tilting towards the investors and against the state, wherein the balance is absent. Having a bird's eye view is important to ensure that the *IIL* continues with progressive steps, rather than regressing and resulting in discontinuance of the system.

Accountable Enforcement of Judgments: Understanding through the Lens of the "End Users"[1]

Introduction

The enforcement of a Judgment is a very daunting task. Once the court renders the Judgment, [many] parties feel and believe that they have come to the end of the legal battle. However, the fact remains that the actual works of the law has just started to begin. The successful execution of the Judgment is measured by how successful a Judgment has been enforced. In the year 2020-2021, the *Anti-Corruption Commission (ACC)* received 451 complaints out of which only 57 qualified for investigation including 15 agency referrals.[2] As per the *Statistical year Book of the Royal Bhutan Police, 2020*, the *Royal Bhutan Police* in the year 2020, dealt with 3062 criminal cases and 309 non-criminal cases with Thimphu recording the highest. The *Royal Court of Justice* registered 6,998 cases out of which 6,832 were decided as per the *Annual report of the Judiciary of Bhutan, 2020.* The *Office of the Attorney General* registered 1,051 cases for prosecution and prosecuted only 930 cases while 195 cases were registered for enforcement alone. This information is as per the *Annual Report of the Office of the Attorney General, 2020.*

Based on the above information and figures, it can be understood that thousands of cases are being investigated, prosecuted and decided accordingly. However, not all Judgments require enforcement. Once [the] Judgment requires an enforcement, it requires the interplay, consensus and willingness of human persons, outside the court of law to agree and act by the document of Judgment. However, the issues of enforcement of a Judgment has been discussed at various tiers of enforcing agencies including the *Parliament of Bhutan*. Many enforcing agencies like the

1 Contributed by Jangchu Dorji.

2 Anti-Corruption Commission. (2021). *Annual Report.*

Anti-Corruption Commission, *Royal Audit Authority*, *the Judiciary*, the *Royal Bhutan Police*, *Department of Forest and Park Services*, the *Department of Law and Order*, *Department of Immigration*, *Department of Revenue and Customs*, and the *Office of the Attorney General* have been duty bound to carry out the enforcement of Judgment among others.

The *Parliament of Bhutan*, through the *Public Accounts Committee (PAC),* raised several issues during the 5th and 6th Session of the *Third Parliament of Bhutan*. It has been specifically deliberated that the Judgments need to be enforced without fear and prejudice. Media houses including the *Bhutan Broadcasting Service Corporation Limited (BBSCL*) and the print media *Kuensel,* among others, also highlighted the issues pertaining the enforcement of Judgments. This article, through a comparative qualitative and quantitative analysis, attempts to highlight on the enforcement procedures, the issues and challenges faced in the enforcement of Judgment[s], and the prerequisite accountabilities.

Legal framework[s]

The *Penal Code of Bhutan 2004*, *(PCB),* the *Civil and Criminal Procedure Code of Bhutan 2001*, *(CCPCB)* and such other specific legislations are some of the law[s] that any enforcing official must be aware of. Enforcement of Judgments specifically arises from those crimes committed under *PCB 2004* and such other specific legislation including but not limited to *Anti-Corruption Act of Bhutan 2011 (ACAB)*, *The Child Care and Protection Act of Bhutan, 2011 (CCPAB) 2011*, *Customs Duty Act of Bhutan (CDAB), Domestic Violence Prevention Act of Bhutan 2013(DVPA)*, *Income Tax Amendment Act of Bhutan 2020*, *Land Act of Bhutan 1987* and *2007*, *Moveable Culture Act of Bhutan 2005 (MCAB)*, *Narcotic Drugs, Psychotropic Substances and Substance Abuse Act of Bhutan 2015(NDPSSAB)*, *Contract Act of Bhutan 2013(CAB)*, taxation laws, and *The Tobacco Control Amendment Act of Bhutan 2014* among other laws.

For instance, a defendant convicted for the offence of *embezzlement of funds or security and embezzlement of property by public servant* is convicted under section 52 and 53 of the *Anti-Corruption Act of Bhutan 2011,* while offences against a person are punishable under chapter 11-15 of the *Penal Code of Bhutan 2004*. In both the cases, their liability to restitute to the State, if any, arises under the same section and also under section 46 to 48 of the *Penal Code of Bhutan 2004*. Hence, the Judgment needs to be enforced accordingly. Similarly, when a person is convicted for offences under *Income Tax Act* or the *Land Act of Bhutan* with a specific decree to compensate or restitute the property or the money involved thereunder, the defendant is held liable for the same under section 46, 47 and 48 of the *Penal Code of Bhutan 2004*. Therefore, it is at this stage or when the decree becomes *due for enforcement* that the enforcing officials must act promptly, diligently and accountably to better enforce the Judgments in a timely manner to give life to a Judgement and provide timely justice services.

The Legal process and the Enforcement of the Judgment in other countries

To better understand the [general] legal processes in relation to enforcement of Judgment[s] worldwide, some countries which follow either the *English Common Law System*, *Civil Law System, Customary Law, Religious Law* and a hybrid of each of these are being carefully chosen as follows. This is to provide a comparative analysis of how Judgments are enforced across different justidictions. It provides information on various Judgment enforcement mechanisms, and laws that facilitate the enforcement of Judgments.

i) Australia

Australia is a common law country. In Australia, Judgment enforcement require the Judgment to be registered before a court of law to initiate the enforcement. It states that such Judgement, while registering, must not

have been obtained through fraud, not been appealed and enforcement of such Judgment should not be contrary to the public policy. To get the foreign Judgments enforced, it must first be registered through *Supreme Court of State* or *Territory in Australia* within six years after the pronouncement of Judgment by paying reasonable amount and the costs incidental to such registration including the interest due upto the time of registration.[3] Such enforcements are governed by both the *statutory regimes* and *common law principles*, and it also largely depend on the type and place of the Judgment.[4] However, if an Australian Judgment is to be enforced overseas, the *Attorney General*'s *Department* recommends seeking legal advice before the enforcement of the Judgment is initiated.

ii) India

Enforcement of Judgment in India, which is also a common law country, is governed by *Code of Civil Procedure Code, 1908*. The same applies to enforcement of the foreign Judgments. Foreign Judgments from the superior courts of any reciprocating territory, can be executed in India as if it had been passed by an Indian Court provided that the matter has been directly adjudicated by it between the same parties litigating under the same title. However, to execute a Judgment rendered by non-reciprocating territory, a fresh suit must be filed before the Indian court and a decree must be obtained accordingly.

When enforcing the Judgment, the applicant[s] seeking to enforce the Judgment must appoint a lawyer through a *Power of Attorney* to represent before the court of law. The application for execution of Judgment, with original award or duly authenticated copy of it, must be initiated within twelve years from the date of decree or order becoming enforceable as provided under *Limitation Act, 1963*. No Judgment is enforceable if it is

3 Dawson, S., & Mulcahy, M. (2018). *An overview of enforcing foreign judgments in Australia.* Retrieved from hhtp://: www.twobirds.com.

4 Australian Government. *Attorney General's Department.* Retrieved from www.ag.gov.au.

contrary to the fundamental policy under Indian law, the interest of India, Justice or morality and is patently illegal.[5]

iii) Japan

Japanese courts, which follow the *Germanic Civil Law* and *Japanese Civil Code, 1895* based on *Civil Law* or *German Law System*, follow the principle of prohibiting re-trial of foreign Judgments. However, any foreign Judgments which needs to be enforced in Japan should be final and binding; jurisdiction should be recognized by Japanese law; the defendant must receive *service of summons* or order[s] as necessary; contents of the Judgment is not against the public policy of Japan and that there should be reciprocity between Japan and the country of foreign courts as provided under section 118 of the *Code of Civil Procedure*. This principally means, any foreign Judgments are respected by Japanese courts where there is indirect jurisdiction.[6] Domestically, enforcement of Judgment requires an authentication of the Judgment and an *Execution Order*. The time taken to enforce the Judgment depends on facts and circumstances of the case, and that no Judgment can be challenged except when the Judgment has been obtained by an unauthorized attorney or forgery of evidence relied upon in the Judgment as provided under *Code of Civil Procedure*. However, there is no organized system to register the Judgments to initiate the enforcement.

iv) Singapore

In Singapore, which is based on the *English Common Law System*, various domestic laws is expected to govern the enforcement of the Judgments including the *Rules of Courts*. These are *writ of execution*, *writ of seizure and sale*, examination of Judgment debtor, garnishee proceedings, committal proceedings, appointment of a receiver by way of equitable execution, commencement of winding-up proceedings for companies or bankruptcy

5 Katarki, S., & Ponnan, P., & Kiran, V. (n.d.). *Enforcement of judgment and arbitral awards in India: overview,* Thomson Reuters Practical Law.

