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THE SUPREME COURT OF BHUTAN

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ROYAL COURT OF JUSTICE

Between the Government of Bhutan and the Opposition Party

JUDGEMENT NO.SC(Hung 11-1)

IN THE SUPREME COURT OF THE KINGDOM OF BHUTAN

BETWEEN:

**The Government of
Bhutan**

Appellant/Respondent
(Represented by the Office
of the Attorney General)
Thimphu: Bhutan.

AND

Opposition Party

Respondent/Petitioner
(Represented by Damcho Dorji,
Opposition Party, Hon'ble Member of Parliament)
National Assembly,
Thimphu: Bhutan.

BACKGROUND

The Office of the Attorney General on behalf of the Government aggrieved by the judgment [10-100] rendered by the Constitutional Bench of the High Court on 18/11/2010 in the matter related to the non-compliance with the provisions of the Constitution with regard to imposition of vehicle tax under "rationalization and the broadening of the existing tax structure" filed their intention to the appeal on November 29, 2010. The appeal was registered in the Supreme Court on December 03, 2010 under registration no. SC (Aa-10-2).

1. Issues on Appeal

1.1. The Office of the Attorney General in their appeal petition dated 06/01/2011 submitted the following grounds for appeal and their reasoning:

- (a) Inadmissibility of the Opposition Leader to submit petition against the Royal Government;
- (b) Error in the interpretation of the *Jabmi* Act;



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- (c) Constitutionality of judicial consideration of a matter under legislative process;
- (d) Question of jurisdictional competence of the High Court in the Matter under review;
- (e) Erroneous interpretation of the Constitution and relevant laws
- (f) That this case should have been dismissed by the High Court for want of legal standing;
- (g) That the High Court should not have interfered in a matter that is already a concern of the National Assembly and as such, is under legislative consideration to be deliberated upon in the 6th Session of Parliament;
- (h) That the resigned or retired *Drangpon* cannot appear and practice before the courts;
- (i) On whether or not the High Court has jurisdiction and competence to interpret other provisions of the Constitution besides Article 7(23) and 23(5) of the Constitution; and
- (j) That the High Court has erred in ruling that the Government has carried out taxation measures in breach of provision of laws in revising the indirect taxes, assuming (but not yielding) that the respondent has legal standing to challenge the act of the Government and that the consideration of the case by the Court is deemed not to be an act of judicial interference in the legislative process.

1.2. The Opposition Party prays before the Hon'ble Supreme Court to:

- (a) Uphold the landmark judgment No. (Majority 10-100) dated 18 November, 2010 of the Hon'ble High Court.
- (b) Rule that the implementation of the tax measures by the Government without the approval of Parliament violates Section 9 and 14(b) of the Public Finance Act and Article 13 and 14(1) of the Constitution;
- (c) Rule that the taxes collected by the Government without the authorization of Parliament be returned with interest to the affected parties, and hold the Government liable for violation of their rights under Article 7(10) of the Constitution.
- (d) Rule that all forms of taxes shall be henceforth, regarded as money bills and subject to the "*procedure of bills*" as enunciated under Article 13 of the Constitution.
- (e) Hold the Government liable for contempt of Court for suspending the import of all light vehicles without obtaining the permission of the Hon'ble Supreme Court; and



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- (f) Order the Government to revoke its circular suspending the import of all light vehicle and pay appropriate compensation to the affected parties with immediate effect.

2. HEARING SCHEDULE

- 2.1 Opening Hearing: presentation of issues on appeal by the appellant Office of the Attorney General on behalf of the government – 10/01/2011;
2.2 Rebuttal Hearing: response by the respondent Opposition Party – 19/01/2011; and
2.3 Closing Arguments by the appellant and respondent – 27/01/2011.

3. SUBMISSIONS BEFORE THE COURT

- 3.1. **Appeal petition by the Office of the Attorney General, dated 06/01/2011 pages 58 in English.**

MAY IT PLEASE THE MOST ILLUSTRIOUS SUPREME COURT THAT,

Most humbly, the Office of the Attorney General, representing the appellant, the Royal Government of Bhutan (hereinafter referred to as the “**the appellant**”) begs to submit its appeal before the most Hon’ble Supreme Court, the highest pedestal of justice and the final interpreter of the Constitution, against the ruling of the Hon’ble High Court viz. *Larger Bench 10-100, dated 18/11/2010*, in the case of the **Royal Government Vs. the Opposition Leader** (hereinafter referred to as “**the respondent**”). The appellant humbly submits its prayers to the erudite Justices of the Supreme Court for enlightenment and guidance on its limited understanding and doubts that have stood in the way of accepting the judgement of the most esteemed High Court.

THE APPELLANT HAS THE HONOUR TO SUBMIT ITS APPEAL as hereunder:

- I. General grounds for appeal;
II. Background of the case;
III. Inadmissibility of the Opposition Leader to submit petition against the Royal Government;
IV. Error in the interpretation of the *Jabmi* Act;



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- V. Constitutionality of judicial consideration of a matter under legislative process;
- VI. Question of jurisdictional competence of the High Court in the Matter under review;
- VII. Erroneous interpretation of the Constitution and relevant laws; and
- VIII. Concluding submission.