6 Manabe, K. (2014). Asian Legal Business.

proceedings for individuals [where relevant], and the *Stop Order*. For a foreign Judgment, the *Common Law* principles are applied and are based on part 3 of the *Choice of Courts Agreement Act* which is enacted from *Hague Choice of Courts Convention*, *Maintenance Order [Reciprocal Enforcement] Act* for reciprocating countries and vice versa. All types of domestic Judgments are enforceable whether interim or final. However, a foreign Judgment adjudged on non-monetary, monetary Judgment which amounts to enforcement of foreign penal or revenue or other laws, Injunctions, Declaratory Judgments, Judgment granting and specific performances are not recognized in Singapore. The enforcement procedure varies and certain separate procedures are established accordingly. Unlike in India or in Australia, submission of a copy of Judgment is sufficient to register for enforcement of Judgment and must be endorsed under *Form* 81 of the *Rules of Court.* For domestic Judgment, the court shall not review the Judgment. However, foreign Judgments are not automatically enforceable and review may be conducted even if it meets all requirements.[7]

v) England

In England, when they enforce foreign Judgments, a country that follows the *Common Law System* along with Wales, fairly depends on when the Judgment was given, what jurisdiction provisions the parties have agreed, what court gave the Judgment[s] and on a myriad of other factors. It is not always straightforward. There are five ways to enforce foreign Judgments in England. These are *The Hague Convention* and *Choice of Court Agreement 2005, Administration of Justice Act 1920*, *Foreign Judgment (Reciprocal Enforcement) Act 1933*, *Foreign Judgment (Reciprocal Enforcement) Act 1933*: *Special Cases, Common Law*, and *European Union (EU) Legacy Judgments*. All that is required to enforce foreign Judgment is the registration in English courts. Once done, it shall have the same effect as that of the English Judgments rendered in the *EU.*[8]

7 Seng, Y.T., & Poi, A.V. et al. (n.d). *Enforcement of Judgments and arbitral award in Singapore: overview,* Thomson Reuters Practical Law.

8 Chance, C. (n.d.). *How to enforce foreign judgment in England.*

An English Judgment creditor may wish to explore options in terms of jurisdiction where they seek to enforce an English Judgment. It must be noted that the validity and effectiveness of a contractual choice of *English Law*, whether in England or in the *EU* member states, is not affected by the *Brexit*. The reciprocal enforcement of Judgments across the *EU* is addressed by a regime of treaties among the *EU* member states including the *Brussels Regime* and the *Lugano Convention*. Even after *United Kingdom (UK)* left the *EU* on 31 January 2020, the *UK* and *EU* agreed that *Brussels Regime* would continue during a transition period but has not been applied to *UK.*[9]

vi) South Africa

South Africa has *a Mixed Legal System* which is essentially a hybrid of *Roman Dutch Civilian*, *English Common Law*, *Customary Law* and *Religious Personal Law System*. In Africa, a final Judgment is essential to enforce the Judgment except in certain preliminary, provisional and interim proceedings. However, only final, conclusive and unalterable foreign Judgments are enforceable in South Africa provided that the defendant had proper notice of the proceedings. A default Judgment is enforceable only when a *Writ of Execution* is issued. However, a *cognovit proceeding* is considered contrary to public policy and is not enforceable. The magistrate courts can hear the enforcement matters to claims involving up to ZAR 400,000.00 while the High Courts have jurisdiction to hear any claims greater than this amount. Further, the courts in Africa do not enforce the Judgement after expiry of three years and that no *Writ of Execution* can be issued unless the debtor consents or unless the Judgment is revived by the court on notice to the debtor.[10]

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9 Tevendale, C., & Ambrose, H. et al. (2021). *Enforcement of court judgments in the UK, the EU and Turkey after Brexit & Enforcement Strategy.*

10 October, A., & Halloway, P. (n.d.). *Enforcement of judgments in South Africa: Overview,* Thomson Reuters Practical Law.

vii) United States of America

The United States of America is a federation and is composed of fifty states, the *District of Columbia*, and a number of other territories and follows the *Common Law System*. As provided under *Article IV* of the United States *Constitution* regarding *"The Full Faith and Credit Clause,"* the Judgments rendered by the Federal Courts and state courts are governed by their own laws. Hence, the US courts generally require the Judgment to be final, conclusive and enforceable before it is recognized and enforced. The US courts, however, does not have uniform law for recognition of foreign Judgments. It simply recognizes and enforces, within 30 days, based on the principles of comity and under statutory provisions, where laws vary according to the courts. However, inadequate notice can constitute grounds to non-recognition of a foreign Judgment.

The procedure to execute the Judgment varies with state, and the limitation period is also of varying nature. For instance, fifty states each have procedures and the requirement of notice for enforcement proceedings. While Federal Courts use *Rule 69 of Federal Rules of Civil Procedure*, the US courts never review the service of original proceedings. However, defendants are given an opportunity to oppose the enforcement proceeding.[11]

General Procedures for the Enforcement of Judgments in Bhutan

Upon pronouncement of the Judgment under section 96.6 and exhaustion of the appeal period under section 109 of the *Civil and Criminal Procedure Code* or when the decree becomes due for enforcement, the Judgment needs to be enforced accordingly. In doing so, a proper procedure must be established in every enforcing agency so as to give life to the Judgment.

The Judgments are enforced through a generally accepted process while there are no specific manuals or guidelines that would principally guide

11 Smit, H. (n.d.). *Enforcement of Judgments in the United States of America,* The American Association for the Comparative Study of Law, Inc.

to enforce the Judgment. *The Office of the Attorney General*, as the central *prosecution and litigation agency* as enshrined under Article 29 (8) of the *Constitution of Bhutan* and section 11 of the *Office of the Attorney General's Act of Bhutan 2015*, has been duty bound to carry out the enforcement services through its procedures mentioned below:

i. Unlike in Australia and India which have *limitation period* to file for the enforcement of Judgment, a plaint seeking enforcement may be filed before the juristic court, under section 81 of the *CCPCB*, *2001* at any time when the defendants does not comply the decree of the the court;

ii. Unlike in India which requires an original Judgment or an authenticated copy or the award, a copy of the Judgment must be attached accordingly;

iii. Both the *Judgment debtor* and *Judgment creditor* may agree or disagree to enforce the Judgment outside the court. However, the majority of the judges in Bhutan prefer the parties to enforce the Judgment outside the court. Hence, the *Office of the Attorney General* has its own specialized *Enforcement Division*, established in August 2021 that carries out the task of enforcing the Judgment where OAG is a party thereunder. It has its established *Standard Operating Procedures (SOP)* and such other manuals and guidelines to enforce the Judgment[s] prior to seeking judicial intervention in enforcing the Judgment;

iv. A Judgment rendered by the the appellate court, must furnish an *Enforcement Order*, *as-is where-is* basis;

v. Filing for enforcement of Judgment before the juristic court is the last resort;

vi. Unlike in Japan which may conduct re-trial based on circumstances like forgery, no formal investigation are being carried out to determine the jurisdiction of enforcement;

vii. The Judges, however, use its immense discretion whether or not to adhere to the Judgment rendered by themselves in the same court or by a court of equal jurisdiction or a court superior to them. Most of the Judges provide additional time, even after the Judgment becomes due for enforcement, in paying the compensation or restitution. In most instances, the defendants either enjoy the time extension until they are released from the prison, say five years or seven years whichever. The question is should this trend be continued then?

Enforcing the Judgment and Accountability

While many Judgements are being enforced in both law enforcing agencies and the courts, not many enforcing agencies have an established procedure that takes care of the enforcement procedure within and outside their agency. Hence, fixing *accountability* has been an issue thus far. Judgment enforcements are either awaiting for enforcement decisions in the *Royal Court of Justice* or the defendants are given additional time until they get released from prison, or some are still at large, or serving a very long duration or life imprisonment.

When the *Judgment debtor*, also when the enforcement is to be carried out under section 29 for foreign Judgments, fails to adhere to the decree of the court, he shall also be held in contempt of the court under section 367 of the *Penal Code of Bhutan, 2004* and section 102, 103 104 and 107 of *The Civil and Criminal Procedure Code of Bhutan, 2001*. If the *Judgment debtor* further fails to comply with such *Judicial Order*, the properties may be attached under section 59 and conduct *Judicial Sale* under section 99 of the *CCPCB, 2001* to enable compensation as provided under section 36 or restitution to the State under section 46 of the *Penal Code of Bhutan, 2004*.

To best help in reaching a data-based enforcement decision, principally on Judgments involving money and monetary values, a short survey has been

conducted accordingly. Any law enforcement official may refer to this data and take a prompt enforcement decision diligently. Respondents include the defendants, victims and law enforcement officials in an equivalent number. Defendants include those who have not paid the money or making the payment, and the victims include those who received the compensation or are still receiving the compensation on installment basis. The law enforcement officials include members of *[Parliament]*, the Judges and *Bench Clerks [Judiciary],* the Attorneys and Legal Officer[s], Police Officer[s] and Police Prosecutor[s], and the Defence Counsels *[Executive]*. Hence, the respondents for this survey covers all three branches of the Government including the defendants and the victims.

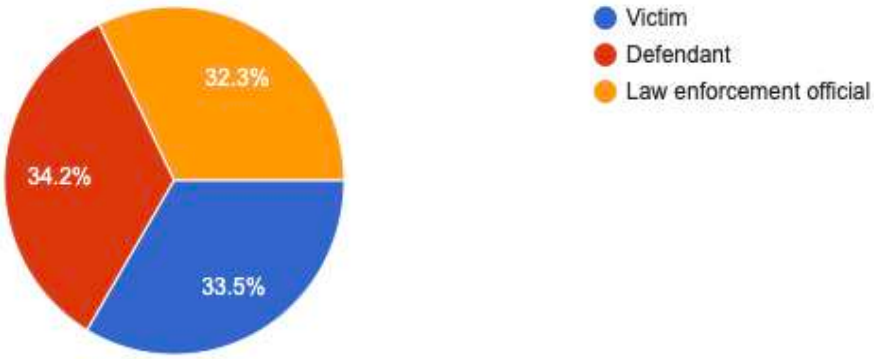

Figure1: The chart representing the respondents

Of the total 158 respondents, 68.40% were male and 31.60 the female out of which 32.3% were law enforcement officials, 34.2% defendants and 33.5% were the victims.

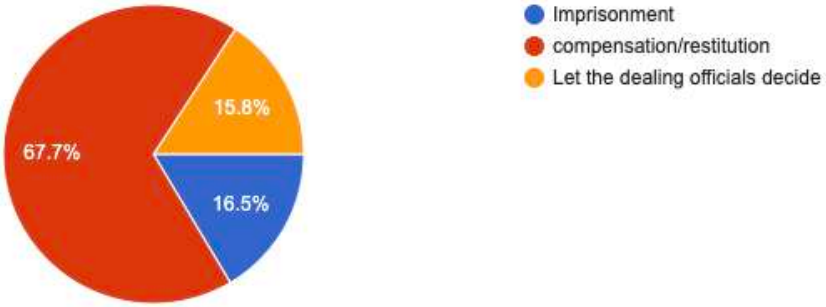

Figure 2: The chart that represents "what worries the most during a legal process"

When asked about what would be the *most worrisome* during the legal process, 67.70% mentioned that they [would] be more worried about their compensation or restitution while only 16.50% [would] be worried about their imprisonment. The remaining 15.80% feels that whatever the enforcing officials act upon is justifiable for them. This means, the majority of the people *accept that they must be imprisoned for their wrongdoings* but are *concerned about their compensation or restitution part of the Judgment*. This signifies that every law enforcing officials must *enforce the Judgment[s] diligently*. It also sends out a strong message that the Judges and the *Bench Clerks* including the parties involved thereunder, while drafting the Judgment, must act diligently and decide on it only after a thorough analysis of the case since the payment of compensation or restitution is the most worried aspect.

Figure 3: The chart representing whether the enforcements are carried out accountably

When asked *"if the enforcing officials carry out the enforcement accountability,"* 63.90% responded that it is carried out accountably. However, 29.10% responded that enforcements are carried out *but not as much as it's required to be done* while 7% responded that the *enforcements are not carried out accountably*. It also indicates that at least 7% of the people who have [are] seeking the enforcement services are aggrieved by the actions taken by the enforcing officials. Hence, those enforcement officials falling under this category *(not carrying out as much as it is required to be done or not carried out)* must be held accountable accordingly.

Figure 4: The chart representing the options of paying those delayed-payments.

Of the total 156 respondents, 69.60% of them responded that the *restitution or compensation, which has been decreed liable to be paid to the victim through a decree of the court, may be given an option to make the payment on installment basis within a reasonable time*. A reasonable time can be a matter of fact. And, the parties involved thereunder may decide accordingly. This will be an effective option and not adjudging that the payment be made within a fixed and rigid time frame. Therefore, the *relevant officials dealing with enforcement of Judgment need to re-look into this matter seriously and deal with it accordingly*. However, 13.30% responded that the *value-based sentencing be awarded and be imprisoned under section 18 of the Penal Code of Bhutan 2004 for being in contempt of the court*. However, *awarding additional sentences shall only increase the burden to the Government exchequer and using the discretion of the court*, as opined by 17.10% of the respondents, but be rationalized accordingly.

The Challenges

Numerous challenges are faced during Judgment enforcement. At times, it is the [very] law enforcement officials which causes impediments in enforcing the Judgment[s]. The issue of either not enforcing the Judgments properly or is the inability to enforce the Judgments has been discussed in length during the 5th and 6th Session of the *Third Parliament of Bhutan*. The same has also been elaborated during the quarterly *Law Enforcement Joint Coordination Committee (LEJCC)* held in the *Supreme Court* in June-July 2019 and was also presented to the *Hon. Prime Minister*, to present during the 6th Session of the *Third Parliament of Bhutan*, to educate the *Parliamentarians* on challenges faced in the Judgment enforcement. Following are some of the challenges faced during the enforcement [non-exhaustive] of the Judgment:

i. Defendants serving life imprisonment or for a long time and have no means to pay (indigent) the decree amount, while their parents or spouse or children abandons them or has not rendered any help or are severely affected by COVID-19 pandemic.

ii. Non-issuance of attachment of property during investigation by the investigating agencies, and at the same time the *Judiciary* rejecting the plea to attach the property that would otherwise enable the payment of the compensation or restitution accordingly.

iii. Non-issuance of the search, seizure and auction order by many courts while it is the same court who rendered the Judgment decreeing the defendant to compensate to the victim[s] or restitute the money to the State.

iv. Defendants are at large and are unable to arrest the defendants despite making several attempts by the *Royal Bhutan Police*, the *Judgment creditor* and other law enforcing agencies owing to multifold responsibilities.

v. Less payment earned during the defendant's tenure at *Open Air Prison (OAP),* and the basic requirement to undergo a minimum of 75% imprisonment (or 50% in case of *Gyalsung* Infra) prior to being sent to the *OAP*.

vi. Non-cooperation, in some Judgment enforcement, by the Government agencies while enforcing the Judgment particularly when the Government is a *Judgment debtor.*

vii. Discharging of the defendant's loan and the lien in the banking institutions are given priority over compensation or restitution.

viii. Loss of property values due to non-cooperation by the defendant[s] among others.

Conclusion and the Way Forward

Although the *letter of the law* and the *spirit of the law* are clear but the enforcement procedures are followed differently in different countries, and so is the case in Bhutan. Once the Judgement is due for enforcement, concerned officials [and the parties there under] must act diligently and enforce the Judgment accordingly. They must be held accountable for any lapses that arise thereunder. However, concerned law enforcing agencies must come up with an established procedure, let us *Standard Operating Procedure (SOP)* and such other relevant guidelines or manuals, to fix the accountability to those officials who is deemed not to be carrying out the enforcement of Judgment tasks as much as it's required (29.1%) or not carrying the Judgment enforcement accountably (7%). Further, enforcement of Judgment[s] which involves money or monetary values can be based on these findings and may allow the defendants to make the payment on installment basis (69.6%) or by using the discretion (17.10%). The challenges faced in the Judgment enforcement, however, are immense. This alternatively can be overcome by fixing accountability, prudential execution of duties and ensuring that [all] tasks coming on the desk of the relevant officials are carried out in an efficient and timely manner.

Accountability in Climate Change[1]

Introduction

There is a story in the eastern Bhutan, about a woman who lived deep in the forest and loved every creature and nature as her own. It is said that when she was old and left her ancestral house, the forest grieved and wailed in sorrow. Nature for Bhutanese has always been held a sacred and sacrosanct status which is treated with reverence and respect. It is the citadels of our deities; thrones of our gods and sanctuary for the living beings. It could be said that it is this social value of respect and mutual co-existence which makes Bhutan unique in its efforts towards the conservation. Environment conservation is an ingrained Bhutanese value; and greenery is ubiquitous to Bhutanese way of living and coexistence for centuries. The national laws on environmental conservation are rigorous with the *Constitution of Bhutan* mandating sixty percent of the country's total land under forest cover at all times.[2]

The *principle of stewardship and intergenerational equity* is also incorporated in the policies to inspire ownership, sustainable care and pass on a *habitable land* for the future generation.[3] But with the current global practice of "environmental slaughter" that literally decimates the "environment" from sea to forests, leading to an inevitable *Climate Change* processes, the researcher wonders who should be accountable for these commitments as well as the failures? With impending *Climate Change* effects in Bhutan, people, mostly unaware of the impact few decades ago proclaimed, "Those tree species growing in the hotter place are seen growing in the colder mountains region[s]. Now the plains and mountains are mixed…" Although the aspects of *Climate Change* are minimal in the Bhutanese

1 Contributed by Tshering Dago Wangmo
2 *The Constitution of Bhutan*, Art, 5.
3 *National Environment Protection Act, 2007*, s. 6 & 67.

geographical landscape, Bhutan is beginning to see the dwindling crop patterns, and for most, especially in the east, potato storage has become a cause of concern. One of the signature pattern of *Climate Change* is the pattern of "pests" and the "rising temperatures" in the Bhutanese landscape. In many areas, storage of potatoes are challenged by pest infestations that had been a characteristic *crop ailment* of the lower valleys. *Climate Change* can be a biblical phenomenon and with cities expanding "at a very fast rate across the globe," the boundaries of *Climate Change* is a very fluid. World over, *Climate Change* is creating a havoc of its own: drying up rivers, creating famines, storms, floods and other weather and climate associated calamities.