Part I
General grounds for appeal

The appellant is aggrieved by the judgment rendered by the High Court for the following reasons:

1. The appellant is not convinced of the claim of the High Court to having taken into account the intent and purpose of the laws both specifically and in terms of their wider ramifications for society, given the unique parliamentary structure and process of our democracy. The failure to do so has given rise to the judgment having the effect of being prejudiced and biased against the poor while being protective of certain categories of people in the name of “public interest”.
2. The High Court has misinterpreted the noble intention of Article 18(1) and Article 18(5) of the Constitution which are to ensure that the Opposition Party plays a constructive role in Parliament and that it contributes to the efficacy of the legislative system. On the contrary, by admitting the case, the High Court has inadvertently supported the Respondent’s scheme to blur the line between the Judiciary and the other branches of government to undermine the fundamental constitutional principle of separation of power. The judiciary has been manipulated into preempting legislative action, and becoming an alternative means for the minority party to effect legislation.
3. The High Court has erroneously construed the two sections of the Constitution viz, Article 18(1) and Article (5), as assigning to the Opposition Leader the function of taking the Government and, in effect, the National Assembly (hereinafter referred to as the “NA”) to court. The High Court, thereby, appears to have failed to consider the far reaching implications of creating a legally enabling environment for a future of conflicts between and among the three branches of Government that must function independently but harmoniously in



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pursuit of common societal values for the well being of the Bhutanese people.

PART II
Background of the case

1. The Hon'ble Finance Minister (the Minister) presented the Budget for the Fiscal Year 2010-2011 to the NA during the 5th Session of Parliament on 25 June 2010. In his presentation, the Minister submitted that the government had approved revision of rates for certain items under indirect taxes to strengthen the Government's revenue base as well as to meet other socio-economic objectives. The NA was also aware that a bill proposing alterations in direct taxes was already presented to Parliament.
2. The Opposition Leader made an intervention in the NA that the measures taken by the Government were not in keeping with the provisions of the Constitution and the Public Finance Act 2007 (hereinafter referred to as the "Public Finance Act"). This led to a discussion among the Hon'ble Members of the NA on the procedural aspects of tax revision.
3. Responding to the statement of the Opposition Leader, the Minister had explained that the tax measures taken by the Government were as per the provisions of the laws, namely,-
 - (a) Section 4.2, Chapter 3, Part I of the Sales Tax, Customs and Excise Act 2000 (herein after referred to as the "Sales Tax Act") which states that:

“The fixation of the rates of Sales Tax and any revision thereof, and the range of commodities and services under the Sales Tax Schedule shall be approved by the Royal Government of Bhutan.”
 - (b) Section 6.1, Chapter 4, Part II of the Sales Tax Act, which states that:



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“Customs Tariff and revisions thereof, shall be approved by the Royal Government of Bhutan.”

Subsequent to the explanation, the tax measures approved by the Government were endorsed by the NA with some changes at the time of approving the Budget with two votes against, as per Article 14(8) of the Constitution.

4. In order to remove perceived anomalies and ambiguities in the tax laws, towards the conclusion of the Session of Parliament, a motion was moved to amend and reconcile relevant sections of the laws. This motion was welcomed by the Government, subsequent to which, the House resolved that the Government should submit amendment proposals at the Winter Session (6th Session) of Parliament. The proposals have since been considered by the NA.
5. The appellant wishes to submit that the Government had not implemented the tax measures except on import of vehicles (as shown in **Annexure A**), prior to informing the NA. Upon the NA having resolved to review the relevant laws which authorized the government to take the decisions, implementation of all other revisions were withheld. The implementation of tax increases on vehicles was compelled by the media which, having accessed government documents on the subject before presentation to the NA, had alerted potential car importers. Not putting into immediate effect the new tax rates would have resulted in a rush for importation of cars thereby defeating the very purposes behind the tax increases which include environmental, rising economic disparity, uncontrollable drain on foreign exchange reserves, high accident rates, lack of parking space and congestion in the capital and Phuntsholing.
6. Any leakage of information on tax alterations before implementation could result in preemptive action including but not limited to hoarding or profiteering by dealers and consumers resulting in loss of substantial revenues and the measures becoming counterproductive. It is to prevent such eventualities that the Ministry of Finance of India is cordoned off and completely secured by the police for at least a week before the presentation of the budget in which all tax revisions, upward and downward, are proposed. Held securely and firmly by the Finance Minister in a briefcase to which only he has the key, the secrets of the budget are declared by him in Parliament to be normally passed quickly. Even more ancient is the same tradition of the worn-out leather brief case held by the Chancellor of the Exchequer (United



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Kingdom), the secrets of which are revealed only in Parliament in much the same way. Presently, the United States banks that give out annual bonuses in millions of dollars, with even mid level employees earning an average of \$250,000, are in the process of deciding whether to pay the bonuses early this year so as to preempt possible government attempts to raise taxes in the coming year. If this happens, the US revenue department stands to lose millions, possibly billions of dollars in potential revenue.