Should it only be the mandate of the law makers to mitigate the *Climate Change*? How does the *Judiciary* fit itself into the fight against *Climate Change* and what are the duties of a private citizen in this context? While the issue of *Climate Change* and resilience presently is an "urban or metropolis issue," Bhutan cannot be a witness; and sooner or later it will be a growing concern in Bhutan too. With deserts penetrating the urban landscape in Saudi Arabia, crops drying up and desertification experiencing in many countries, *Climate Change* is a sad global reality. And it is timely that Bhutan showcase institutional and community consensus to preserve our home planet.

The researcher acknowledges the "call of *Climate Justice"* against the developed countries who have majorly contributed towards the current state of the planet. This article aspires to examine the questions of accountability in the Bhutanese context.

Bhutan's remarkable achievement in Climate Change, and its weaknesses

Under the visionary and farsighted leaderships of His Majesty the Kings, Bhutan has achieved an extraordinary feat to stand as the only country as *'carbon negative.'* The declaration of this status in the *Fifteenth United*

Nations Climate Change Conference of the Parties (UN COP 15) in Copenhagen and the reiteration of this promise in the *COP 21* in 2016 was a moment of pride for every Bhutanese.[4] It is incredible to mark how this vision aligns with the principles of *Gross National Happiness (GNH)* and is further strengthened by the political will to shape the country with sustainable-centric developmental plans. But times have changed and Bhutan must pick up the pace of development and simultaneously translate this political will into real actions through implementation of the plans.

The *Intergovernmental Panel on Climate Change Report* issued *'Code Red for Humanity.*[5] The catastrophes brought on by *Climate Change* like heat waves, flood, drought, forest fire[s] and melting of glaciers are not unfamiliar to Bhutan. In 2020 alone, 1.29kha of the total land were lost to forest fire[6] and there were various accounts of flash floods which destroyed livelihood[7]and lives of many citizens.[8] It has now become imperative to acknowledge that our country is vulnerable to environmental hazards and frightening impacts of *Climate Change*, even with least or no contribution to the cause. The *GNH* index places a strong emphasis on *'responsibility towards environment'* and *sustainable development*. As the country embarks on the journey of development, the developmental activities must align with the green policies.

In pursuance to this vision, the *Ministry of Work and Human Settlement* has adopted a *guideline* titled *'Bhutan Green Building Design Guidelines'* to promotes sustainable constructions in the country. However, it is the dark reality that these recommendations have neither been incorporated

4 Munawar, S. (n.d.). *Bhutan Improves Economic Development as a Net Carbon Sink*, Climate Institute.

5 *The Intergovernmental Panel on Climate Change Report. (2021).*

6 Global Forest Watch. *Bhutan Deforestation Rates & Statistics Report*.

7 *Incessant rain damages paddy crops across the country*. (2021, October 20). *Kuensel*.

8 *Local highland leaders feel Laya incident holds lessons for the future*. (2021, July 19). *The Bhutanese.*

by the private individual[s] nor by the government agencies. Practically, it is challenged by factors unique to Bhutanese work culture and practice. The *Ethical Code of Conduct for the Contractors* under the *Construction Development Board* requires the contractors to showcase utmost consideration of the environment in their construction works and draft *internal policy on environmental preservation* even without a legal obligation. But like the *guidelines*, these requirements and considerations remain a farfetched dream. The implementation of *ethical guidelines* improves work culture, increases professionalism, and makes the works less disorganized.

Similarly, *waste management* has been acknowledged as a threat to the environment since the 1990s.[9] However, it has yet to witness any substantial improvement and continues to cause unwarranted disturbances to the natural wildlife. In practice, *waste management* has to begin as a "culture from birth," an "ingrained social habit" and enforcement of strict sense of hygiene. We will have to adopt these social practices from the habitus of keeping our houses and surroundings clean; and extending the habits to places around us, and then into the spaces of common environment. The *Memelakha*, the only waste dumpsite in the capital is the ultimate symbolism of incessant waste generations, which is the ultimate mark of urban living. The problem is inevitable; it is how we intelligently deal with it. Further, the *Zero Plastic Movement* initiated in 1999 and reinforced in 2019 is one of the greatest testaments of an ineffective strategy. In a press interview, the then Director General of the *Ministry of Trade and Industry*, Achyut Bhandari blamed the resource constraint and monitoring mechanisms to enforce the ban.[10] But it is arguable if the blame of this gross failure lie solely upon the government for poor implementation and execution of the commitments.

9 Chakraborty, B. et al (2018). *Analysis of Solid Waste Management Strategies in Thimphu with reference to its detrimental effect and remission approach*.

10 Plastic ban still ineffective. (2013, January 14). *Kuensel.*

Climate Activism

The *Constitution* has bestowed the citizens the rights of 'stewardship' over the pristine environment and the researcher strongly asserts that the citizens should be the first and foremost to supervise, demand and monitor administration of *due diligence* towards the environment. Deriving inspirations from the collective will of two million French citizens to mobilize the government to meet its climate commitments,[11] Bhutanese also must assume and shoulder the responsibilities owed towards the environment. In the recent case of *Green Road's Asphalt Bitumen Plant (ABP)* pollution,[12] the company which promoted green constructions disrupted the nature and caused the health of the students and villagers to be at risk with its bitumen smoke emission. It is curious to observe that the incident surfaced to light after a publication in a national newspaper but failed to gain momentum to seek accountability and Justice.[13] Perhaps, this silence could be attributed to the social nature and laxity habits of the Bhutanese. But, as aforementioned, respect for the sacred environment is an integral aspect of our social norms and the Bhutanese must choose to address the greater evil, which is environmental degradation and *Climate Change*.

The heart of climate action has always been in the determination of the people to construct and secure a better future. The 2000s large scale demonstration on the first *Global Day of Action* in Montreal or the rally of the student groups in the US and the UK demanding the Institution to divest from fossil fuels, it was the dedication of the concerned citizens which drove the governments for better *climate sensitivity*. *Climate* is becoming a part and parcel of our lives; and its effects are universal; and

11 *Paris court finds French state guilty in landmark lawsuit over climate inaction. The Guardian.*

12 Students and residents in Bjemina complain of bitumen pollution. (2021, October 16). *Kuensel.*

13 The company's' request to extend the lease to operate in Bjemina was rejected. But there was no accountability of the action and justice to the effected people.

can touch ever person. These gatherings for a common purpose are not a foreign concept to Bhutanese. The amendment of section 213 of *the Penal Code of Bhutan* and the *decriminalization of same sex is an attestation of how the common will of the common people can move the Parliament to bring better changes in the society*. The prescience of *Climate Change* is a reconnaissance to Bhutanese values of *preparedness* and the *ritualization prior to ailment[s].*

The *Constitution* has prescribed the citizens the *locus standi* to fight for the environmental and *Climate Justice.* The section 149 of the *Civil and Criminal Code of Procedure, 2001* allows the effected citizens to file *class action suits* if and when necessary to hold the perpetrators of environmental injustice accountable. Bhutan is already a champion in its commitment towards *environmental conservation and climate mitigation.* And it is the need of the time for the citizens to rise to the occasion and support the government to mature these commitments into real actions.

Role of the Judiciary

The *Judiciary of Bhutan* derives its legitimacy from the *public trust* and *doctrine of Separation of Power*. The *Judiciary* is the *guardian of the law and protector of the rights of persons* [inclusive of legal personhood]. Invoking the spirit of the *Constitution*, the *Judiciary* must strive to administer *justice fairly and independently* and provide check and balance with respect to the duties of the two branches of the government. In other countries, the *Judiciary* is a very strong and powerful institution. It cohabits the powers of all other institutions; and strikes the cord with "judicial sanctions" thus immobilizing many of the irrational, illegitimate and incompetent actions.

With regard to the environmental and climate disputes, cases seldom reach the courts of law although cases of environmental offences are reported on a daily basis. Majority of the cases are addressed directly by the *National*

Environmental Commission or other relevant agencies.[14] There were only eight environmental cases registered and adjudicated in the courts in 2020 involving mining, poaching and wildlife trade.[15] However, the lack of environmental cases should not serve as deterrence to the commitment of *Judiciary* to protect the environment. The courts must be progressive and uniform in its adjudication of the cases before them; to dispense stringent directives which should serve as a forewarning for the future environmental predators.

The courts must take a bold stand in determining the outcome of environmental cases. For instance, with respect to the offence against *Totally Protected Species* the question presented was of relevancy under the *Bhutan Penal Code* or the *Forest and Nature Conservation Act of Bhutan*. It is imperative for the courts to uphold the *trusteeship principle* as detailed under Article 5 of the *Constitution* both in letter and spirit and award severe penalty to end the popular practice of harming totally protected species. A *judicial consensus* through case laws must be sought to establish *Judiciary* as a leader in environmental conservation.

The *Paris Court Judgment* holding the state liable for failing to meet its commitments to curb greenhouse gas emissions has been termed as a 'victory' of the environment and as the 'case of the century.'[16] The researcher believes that the Bhutanese courts too must manifest the highest degree of sensitivity while dealing with environmental related cases. *The M/s. S.D. Eastern Bhutan Coal Co. Ltd vs. Office of Attorney General* is one of the many examples of how the courts have penalized the perpetrators of *illegal mining* by levying hefty compensations. The researcher hopes that the courts could develop or uphold environmental jurisprudence that captures environmental restitution and *precautionary principle* in every

14 Ashan, I., & Gawel, A. (n.d.). *Review and Compendium of Environmental Policies and Laws in Bhutan*.

15 Royal Court of Justice. (2020). *Annual Report of Judiciary*, Thimphu.

16 Arvin, J. (n.d.). *A court has convicted the French government of failing to meet its climate goals*, Vox.

developmental activity, while reinforcing custody vested in every citizen and responsibility of strictly monitoring with the government.

The *Judiciary of Bhutan* robust institution of *Justice.* There are only countable environmental Judges with almost no environmental lawyer[s] in the country. Further, there is no separate *environmental tribunal* [Green Benches] in the Courts to hear the environmental cases, except the one established in the *High Court*. Whilst, the lack of human and infrastructure resource may be a result of the limited number of environmental cases registered in the court[s], the researcher believes that it is timely for the *Judiciary* to equip itself in light of the economic progress of the country and growing awareness and requirements in the field of environment and *Climate Justice.*

Conclusion

Bhutan is blessed with the exceptional and visionary leadership of His Majesty the Kings. His Majesty the Great Fourth *Druk Gyalpo* enlightened the country with the foundations of conservation of environment while many countries pursued mindless economic progress. In many ways, Bhutan has made its mark with her highest commitment to champion the preservation of the natural environment. And walking the sacred words of His Majesty the King, *"Let us not speak of world leaders and great nations – let us demand answers from ourselves, as individuals,*[17] we must exhibit self-leadership and take accountable and proactive initiatives in mitigating and combatting the various aspects of *Climate Change*.

The legislative branch of the government has enacted many prudent legislations to conserve the environment and pass on a *worthy world* to the future generations. The *Executive* is tasked with implementation of these laws and policies. However, it is the duty of the *Judiciary* to support the other two branches, in the face of adversities and ensure that they

17 His Majesty the King's *Royal Address* at the *Convocation Ceremony* at the University of Calcutta on 5 October 2010.

adhere to commitments of conservation. The *Judiciary* has been and is an asylum for the unjust and helpless to seek *Justice*, and in this regard, to *Climate Change*; the *Judiciary* can and must continue to provide easy *access to Justice* and pave way for a better and sustainable Bhutan.

Accountability: A Toolkit for Results[1]

Introduction

Organizations and institutions are constantly struggling to meet the expanding requirements dictated by modern society and work culture. Today, work culture[s] are changing at a very fast pace; accountability has become a cornerstone for good governance and upward national and *institutional mobility*. Modern corporate culture and competition[s] are fueled by varying institutional competency requirements and the institutional zeal to excel. It not only demands professional expertise; but also individual and institutional commitments to enhance services to the people. If there are any "gaps" in the institutional or personal performance, the framework of accountability takes in charge. The main motto of any national institution is not premised on the domain of *"status quo,"* but as an *institution of progression* and *uphill acceleration*. All institutions and the nation is propelled by the philosophy of growth and mobility. Accountability has been bifurcated into personal and institutional dimensions- it today calibrates on the basis of personal competence; and institutional rigour. The important aspects to sustainably carry the modern values are the need for increased competency levels and requirements, high degree of professional competencies and a non-failing work culture resting on the basic pillars of responsibility, answerability, trustworthiness and liability.[2]

The hybrid work culture of the western societies are penetrating into Bhutanese work landscape as a result of the COVID-19 pandemic. It has become pertinent to show best work culture, institutional competitiveness, and a *brand working name for Bhutan.* All institutions in Bhutan are

1 Contributed by Sonam Palden.

2 Khan, N.A. (n.d.). *Concepts and Forms of Accountability,* University of Dhaka, Bangladesh, Retrieved from https://openjicareport.jica.go.jp/pdf/12284808_03.pdf.

not income generating institutions; [many] exist to drive the national institutions and national goals; and not economic goals. One of the drivers of the brand name of Bhutan can be "accountability." In addition to the brand name of *Gross National Happiness (GNH),* Bhutan should now aspire to create a brand niche through an *accountability procedure.* Whether it is the *Justice Service Institutions* providing timely and effective *Justice Services*, or any other agencies or the institutions working for the betterment of the country and its economy, the non-debated prospect of its *success assessments* starts at its personnel being accountable. Many grapple with how effectively we implement the theories and processes of accountability, ensure accountability and spearhead it as a process of change. His Majesty the King during the 114th *National Day* celebration commanded that *from now on, all of us must boldly embrace accountability as a measure of our service.*[3] Accountability is an infusion of responsibility, and a mindful governance based on best human intellect and reasons guided by acceptable philosophies and strategies.

His Majesty the King in the *National Address* pointed out that *Bhutanese are becoming more complacent and losing discipline in their work.* This is an important personal as well as institutional moral reminder. His Majesty the King also pointed out that the *implementation of the laws has resulted in creating a diarchal existence of laws.* These immediately brings us the question of *"what has gone wrong;" "has the laws been applied discriminately," "or has the laws been bifurcating into different faces"?* This also intrigues us with dilemmas of asking about our own powers to deride responsibilities. One of the reasons for the *"failure of accountability"* worldwide is the capture of public institutions by powerful and resourceful groups of people; and the lack of representation of the people. The *ability to demand accountability* and the *capacity and willingness* to respond to *calls for accountability* is shaped by relations of power between the state, civil society and market actors.[4]

3 His Majesty's Address to the Nation on 17 December 2021 at Thimphu.

4 Combaz, E. & Mcloughlin, C. (2014). *Accountability and responsiveness of the*

Countries with high levels of corruption, or which lack effective *rule of law* or accountability in government are more susceptible to conflict and social unrest than other developing countries.[5] One of the most acceptable phrases worldwide is the belief that *absolute power without accountability leads to corruption*. *Absolutism* is an *anathema* to progress; and it may insidiously incite corruptive practices. People can be opportunistic and the perceptible holes in the governance can be the rupture through which the bane of corruptive airs may flow. We live in a region where corruption is so ingrained that it has become an aspect of daily life.[6] Corruption can demotivate workers, ruin accountability and deface the system of good governance; and as reflected, it is attributed that Afghanistan lost to Taliban forces due to corruptive practices.[7]

In western countries and work culture, the concept of "excusing yourself" for your failures is unacceptable. The concept of *rule is rule* is highly embedded in their customary work practices. This has generated a system of "respect for the rules" and it "helps to erase regret" if we fail, since it helps to generate selfless respect for the rules. This is evident in countries with cultured and efficient work culture. They do not provide "much grounds" to elaborate and explain the failures. They have put a very mathematical rule of governance; which entail results, more than the processes.

The simple point of accountability in governance sense is the *ability to account and credit the performance*. Accountability is the seed for wise governance, dedication and respect for expertise, hard work, grit and

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state and society, GSDR. Retrieved from https://gsdrc.org/topic-guides/voice-empowerment-and-accountability/supplements/accountability.

5 US AID. (2021). *Promoting accountability and transparency*. Retrieved from https://www.usaid.gov/what-we-do/democracy-human-rights-and-governance/promoting-accountability-transparency.

6 Editorial. (2021, Dec. 20.). *Understanding Accountability, Kuensel.* Retrieved from https://kuenselonline.com/understanding-accountability/

7 In one of the media reports, it was reported that Afghanistan lost to the *Taliban* forces due to misdirection of the commands and internal distrust generated by corruption.

merit. Unless the conceptions of accountability is centred upon the basis of best human and institutional reason, there can be little room for national improvement, fulfillment of the national aspirations, and can also have free rider[s]. The workers [may] be overworked, and the free riders may opportunistically reap the benefits. Accountability is the infusion of values of workmanship, the concept of *Threl* and *Ngotsa* in Buddhist philosophical and legal jurisprudence. Accountability is a very inspirational topic and it builds values, ethics, and integrity; and also brings corresponding satisfaction of our own failures; and mistakes since it shows the path for self-learning and ownership. Accountability, is in short, the system of ensuring *Damtsig* in the Bhutanese locale parlance.