PART III

Inadmissibility of the Opposition Leader to submit petition against the Government

Ruling of the High Court:

- i. The High Court deemed that the **Opposition Party had consented** to bring the case against the Government based on the testimony of the other member of the Opposition Party in Parliament that “a case was that of the Opposition Party”;
- ii. The petition of the Opposition Leader was upheld on “**public interest standing**” and as a concrete **case of controversy** under section 31.2 of the Civil and Criminal Procedure Code;
- iii. The dismissal of the case for **want of consent** of the other Member of the Opposition Party without considering the merits would have caused **grave lacuna** and **irreparable harm** by our legal system.
- iv. The dismissal of the case based on the **outdated technical hitches of the rule of locus standi**, and thereby, debarring from bringing a matter before the Court would **abdicate rule of law** and **set wrong precedent** without first undergoing the **test of its legality** through the courts and the justice system;
- v. The established jurisprudence of taxpayer’s *locus standi* is the concept that **any person who pays taxes should have standing** to file a case against the taxing body **if the taxation imposed is unlawful** in accordance with **Article 21(18)** of the Constitution;
- vi. **No locus standi** of the case be cited as precedent invoking Article 18(1) of the Constitution by the Opposition Leader or any individual members of the **Opposition Party unless written consent is availed** in writing of **all the Opposition Party Members, counter-signed by**



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the Secretary General of the National Assembly for filing a constitutional case.

Argument of the Appellant:

The High Court has erred in not establishing the legal standing of the respondent because neither the criteria set by the High Court itself were fulfilled nor do Article 18(1) and Article 18(5) of the Constitution, in any way, suggest that the courts are a means through which the Opposition Party shall play his role in law making.

1. With due respect to the Hon'ble High Court, it is the humble opinion of the appellant that the High Court has erred in giving such rulings both **in law** and **in fact**.
2. **Respondent lacks legal standing:** In law, the respondent has no *locus standi* to file such a lawsuit against the Government. As submitted before the High Court¹, it is true that as per Article 21(18) of the Constitution, every person has the right to approach courts in matters arising out of the Constitution or other laws. But this right to approach courts is subject to Article 7(23) of the Constitution. Article 7(23) of the Constitution provides that “*All persons in Bhutan shall have the right to initiate appropriate proceedings in the Supreme Court or High Court for the enforcement of rights conferred by this Article, subject to section 22 of this Article and procedures prescribed by law.*” “*Procedures prescribed by law*” means the procedure for initiation of legal proceedings as outlined in the Civil and Criminal Procedure Code. Of direct relevance are sections 31.2 and 149 of the Civil and Criminal Procedure Code which provide for determination of the legal standing of a person who may initiate lawsuits before a Court of law. Under section 31.2 of the Civil and Criminal Procedure Code, there are two requirements to file a lawsuit or legal action, namely,-
 - a. *A petitioner must have legal standing, and*
 - b. *A petition must involve a concrete case or controversy.*
3. To merit legal standing, a person must have suffered an actual injury, and the interests sought to be protected must be within the domain of interests guaranteed by law. Normally, in most countries, only a person whose rights are directly affected by a

¹ The appellant's submission before the High Court, dated 6 September 2010, pp. 4-5.



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law can challenge the constitutionality of the law². This means a person who questions the validity of a Statute must show that his/her right (more so fundamental rights) is injured by its operation. Only then the Court would proceed with examination of the constitutional validity of a Statute. Not to pay tax is not a fundamental right guaranteed by our Constitution and therefore, there is no question of his rights having been infringed by alterations in tax rates. In this case, not only was the Opposition Leader not able to prove how he was injured by the Sales Tax Act, but he was exempted from doing so by the High Court. Furthermore, the High Court has interpreted section 31.2 of the Civil and Criminal Procedure Code to permit ‘public interest’ litigation by dissenting opposition members or any individual or party against any government action in the future. In so doing, it failed to ponder the larger implications of such a decision for the society wherein the government will be fully exposed and vulnerable to all kinds of litigations. In the humble opinion of the appellant, the High Court should have:

- a. Examined whether the rights of the petitioner were infringed (injured) by the act of the Government;
- b. Determined if the rights infringed fall within the protected zone of Article 7 of the Constitution; and
- c. Examined the constitutionality of the Statute (the Sales Tax Act).

Due process and diligence would have required the High Court to dismiss the case for the want of legal standing.

4. **Judicial interference in legislation:** On the ruling that the petition is a case of concrete controversy, the appellant is unable to comprehend how a controversy/difference in opinion between the Opposition Leader and the Government on the floor of the NA can be construed as a controversy that gives cause for judicial intervention.

The appellant believes that the High Court should not have accepted the petition which primarily arose from the inimical act of the petitioner, as a Parliamentarian and law-maker. To allow a

² Justice Y.V Chandrachud, V.R Manohar and Justice Bhagabati Prosad Banerjee (Editors) *on Durga Das Basu's Shorter Constitution of India*, 13th Edition (Reprint), Wadhwa and Company, Nagpur, p. 47.