The ideal[s] of accountability, for most people, remains with the *Judiciary* or the law implementing agencies alone. People perceive that accountability means performance of the duties and tasks and "ensuring an infallible system." The dimensions of accountability is both vast and non-exhaustive. Accountability has different forms and different agencies need to be accountable in different manner. If doubts and questions are asked, the responsible individual or agency must be ready with credible and effective answers. The answers should be both convincing in light of the facts and circumstances; and the questions [must] represent a *defacto* need for evaluation. If anything goes wrong, there must be a system for an answer; and must be willing to make valid corrections. In simple terms, it is as easy as saying *"we have to pay the fares if we asking for a service of a taxi."* Accountability is a system of *quid pro quo*. In modern communication interphase, it is the reciprocal payment for causes and conditions; and the exploration of the concept of *karma* in Buddhist theology. In most terms, it is being responsible in our actions and engagements. The basic idea of accounting is that *"you count the money well, if you fall short, you may have to pay or show us the valid expenditure credence."*

Hiding behind a "veil of position" and title does not bring about

accountability. It increases the translucent nature of the governance system- thus perpetuates *invisibility* and *non-accountability*. Governance systems, in which both public and private stakeholders are accountable to laws that are publicly promulgated, equally enforced, and consistent with international norms and standards, have become necessary in order to sustain peace and achieve inclusive development.[8] It enables people to know the actions of the government; and also about the processes of redress, when things are incorrect. It ensures that the elected *Members of the Parliament* and the civil servants act in the interests of the people they serve.[9]

This paper, therefore, intends to look at accountability in different institutions. In the first section, it will discuss the concept of accountability and its importance. It will then look into different organs and agencies of the government that bear with it the need to be accountable. The paper will also discuss the challenges of these bodies in establishing an accountable system, provide for relevant suggestions for a better and accountable governance.

Understanding Accountability

The first point of reference that clicks on hearing the term "accountability" is financial accountability. It means, the person in charge of handling money must be accountable to the auditors about how the public fund had been utilized and that it is done in accordance with the laws of the land.[10] Doctrinally, accountability can be simply misunderstood as a simple misnomer of financial liability and transparency. However,

8 United Nations Human Rights Office of the High Commissioner. (n.d.). *Rule of law and accountability.* Retrieved from https://bangkok.ohchr.org/rule-of-law-accountability.

9 Institute for Government. (n.d). *Accountability in modern government: recommendations for change.* Retrieved from https://www.instituteforgovernment.org.uk/summary-accountability-modern-government-recommendations.

10 Keynote address by Elmer B. Staats, (Dec. 6, 1979), *Who is accountable? To whom? For what? How,* Washington, D.C.

accountability is a much broader spectrum of good governance. It involves various other procedures, operations and management of programs, and institutional good governance competencies. It may be a horizontal mechanism that include checks and balance among the state entities or vertical accountability measure which allows citizens to hold institutions and states to account.[11]

Under Article 1, section 13 of the *Constitution of Bhutan*, it provides for an important constitutional principle of *separation of powers.* It prescribes that there cannot be [any] encroachment in the powers of the three branches of the government.[12] *Separation of powers* is [an] indispensable part of public and official liberty. It enables non-interference, preservation of institutional liberty and well-being of the institution and the people. One of the sources of injustice is the concentration of power in one hand or an organization.[13] Each organ of the government has its distinct functions, and in dispensing their roles and responsibilities, it must be done in such a manner that the liberty of its citizens are not threatened. The laws passed by the *Legislature* are tested by the *Judiciary*, to see if it violates the constitutional guarantees. If it does, the court may declare it *null and void*.

While laws voice the concerns of the nation and affords the methods to correct them, an incorrect law[s] may fuel ineffective governance and curtail the rights of the people. It will open an arena of miscarriage of Justice. In most jurisdictions, any laws may not be advisable to question, but in the meantime, it may generate the cascading ill-effects of a bad legislation. Through the principled process of *separation of power*, one organ of the government may be able to function without the interference

11 Combaz, E. & Mcloughlin, C. (2014). *Accountability and responsiveness of the state and society*, GSDRC. Retrieved from https://gsdrc.org/topic-guides/voice-empowerment-and-accountability/supplements/accountability-and-responsiveness-of-the-state-and-society/

12 Tobgye, S. (2014). *The Constitution of Bhutan: Principles and Philosophies*, Thimphu, pp.37-39.

13 Ibid.

of the other. However, the concept of separation has to be viewed from a perspective of a relative or absolute *separation of powers* which may determine institutional and accountable independence of different government institutions. These *separation of powers* may in one way infuse accountable standards since it provides the other institutions with the opportunity to gauge the performance of their tasks and duties. This also enables to fight corruptive practices and increase the efficiencies of different government functionaries, including effective services to the people. A seemingly incorrigible system affects the quality of the services; and hinders effective governance, amongst other harmful results to the nation. In such instances, accountability standards and mechanisms have to be set vertically as well as horizontally to ensure that there are checks and balances.

The manner in which accountability is administered cannot be "specifically only one"- it has to be contextual in relation to the specificity of the duties. One of the most important parts of accountable administration of duties is the "truthful expiation" of the interest as well as the "good intent" in the performance of one's duties. The purpose of duty has to be oriented with the results expected; and if the result of a "particular act" is not fulfilling the mandates set by the law or an institution, "good intentional service" for that matter cannot justify an accountable and responsible act without results. Accountability can also be financially enumerated, in which the concept of *value for money* can suggest that a certain amount of money should be able to buy a certain amount of things, in which the word "certain" can be a definitive variable of *money coefficient.* This direct financial principle of "buy how much money can get" also can be interpreted as "pay how much you buy." These retrospective "financial buying principle" can be reiterated in the principle of governance and integrated as directly proportional principle for good governance strategies. This can be one of the most understandable and transparency based equations of good and accountable governance.

Judicial Accountability

Judicial accountability and accountability standards for that matter, is a relative assessment terminology for all institutions. Accountability is a mechanism through which justifications are forwarded that equitably serve as the denominator for institutional standard of governance and quality check. If the institution has to show its competency values, one of it is through the proliferation of the accountability standards, through which the scales of competencies are gauged, assessed and recorded. It is one of the most credible ways of assessment- beginning from the administration and fulfillment of the tasks to responsible decision-making that is reasoned and transparent. This is an original recipe for trust, confidence as well as it provides an opportunity to repose faith in an institution. This enables the credence system built on credibility, transparency and accountability. Accountability is the starting of a transparent system- that values and respects meritocracy, professionalism and standardized approach to service.

Judicial accountability is one of the hallmarks of a credible judicial institution and the administration of Justice. Administration of Justice requires the fulfillment of procedural standards as well as substantive standards of Justice; and fulfilling every duties in the administration of the court. One of the essential elements of administration and decision-making is that "it delivers" credible deliverables as well as the "substance of the deliverables" satisfy the consumers of Justice. One of the best ways to build a credible system of governance is to create an institution that fulfills the basic "aspirations of the people." Judicial accountability [may] require standards, processes, competencies, assessment tools, and independent institution modelling systems- based on prudent reasons and intra-institutional analysis.

One of the essential elements of judicial leadership as well as professional judicial culture is judicial accountability. In the international legal regimes, judicial accountability is associated with fair trial rights, administration of

Justice, *rule of law,* and proper judicial conduct.[14] Both the individual Judges and the *Judiciary* as a branch of the state are subject to a number of forms of accountability which are not incompatible with their individual and institutional independence.[15] Judges must be accountable for the judgments they render. The decisions must be reasoned and the process transparent. A Judge shall be neutral in his approach and at all times uphold the principles of natural Justice. Similarly, Judges cannot be removed or punished for *bona fide* errors or for disagreeing with a particular interpretation of the law. Furthermore, Judges enjoy personal immunity from civil suits for monetary damages arising from their rulings.[16]

Judicial Independence

The *Judiciary* is independent in all aspects under the *Constitution of Bhutan*. An independent *Judiciary* that uphold the *rule of law* is *sine qua non* and the most [prudent] criterion for a "fair and just society."[17] It must be motivated by ideals of Justice and *rule of law*, without external influence and partisan interest[s]. Laws should nurture a good society and Justice should support it. Independence, literally, is the exertion of independent judicial decision-making powers and to be unfazed in the face "exterior scrutiny" and "externality examination[s]." One of the most important aspects of judicial independence is the "independent fulfillment of the duties" without fear and favour, thus fulfilling the noble constitutional duty to uphold the just causes of the society. "Fear and favour" is and can [be] instrumental in derailing the cause of Justice and distort the institution of administration of Justice.

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14 International Commission of Jurists, Switzerland. (2016). *Judicial Accountability: A Practitioners' Guide.*. Retrieved from https://www.refworld.org/pdfid/4a7837af2.pdf

15 The Judiciary of England and Wales. (2007). *The Accountability of the Judiciary.* Retrieved from https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Consultations/accountability.pdf

16 International Commission of Jurists. (2017). *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*. Retrieved from https://www.refworld.org/pdfid/4a7837af2.pdf.