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Parliamentarian to file a lawsuit on an issue that is under legislative consideration is a transgression by one arm of the Government into the independent domain of the other. This is in clear violation of Article 1(13) of the Constitution. It would greatly benefit democracy and our society if the Supreme Court could enlighten the appellant on whether the filing of lawsuit by a member of the Opposition Party against the Government on an issue arising out of ongoing Parliamentary deliberation is **constitutional**.

5. **Tax revision was endorsed by the NA:** The appellant begs to submit that the revision of tax on vehicle under dispute was in reality, endorsed and approved by the NA in line with Article 14(8) of the Constitution. This was very much against the popular sentiment of the urban privileged while the vast majority of the people can only hope to be able to pay for bus fares. It was this sentiment that the respondent sought to exploit against the hard choice that the government made in the interest of promoting the well being of the larger population. The precedent will enable any Opposition Party in future to hold the government at ransom and indeed, even Parliament, with lawsuits on any matter that has popular public support or is not acceptable to it.
6. **The High Court abdicated rule of law by deviating from the express provision of law:** The ruling of the High Court states that dismissing the case for want of consent of the other member of the party would have caused “grave lacuna” and “irreparable harm” and that such would “abdicate rule of law” and set “wrong precedent.” The appellant is of the view that, in the interest of equity and justice, the Court may evolve such a principle if there is a lacuna in the law itself. But in this case, there are express provisions of law on admissibility of the case based on the rule of *locus standi*. As for the fear of abdicating the rule of law, it would appear that in not applying the rule of *locus standi*, and deviating from this express provision, rule of law may have been deliberately abdicated by the High Court. Such court action could be perceived as setting wrong precedence not to mention making a rule for filing cases that the Court itself does not follow. “Irreparable harm” is what such rulings may bring upon the nation.
7. The above cited opinions of the High Court were the cause for the erroneous conclusion that the “**case was that of the Opposition Party**”. But the case has been registered as a case filed by the “Opposition Leader” and not by the opposition party. The appellant wonders why, if the case were indeed that of the opposition party, it was not accepted as such. In actual fact, the petition which was



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submitted before the High Court was signed only by the Opposition Leader and not even by the only other Member of Parliament of the Opposition Party, leave alone “*all members of the Opposition Party*” as per the conditions set by the High Court itself. One is hard pressed to find any reason to treat the respondent’s petition as reflective of the views of the Party which formed a basis for establishing the legal standing of the case and the petitioner within the scope of Article 18(1) and Article 18(5) of the Constitution.

Furthermore, while there is no basis to even imagine how the respondent could suffer irreparable harm, the High Court has not presumably, reflected on how a government not able to exercise certain means as allowed by an existing law to distribute wealth, prevent income and consumption gaps, and deliver services to the people can fulfill its mandate in a democracy.

8. **Rule of *locus standi* is not “outdated technical hitches”:** The appellant is unable to accept the dismissal of the law on legal standing as “*outdated technical hitches*” especially in establishing, as the Hon’ble Court claims, the *test of legality of the case*. Such biased means to determine legality of a matter before the court is most reproachable. Yet, the court cites this very law, section 31.2 of the Civil and Criminal Procedure Code when it suits the court. For the sake of democracy, and rule of law, the appellant cannot accept the treatment of a law with such disrespect and disdain by a court of law whose function is to respect and interpret law. As for the court’s fear of “set (ting) wrong precedent”, it finds contrary expression in the way it sets a rule by which it never intended to abide and has granted exemption from it to the respondent. In the interest of enhancing rule of law, the broader ramifications of such court conduct must not be ignored by our judicial system.
9. **Violation of the principle of separation of power to legislate from the Bench:** The appellant agrees with the observation of the High Court on the fundamental principle of separation of powers enshrined under Article 1(13) of the Constitution, that the lawmaking jurisdiction rests with Parliament; the application, implementation and the enforcement is upon the Executive; and the roles of interpretation of the laws are bestowed upon the Judiciary. The High Court also observed that the application of strict legalism as per the Constitution and the concept of judicial restraint are based on the principle that each branch of government will stick to its own proper function. In line with the observation of the High Court, and considering the act of each



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branch of the Government, the appellant is emboldened to ask if this principle is being observed and adhered to in the true sense, not only by the respondent, but also by the High Court itself. In the opinion of the appellant, this case has given rise to several intriguing constitutional questions and issues of law that threaten entire foundation of democracy for the reasons stated hereunder:

- a. The respondent, as a law-maker, had sought the intervention of the High Court on a matter that should remain within the confines of the legislative domain;
- b. The High Court has admitted a case when there is no legal standing by importing questionable grounds for instituting a law suit (public interest standing) and denouncing the cardinal rule of *locus standi* expressly provided in our law amounting to legislating from the Bench. The relevant section 31.2 of the Civil and Criminal Procedure Code States that “**A petitioner must have ‘legal standing’ and the petition must involve a concrete case or controversy**”. Further, the High Court also diluted the very essence of the Sales Tax Act by introducing a procedural requirement to *further* route through Parliament any revision of indirect taxes, when Parliament did not intend it, as succinctly provided under the Sales Tax Act. In the opinion of the appellant, these tantamount to legislation from the Bench, which is beyond the mandate of the High Court; and
- c. The High Court has prescribed an innovative procedure for the Opposition Party and its Members for instituting a lawsuit before the Court. This procedure is not prescribed by the Civil and Criminal Procedure Code. Is it within the mandate and authority of the High Court to be innovative, not in interpretation but in legislation? Again, can the Judiciary legislate from the Bench?

10. **Special dispensation granted to the respondent to file petition:** In direct contrast to the actual conditions by which the respondent was given legal standing, the High Court ruled that, for all others, legal standing can be acquired only if consent for a petition is obtained in



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writing from all members of the Opposition Party (not just Member of Parliament) and counter-signed by the Secretary General of the NA. The very fact the High Court is prescribing such a procedure for admission of cases, *ipso facto*, makes clear that the petition should not have been accepted *ab initio*. Surely, acceptance of this double-standard and arbitrary ruling, as well as the near impossible criteria would harm our society now and in the future. These beg answers to several questions:

- a. What could have been the compelling reasons for granting this special dispensation?
- b. Why could the High Court not have waited until the prescribed conditions are met?
- c. What might the larger ramifications be for society?
- d. Further, did the High Court consider the constitutionality of requiring the NA Secretary General to be a signatory and thereby become party to a suit against the government or parliament?

The irony of such ruling in the consideration of the first constitutional case is difficult to ignore. Making a mockery of established judicial process by the guardians of law is not a practice that the appellant feels comfortable to accept. It is not something that the appellant would like to encourage or accept in our fledgling democracy where a just and truly independent judiciary is critical.

11. **The High Court's ruling has opened the floodgate to future litigation:** Having erroneously dispensed with the requirement under section 31.2 of the Civil and Criminal Procedure Code which states that “**a petitioner must have legal standing and a petition must involve a concrete case or controversy**”, the respondent was exempted from proving his injury to merit legal standing. The High Court then helpfully created the respondent's **public interest standing** while, wrongfully citing ancillary jurisdiction under section 125 of the Civil and Criminal Procedure Code. The appellant begs to disagree with the reasoning of the High Court and submits that it is not correct for the High Court to assume jurisdictional authority to establish such a principle because:



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- a. Our laws do not recognize public interest standing (except class action) as the basis for accepting litigation. The intent of the legislation was to discourage baseless public interest litigations, except to the extent that, only aggrieved individuals can bring lawsuits in the form of class action under section 149 of the Civil and Criminal Procedure Code. Even under this section, litigants must be aggrieved individually. It is the opinion of the appellant that granting legal standing on the basis of public interest, would open the flood gates to a deluge of litigations motivated by private malice, vested political interests and by those who can best function through power and privilege. This will not only make government ineffective and indecisive, but could paralyze government while burying the courts and other legal institutions under frivolous constitutional cases. One might ask as to whether the court systems can afford and follow such precedence. Such considerations must indeed have been the reason why our laws permit the acceptance of only class action suits and closed the door to unqualified litigation in the name of public interest;
 - b. By invoking the principle of public interest standing, the High Court not only rendered section 31.2 of the Civil and Criminal Procedure Code defunct, but has practically amended the said Act with the ruling, thereby infringing on the domain of legislation which is the function of Parliament. The court's action constitutes legislation and not construction (*causis omissus*), which is in excess of the mandate of the Court to interpret laws made by Parliament. Upholding such action would be injurious to the principle of separation of power; and
 - c. The Court may not assume jurisdiction and admit a case based on ancillary jurisdiction. The issue of ancillary jurisdiction will arise only if the court has accepted the case, based on the primary jurisdiction and legal standing. The appellant would like to seek guidance from the learned Justices of the apex court, as to how ancillary jurisdiction can be used to justify the jurisdiction of legal standing.
12. **The High Court committed a factual error:** Factually too, the High Court erred in ruling by deducing that “*by appearing in person*”, “*on behalf of the Petitioner*” the other member had testified to establish “*a case was that of the Opposition Party*”. Likewise, it cannot be concluded that by his statement that “*he would represent the case if the*



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fund for hiring a lawyer was not provided by the Government” makes him a party to the petition.

The High Court has viewed this as reflective of the consent of the other Member of the Opposition Party. The appellant submits that the above facts as determined by the High Court negate its own reasoning because:

- a. The other Member of the Opposition Party has not signed on the petition;
- b. As the High Court rightly found, the other Member was acting only “on behalf of the Petitioner” and not as the Opposition Party. Thus, the other Member was representing the petitioner and not appearing as the Opposition Party;
- c. The most important fact that the Hon’ble High Court has omitted is that the other Member refused to answer when asked by the court whether he supported the petition on 26 August 2010 during the Preliminary Hearing; and
- d. The other Member did not appear before the High Court to represent the case on the remaining three occasions, after his initial appearances. What were the far graver reasons that prevented the other Member of the Opposition Party from attending the hearings of the first constitutional case before the Constitutional court of first instance?