17 Judiciary of the Kingdom of Bhutan. (2014). *Annual Report.*

The basic principles of *Judiciary* as enunciated under the *United Nations*[18] state that Judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens. In that respect, it states that the *Judiciary* should decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason, there shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. It further states that this principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the *Judiciary,* in accordance with the law.[19] These principles are essential in fostering confidence in the courts and enhance impartial decision-making. Judges are natural and essential allies in building support for judicial independence.[20]

Accountability and Rule of Law

Accountability and *rule of law* must go hand in hand. Accountability is a sustenance of the *rule of law.* The laws should provide the firm basis to eliminate non-accountability; and any accountability process without the support of the laws and the legal framework will appear legally contradictory as well as arbitrary. In other countries, the respect for the *rule of law* demands that administrative bodies should not sit in appeal or review of the courts. This does not, however, prevent monitoring and reporting on court activities, and making independent recommendations

18 *Basic Principles on the Independence of the Judiciary* Adopted by the Seventh *United Nations Congress on the Prevention of Crime and the Treatment of Offenders* held at Milan from 26 August to 6 September 1985 and endorsed by *General Assembly Resolutions* 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

19 Ibid.

20 Office of Democracy and Governance. (2002). *Guidance for Promoting Judicial Independence and Impartiality*, Technical Series Publication, Washington, DC, United States.

meant to improve the application of human rights principles in the court setting or to remove *undue delay in the judicial proceedings*.[21] If we are to correct the threat to the *rule of law*, accountability is the tool. It need not necessarily be restricted to criminal behaviours or other aspects of official misconduct, it expands to various other facets of effective administration and governance. Judicial accountability promotes the *rule of law* by deterring conducts that might compromise judicial independence, integrity and impartiality.

Reconciling Accountability and Independence of the Judiciary

The idea of accountability and independence are two paradoxical legal notions. However, these concepts should not be dissected to give a separate picture of a separated *administrative doctrine,* but it should be understood as more prominently required institution. In the sense, it can be said that "when an institution is independent, it exposes more areas towards accountability since, it cannot depend on other institutions, thus complicating the whole procedure of accountability."[22] When an institution is alone, it opens up more and provides more clear processes as well as opportunities for better administration and transparency. The external factors get opportunity to review it better. There is "no veil" to hide the accountability. In most institutions, accountability has become a process of "blame game," which says "because of that reason or the institution…" The *Judiciary* is in the position to exhibit the best amount of accountability since, the task of the institution itself is making others accountable. So it also poses the question of if complete independence leads to lack of accountability. Judicial independence has not been properly defined and such ambiguities in the meaning and scope of the term has added to the already existing controversies and confusions regarding its proper definition, leading some scholars to question whether the

21 Office of Democracy and Governance. (2002).

22 *Judicial independence and accountability. Annual Report*. (n.d.). Ballotpedia. Retrieved from https://ballotpedia.org/Judicial_independence_and_accountability.

concept serves any useful analytical purpose. While judicial independence forms an important guarantee, it also has the potential to act as a shield behind which judges have the opportunity to conceal possible unethical behaviour.[23] Judicial independence provides the freedom to interpret and decide; but freedom is seen as restrictive, if it affects the interests of the public.[24] Judicial personnel or any person for that matter, involving in corrupt practices must face the consequences of the law with a fair procedure.

Legislative Accountability

One of the most important aspects of a good legislator is that it engenders from the person of good legislators. Legislations are very important part of national governance tool. It allows the nation to be within the required disciplines of law and legal expectations. As we see, laws, when drafted sounds as if they are "dried conversations", not requiring proper scrutiny or analysis. However, when the laws are transformed into various "legislative actions"- the laws become a tool for transformation as well for transformational information. Laws are silent spectators- they examine like *karmic forces*, and once the iron is red hot, the effect of its strokes, can transform the shape as well as the size of the hot metal. Similarly, legal actions, emanating from various legislations can totally change the lives of the people. Therefore, if we have to change the course of human as well as national behaviourism, it has to be sound, prudent, and effective. The laws should not only tell "how the road should be," but it must also justify "why it wants the road to be that way…" Even behind every idea of the subject of what is "good and bad," this is fundamentally supported by a reasoned notion of goodness. Every action or a reaction, for that matter, is a continuum of reasons that justifies itself. In this sense, no law can be

23 International Commission of Jurists. (2017). *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*. Retrieved from https://www.refworld.org/pdfid/4a7837af2.pdf.

24 Verma, A. (2021). *Need for Stronger Judicial Accountability,* ipleaders. Retrieved from https://blog.ipleaders.in/need-stronger-judicial-accountability.

considered "good" simply because it has emanated from the *Legislature.* It should be inherently good and support the common aspirations of the people. What if the laws do not serve the common good, and in that response, the theory of accountability enshrines that it is inherently good and accommodates highest reason and good conscience. It should be supported by good motivation and causes so that it initiates good cause and conditions. All good things should beget good.

The question here is what if a law generates a social turmoil or [may] result in injustice? There can be no immediate question of who and how the law was drafted; and the only solution, which is sparingly used is the action of legislative amendment[s]. In such circumstances, not only good intention and a clear and objective reasons are required, the reasons should also fulfill the national interest tests. National interest test may require that it fulfills the interests of the nation and aspirations of the people by securing objective and rationalized ideas. The relationship between those who govern and the governed is deeply rooted in the indispensable idea of being accountable to each other. The law makers in a democratic country like ours are chosen by the people. They are the representatives of the voters, who shall always prioritize the national goals above everything and realign accordingly. To them, accountability should become the cornerstone of governance. By accountability, it means to be answerable and be in a position to be audited. Such accountability, of those who govern to those who are governed, is indeed the aim or purpose of all democratic governments to ensure that government consists of mechanisms or legal processes through which the government is accountable and can be held accountable by the people they serve.[25]

Legislative accountability of the *Members of Parliament* has been enshrined under Article 10, section 2 of the *Constitution of the Kingdom of Bhutan*.[26]

25 Warren, R. K. (n.d.). *The importance of Judicial Independence and Accountability*, The National Centre for State Courts.

26 Tobgye, S. (2014). *The Constitution of Bhutan: Principles and Philosophies*, Thimphu,

It states that the interests of the nation and people's aspirations must be safeguarded by the government, and must discharge their responsibility through public review of policies and issues, *Bills* and other legislations, and scrutiny of State functions.[27] Public review is one of the many means of holding the *Members of Parliament* accountable in carrying out their responsibilities. They can be held accountable in three ways:

a. Choice at the election stage,
b. After election, continued interaction of the people with the elected representatives, and
c. In cases of failure on the part of the representatives, their right to represent may be forfeited. National interests and aspirations of the people should be the priority.[28]

Additionally, the *Legislature* is accountable to the people. The people in different constituencies wield both political power to choose; and also has an indirect force to direct their representatives to accountably fulfill their aspirations. These duties put a psychological pressure as well as enable an action-oriented governance that is based on the principles of transparency and accountability. Legislative accountability cannot be presumed only as the duty to enact the laws; and fulfilling its tasks by merely legislating a law. There are other part of things to be done to fulfill the duties of a legislator. One of the compelling factors that pummels legislative accountability starts from the genesis of legislating good and effective laws; that serves the nation to achieve the aspirations of the people and the country. These legislative harmonies should supplement to introduce other aspects of good governance that begets a system based on good governance principles and the *rule of law*. The duties of the *Legislatur*e to achieve the aspirations of the people through good and accountable laws are paramount.

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pp.143-144.

27 Ibid.

28 Ibid.

Giving out correct and timely information to the public constitutes an element of accountability. Many people these days are fed with wrong information in the wrong time. While living in a world driven by technology, fake news and information have the power to persuade the people to wrong decisions.[29] It can be analogous to a wildfire in a dry season. Public can become a part of the law making and policy formulation if adequate information flows to them. Through this, public interests are properly addressed by the law making organ of the government.

The Executive Accountability

Accountability is a word that has both the blessings and means to secure that blessings. It has the power to rectify human emotions, mental landscapes and correct the wrongs, expected to be engendered out of misinformation and irresponsibility. What is a responsible human interaction at a government level? It surrounds around the idea of transparent interpretation of the laws and administration of administrative justice at an individual institutional level- thus promoting a cultured society and *principled rule of law.* The words of the laws are transformed by the *Executive* and the *Judiciary.* The transformation should echo the intent of the *Legislature* and reflect the aspirations of the people - a distortion of the intent of the laws can lead to corrosion of social, political and national values. It will also lead to loss of faith in our laws. The moralistic interventions include financial and positive disciplining of conduct so that, the interventions help people to fulfill their community and national aspirations. One of the most important elements of accountability at the *Executive* level is the timely delivery of the services. It requires timely delivery of administrative and financial services and professional accountability, which requires that services are professional and of standard quality.