Therefore, if the Hon’ble High Court were to derive the legal standing of the constitutional petition from the role of the other Member of the Opposition Party, it is that, both in intent and action, there truly was no consent from the other Member of the Opposition Party. And can a mere fact of the Opposition Leader signing a petition and an ambiguous testimony of the other Member of the Opposition Party sufficiently constitute consent of the Opposition Party and establish the legitimacy of the petition? Was there not some necessity to confirm the consent of the Opposition Party through some other means including perhaps, other office bearers of the party? Lack of such crucial facts cast a doubt on the wisdom of the High Court’s ruling on the establishment of the petition as the Opposition Party’s case.

13. **Dismissal of the rule of legal standing to allow public interest standing:** The High Court has opined that the rule of *locus standi* is



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“*outdated technical hitches*” and it admitted the case as one of “*public interest standing*”. In the opinion of the appellant, the High Court, in accepting this case, has deviated from the express provision of our law on *locus standi* to institute suit. The High Court also observed that it is legitimate for the Government in power to raise revenue through taxes or other measures for the economic well being, progress and development of the nation, to ensure just and equitable distribution of wealth and share economic prosperity among citizens. However, the appellant is forced to seek the wisdom of this Court, on the determining factor that tilted the “*delicate balance of law and its merits of argument*” and made the High Court deviate from the express provision of law in order to accept the petition and unjustly condemn the legitimate act of the Government. Was the public interest act of the appellant less important than the public interest intended by the High Court? If so, the High Court should have explained how the respondent actually represented the larger public interest? Who was he truly representing? Could it be that he was representing certain car dealers?

14. **Concluding submission:** The respondent **lacked legal standing** in accordance with section 31.2 of the Civil and Criminal Procedure Code to file petition before the High Court. The High Court has erroneously presumed that the difference of opinion in Parliament among the Members of Parliament is **a concrete case of controversy** while denouncing the rule of *locus standi* as “*outdated technical hitches*”. This has caused irreparable harm not only to our legal system but also to the separation of powers of three branches of the Government guaranteed by our Constitution. It is erroneous to dismiss rule of the *locus standi* explicitly provided in our law as “*outdated technical hitches*” and thereby open flood gate to future litigations.

Part IV

Error in the interpretation of the *Jabmi* Act

Ruling of the High Court:

- (i) Section 24 of the *Jabmi* Act bars retired *Drangpons* from practicing before the courts but it does not bar them from appearing for his own cause or as *ngotshab*; and
- (ii) The *Drangpon* who ‘resigns’ from the service does not fall within the category of the ‘retired’ *Drangpon*.



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Argument of the appellant:

The High Court has erred by differentiating between a retired *Drangpon* and a *Drangpon* who has resigned to bring an undesirable ambiguity to existing law as well as the very case under consideration to deliberately undermine the purpose and intent of the *Jabmi* Act in order to strengthen the legitimacy of Dasho Damcho Dorji's appearance before court.

1. **The High Court's ruling defeats the intent and purpose of the *Jabmi* Act:** The appellant is dissatisfied with the ruling of the High Court because the Court's interpretation of section 24 of the *Jabmi* Act is devoid of the very intent and purpose of the legislation by playing with words (semantics) in order to superficially differentiate between a resigned and retired *Drangpon*. Does the technical difference and its interpretation serve the purpose of the said law and did the High Court take into account the intent and purpose of the law? If it did do so, its interpretation does not evince any wisdom in the exclusion of 'retired *Drangpon*' from practicing as *Jabmi*. The understanding of the appellant is that the intention of the *Jabmi* Act was to prevent former *Drangpon* from appearing and practicing in the courts as *Jabmis*, irrespective of how they may have *ended their service career*. It is a blanket prohibition and therefore, the distinction drawn by the High Court between "retired" and "resigned" is superficial and appears to be deliberate.
2. The High Court has reasoned that 'retired' means "*withdrawn from one's occupation, business, or office; having finished one's active working life*" or "*having given up one's work, office, etc., especially on completion of the normal period of service*". From the High Court's interpretation, to constitute retirement, a person must necessarily be "superannuated". The High Court observed that retirement is different from "resignation", which is interpreted as "*the formal act of giving up or quitting one's office or position A resignation can occur when a person holding a position gained through election or appointment steps down, but leaving a position upon the expiration of a term is not considered as resignation.*" Further, according to the High Court, section 24 of the *Jabmi* Act applies only in cases of a *Drangpon* who has retired or superannuated from the service after the retirement or attaining superannuation age and not to those *Drangpons* who have resigned.
3. There is no reason for the High Court to distinguish between a 'resigned *Drangpon*' and a 'retired *Drangpon*'. It is obvious from the definition of resignation and retirement that there is no fundamental



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difference between the two. Retired means “*withdrawn from one’s occupation, business, or office*” and “**resignation**” means “*A formal notification of relinquishing an office or position*” or “*the act or an instance of surrendering or relinquishing an office, right*”. The only difference is that retirement can happen in two ways: either through voluntarily resignation prematurely before superannuation, or retiring upon superannuation. This argument particularly holds good in light of the definition of retirement given by the Ninth Edition of Black’s Law Dictionary which defines retirement as “*Termination of one’s own employment or career, esp. upon reaching a certain age or for health reasons; retirement may be voluntary or involuntary.*” Therefore, **resignation is one form of voluntary retirement and section 24 of the *Jabmi Act* shall apply.** Hence, even a military officer or a doctor who has resigned from service or practice is referred to as a retired captain etc. or as a retired doctor never as a resigned officer or doctor.

4. Dasho Damcho Dorji did not contend that the *Jabmi Act* differentiated between ‘resigned *Drangpon*’ and ‘retired *Drangpon*’. This superficial distinction was created by the High Court. Such maneuvering, activism and interpretation by the High Court with questionable intention will tarnish the image of the judiciary at cost to society.
5. The true intent and purpose of the *Jabmi Act* is made succinctly clear by the lack of difference between ‘retired’ and ‘resigned’ in the Legal Dictionary published by the Royal Court of Justice, High Court, wherein both ‘resignation’ and ‘retirement’ mean “*Gongzhu*”. Further, section 24 of the *Jabmi Act* [**Dzongkha text**], the authoritative text as per section 71 refers to ‘retired *Drangpon*’ as “*Drangpon Droeb*” meaning a former *Drangpon* who can be either a resigned or retired person. A *Drangpon* becomes “*Drangpon Droeb*” by virtue of resignation as well as retirement. This makes clear that no difference was intended by the *Jabmi Act*.
6. Further, if the ruling of the High Court were to hold good, it means that any *Drangpon* who is even dismissed or his/her services terminated, can also appear and practice before the courts since such persons will not have superannuated.
7. The appellant believes the whole purpose and intent of section 24 of the *Jabmi Act* were:



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- a. Not to allow a former judge to appear before the court as a *Jabmi* whereby he/she could take undue advantage of familiarity with former peers and possibly privileged knowledge that would be advantageous to his/her client. Such possibilities could unduly influence the court in determining the outcome of the case to the benefit of a former judge's client;
 - b. It was intended that the sanctity of the post and position of former judges must be preserved;
 - c. It was also intended to avoid an unlikely but possible situation where a presiding judge could be lured or persuaded to resign and represent a litigant in the same case; and
 - d. The effect and impact of practicing after resignation or retirement of a judge is the same and therefore it serves no good purpose in distinguishing between the two.
8. **Non-application of mischief rule:** The appellant begs to take leave of the learned Justices of this Court to cite and draw wisdom of applying the Mischief Rule in interpreting section 24 of the *Jabmi* Act. This Rule has been well established in the *Heydon's case*³, by asking four questions while interpreting a Statute. They are: (i) *What was the common law before the making of the act;* (ii) *what was the "mischief and defect" for which the common law did not provide;* (iii) *what was the remedy parliament hath resolved and appointed to cure the disease of the commonwealth;* (iv) *and what is the true reason of the remedy.* This principle was reasserted in the case of *Smith V. Hughes*⁴. In the case of *Smith V. Hughes*, as per section 1(1) of the Street Offences Act (United Kingdom), it was an offence for a common prostitute to loiter or solicit in a street or public place for the purpose of prostitution. The prostitutes solicited and attracted the attention of passer-by from balconies or windows. Lord Parker CJ ruled that '**For my part, I approach the matter by considering what the mischief is aimed at by this Act. Everybody knows that this was an Act intended to clean up the streets, to enable people to walk along the**

³ Cited as 76 ER 637 in **G.P Singh's Principles of Statutory Interpretation**, 11th Edition, Wadhwa and Compnay, Nagpur, 2008, at p. 121. See also Halsbury's Laws of England, Fourth Edition (Reissue), Volume 44(1), para.1372.

⁴ Cited as [1960] 1WRL 830 in **N.S Bindra's Interpretation of Statutes** (Editor: Markandey Katju and S.K Kaushik), 9th Edition, Butterworths, Delhi, 2002, at p. 622-623.



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streets without being molested or solicited by common prostitutes. Therefore, viewing in that way, precise place from which a prostitute addressed her solicitations to somebody walking in the street became irrelevant'. Similarly, in the opinion of the appellant, applying the Mischief Rule, everybody knows that the *Jabmi* Act was intended to prohibit former *Drangpons* from practicing and appearing before the courts. It is irrelevant whether a *Drangpon* became 'former *Drangpon*' through resignation or retirement. The High Court, instead of using purposive interpretation or Mischief Rule to interpret section 24 of the *Jabmi* Act, it has perpetuated mischief in the law.

9. The appellant begs to submit that its position is not affected by the ruling on this particular subject and that it is immaterial to the case. However, the above argument has been submitted for consideration of the Hon'ble Court for the benefit of protecting the long-term interest of the judiciary.
10. **Concluding submission:** The High Court has taken advantage of the English text of the *Jabmi* Act to undermine intent and purpose of its provision by differentiating between the qualifying words 'resigned' and 'retired'. The purpose and intent of the *Jabmi* Act was to prohibit former *Drangpons* from appearing and practicing before the courts irrespective of whether the *Drangpon* has resigned or retired.