29 *Promoting accountability for improved outcomes*. (July, 2014). Retrieved from https://www.healthpolicyproject.com/pubs/272_AccountabilitySystemsResourceGuide.pdf

The *Local Government* is the foremost and the most near and direct government institution in the country. Its precincts are located in the heart of the village or at least at a place, which can be directly accessed by the people. The most rudimentary and common men ideology of accountability, in the narrowest sense, simply means *"deliver since you are earning a salary".* Even in the rural areas, accountability is a very crucial part of governance. Most people want expeditious services, be it for legal disputes or for [other] legal and administrative documentations. One of the most frustrating aspects of any service or governance for that matter, is the relaying of services to tomorrow or some other departments or agencies. People in the villages are the busiest; and they have innumerable personal errands; and they logically do not have time to waste or to procrastinate.

It can be equally and easily understood that after traversing long distances [as expected for many], the *come tomorrow concept* or ineffective services, can be both frustrating as well as emotive. This can generate a sense of dissatisfaction among the people. Although, this generally may not be happening, but it can be presumptively happening to someone or to some areas. Few of the elements of quality service are politeness, efficiency and quality. These factors determine the quality of the service provider[s]. One of the evolving new domains of services, is the concept of egregiousness and timely service- oriented based on the notion of *your service is our duty.*

The concept of accountability should arise from the "sense of duty" and the "need to serve." Unless, we perform the tasks with ownership, it may remain both halfhearted and be typically "non-owned." This non-ownership can lead to lack of sincerity, and non-belongingness. One essential remedy to that "personal non-motivational lapses" is motivation and empowering the people with trusts, confidence and ownership. If the services lack trust and confidence, any tasks, for that name performed, cannot be recognized. This provides the basis for demotivation; as well as spawn a callous corrupt practice. Recognition, accountability and acknowledgment of the services are a genesis to faithful performance

of duties. The administrative machinery should also base decisions on rational analysis and recognition of the services.

Be it at the *Local Government* or any other service oriented institution, it should provide services that are professional, information based and with clarity. Telecommunication has been established world over; and reached every part of the country, thus facilitating information based services are becoming crucial to save time and energy of the people. In many instances, just to get a one "worded answer" of "yes" or "no," a person [may] inevitably waste a whole day. These strict non-conformist strategies of leadership typically poses not only a great hurdle to the people, it wastes their time and [may] perceptively generate discontent.

One of the primal Buddhist beliefs of "responsibility and shame" predates any modern governance and administrative logic. These provide a habitus for timely service as well as the need to personally justify, why it cannot be done. This doctrinal belief still holds as a very important parameter to advance good governance policies in the country. One of the [another] essential components of service is "dignity and respect." While it is a cultured tradition that recognizes the line between the superior and subordinates, *Gom* and *Wog,* this principle of hierarchy should be based on personal dignity, respect and recognition. It cannot be applied proportionately or disproportionately: it has to be directly based on respect, reason and friendliness. Even if the service fails, a person would not complain, if the failure is explained in a courteous and non-contemptuous way. The basic idea of all services in the country, all actions, has to be based on proper understanding. It should not be based on misunderstandings, and applied through the principle of *superior respondent*. Principal quality, equality, accountability and fairness has to be determined on sound national and institutional judgment.

Challenges to Accountability

One of the dominating mindsets in Bhutan's administrative parlance, is that accountability is an alarming and a frightening echo. It reverberates through the deep recess of personal ego, incompetence and "the non-changing mindset." Psychologically, accountability can be tormenting and discomforting- since it has to shake the old habits and infuse a transformed mindset to replace the normative values; and personal indoctrinations and non-working values and relationships. One of the most challenging questions about "accountability" is that "it is yet to become an institutional habitus" in the country. It has to be relayed on trust and confidence of the people. To study how few European countries ensure accountability shows us that the *social discipline* is ingrained in the people. For example in Austria, the metro train managements never checks, if the passengers have the train tickets or the *Train Passes*. On careful examination, it could be studied that people had been disciplined in such a way that "discipline" has become a part of the society. When carefully observing if any person is caught without a ticket, when sudden ticket checks are initiated, only countable amongst the thousands, are found without a ticket, which for some passengers have simply not recollected to bring it with them to the train platforms. These *unwritten personal principles* have come from the people without the need to impose it on them.

In this case, these personal or individual principles have been forced by "non-dualistic legal doctrines." The legal system there says that "it does not entertain" much justifications for the failure. It is a "non-refutable" doctrine which can be translated as "if you do not have the ticket, pay the fine, there are no excuses…" In the same way, accountability also stretches from "individual pride to serve the best." These principled work culture enables a society based on best social ideals. In the narrower sense, accountability stems from a system that calibrates human trust. It has to be systematic for time being, and it slowly becomes ingrained in the lives of the people.

One of the seeming challenges to accountability is the non-result based work culture. In many of the institutions across the country, few are accounted for the day long tasks they performed. All tasks have to be evaluated within a specific time. When there is no evaluation, people do not perform adequately and accountably. Providing a timeline for the services is an important yardstick to "put in the index for accountability." Another elemental challenge to accountability in Bhutan is the non-affordability of professional expertise and a work culture. Any tasks performed, for example a simple wall construction, has to be measured in the light of time, and quality of the service. Although, it may be conjecturally a wrong notion, one of the best ways to ensure accountability is to evaluate the "finished work product." For example, if we evaluate the constructions initiated by a Japanese company, we can, before the start of the construction project, be aware and rely [and ensure] that the construction will be safe, it will look good and professional. These are based on accountable work culture- which posits on these elemental things:

a) Quality work culture
b) Quality work product; [non-acceptance of mediocrity]
c) Timely;
d) Done with professionalism; and
e) Accountability.

These cultures are built on following [possible values]:

a) Systemic good work culture
b) Intolerance for unethical work;
c) Accountability;
d) Credible Assessment for work products;
e) Very hardworking professionals- who overwork [they have a work culture which is not time bound from 9 a.m. to 5 p.m.]

These work culture has to be institutionalized to ensure that there is "value for money" for the services. One of the component of accountability is "a

professional and clean work culture." Today, the concept of "clean work culture" dictates that the work performed should not only be clean and "multitasked," our work culture should be sidelined on the values of non-interference; and clean. We should be [very sensitive] workers regulated by spheres of checks and balances.

Another impediment to accountability in Bhutanese work culture is affected by the "small nation syndrome." The "small nation syndrome" predicates that "if we expose the work of **Mr. A as inefficient,** the replications, may be harmful to his image as well as affect his profession." These act together with the culture of compassionate society. A compassionate governance can have both merits and demerits. Accountability puts in a system- which does not allow people to regret [if they are official excommunicated]. Another possible feature of lack of accountability in Bhutanese work culture, be it financial or otherwise is the relationships fostered by unhealthy trust and confidence. For example, if a person engages in "unacceptable behaviour," the respect or the "good niche" the person has created in the good conscience of the immediate supervisor [may shield] him. The person is trustworthy, he would not do… phantasies [invigorate] the culture of corruption. These are the few challenges that counters the establishment of a stable and accountable system of governance based on principles and the *rule of law*. Moreover, in creating our own standards, there should be strict application as well as interpretation of the laws, which does not provides the grounds for dichotomy of reasons.

Conclusion

Accountability has become a necessity. It boots performance and definitely creates room for improvement. Public accountability is the process through which the public sector demonstrates its competence, reliability, and honesty in a way that allows the public to judge the trustworthiness of the public sector in using public money and resources.[30] Creating a culture

30 Controller and Auditor General. (2019). *Why public accountability is important.*

of accountability improves employee morale, increases effectiveness, and protects against liability risks. Transparency should be a yardstick for every institution to adopt, such that more transparency in governance should mean less scope for corruption, in that dishonest behaviour would become more easily detectable, punished and discouraged in the future.[31] Should there be any problems and weaknesses in the current system that fail the requirements of good governance, such shall be addressed and reforms ought to be made. Improvement must be the goal instead of putting the blame on someone else. Civil service leaders have a collective responsibility to ensure that the civil service has the right capability in place to deliver the Government's priorities that this capability is being developed appropriately, and that specific aspects of the accountability system operate effectively to safeguard value for money for taxpayers.

> *All of us must boldly embrace accountability as a measure of our service, should we falter, deviate, and err in the service of our country.*

His Majesty had commanded on the114th *National Day*.

> *We must correct those who deviate, be firm with those who do not deliver, replace those who are incompetent, and terminate those who underperform and have therefore become a liability to our system and nation. We must not hesitate to expose those who engage in corrupt practices, so that we send a strong signal to deter others from doing so.*

It is now a duty of each one of the citizens to be bold enough to bring back the rigour and sternness our country once saw.

Retrieved from https://oag.parliament.nz/2019/public-accountability/part3.htm.

31 Decentralization Thematic Team. (n.d). *Accountability, Transparency and Corruption in Decentralized Governance*. Retrieved from https://www.ciesin.columbia.edu/decentralization/English/Issues/Accountability.html.

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