Part V

Constitutionality of judicial consideration of a matter under legislative process

Ruling of the High Court:

- (i) The appellate Courts are vested with the power of judicial review and being the final authority in its interpretation, the framers contemplated that the Constitution as the paramount law is **to guide the Government's conduct** as well as **of the legislature**;
- (ii) The roles of the interpretation of the laws are bestowed upon the Judiciary and the Constitution emphatically expounds the province and duty of the judicial branch **to say what the law is or the Constitution means** in light of the separation of powers under the Constitution;
- (iii) "Any citizens and more importantly so for those who occupy the seats of the august office of decision-making must be conscious of setting right precedent for the future well-being of a nation. Any failed legislative reconciliation must be sought to be resolved within the mandate and ambit of our Constitution. In view of the above, the Court



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deemed appropriate to establish certain procedural guidelines to bring forth any constitutional cases by the Members of Parliament in the future.”

Argument of the appellant:

The acceptance of the petition on a subject matter which was and is under legislative process tantamount to judicial adventurism and interference in the legislative process.

1. **Should the Constitution guide only the Government and the Legislature?** The appellant fully respects the ruling of the High Court that the appellate courts are vested with the power of judicial review. With full faith in the appeal system and being dissatisfied not only as a government but being deeply concerned that the ruling of the High Court would greatly undermine the functioning of democracy and the interest of good governance in our country, the appellant has appealed to the highest court for redressal. The appellant is perturbed by the High Court’s view that the purpose of the Constitution is to guide the Government’s conduct and that of the Legislature. While such a narrow understanding of the purpose of the Constitution causes doubts about the Court’s esteem for the book that provides the values and principles to guide the functioning of our society and to shape its destiny, it seems to convey a degree of judicial arrogance. It apparently believes in the infallibility of the Judiciary and does not see the Constitution as having a role in guiding its own conduct just as it must in respect of the other two branches of government. If such were to be also the opinion of the Supreme Court, the appellant fears that its appeal in which it has vested full faith and confidence, is doomed to suffer the same fate. The appellant, therefore, prays that the most esteemed Supreme Court will correct this obvious fallacy which, in fact, undermines the very purpose of the appeal system.
2. It would appear that the High Court had admitted the case, among other reasons, upon having concluded, without any basis, that the government and the NA had willfully set a wrong precedence, unmindful of the future wellbeing of our nation when the High Court ruled that ***“those who occupy the seats of the august office of decision-making must be conscious of setting right precedent for the future well-being of a nation”***. This is an extremely arbitrary and unfounded opinion condemning both the Legislature and the Executive. This baseless and negative perception of the government by



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the High Court has greatly disconcerted the appellant. Coming from where it does, the insinuation has given the Government much pain.

3. **Court as legislator and adjudicator:** The High Court has ruled that “any failed legislative reconciliation (consultation among law makers) must be sought to be resolved within the mandate and ambit of our Constitution”. This could be understood in various ways and, given the apparent disposition of the Court, it raises concern. Could this mean that the High Court is creating space for judicial intervention whenever the opposition or a section of the legislature is dissatisfied with the outcome of a contentious debate – and whenever popular sentiments are affected or can be fanned. The appellant is also unclear as to how the High Court determined that legislative reconciliation had failed in the first instance? What constitutes such failure? When consensus (reconciliation) fails in Parliament, the way of democracy is to put the matter to vote. The principle of majoritarian rule must be respected while constitutional questions must certainly be settled by the Supreme Court as provided for by the Constitution. One would hope the Court does not consider the failure of the minority opinion to prevail over the majority as legislative failure.
4. **Constitutionality of the Court to guide the Legislature in law-making process:** Can a Parliamentarian or a party in the Legislature seek intervention of the Judiciary on a matter that is under deliberation or is slated to be discussed in Parliament? On the ground that ‘legislative reconciliation’ had failed, the High Court accepted the case under review and ruled that the government was wrong even as the same matter was under legislative process. This seems to indicate that the High Court is inclined to assume the responsibility of guiding the Legislature in the making of law. It is the considered view of the appellant that such a premise is erroneous because:
 - a. This highly unconstitutional ruling will blur the line separating the three branches of government;
 - b. Any legislative issue that arises in Parliament must be resolved in the Legislature itself to its finality. Any difference of view with respect to legislation must be settled through majority decision in line with the majoritarian rule of democracy. This Hon’ble Court may be pleased to note that the subject matter of dispute under consideration, regarding the tax revision was endorsed by the NA;



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- c. Any member of Parliament seeking support of the Judiciary when unable to accept the will of majority does so to undermine the very basis of democracy and risks causing unnecessary confrontation between and among the branches of government; and
 - d. The High Court has cited Article 18(1) and Article 18(5) of the Constitution to mean, albeit implicitly, that it is one of the functions of the Opposition Leader (as a law maker) to take the Government to court even when efforts are underway for the issue to be resolved in Parliament. Even if this may not be the intent behind the ruling, its effect will be an Opposition Party that feels it has the support of the Judiciary to use the courts as an alternative mechanism in the legislative process. Since this issue has serious ramifications that would test the very foundations of democracy, the appellant pleads before this apex Court to rule on the matter with cautious wisdom.
5. **Should one branch of the government undermine the authority of another branch?** The appellant welcomes the Court's clarification that it is the duty of the Judiciary to interpret laws. It is with the same spirit that the appellant received the affirmation of the duty of the judiciary as having "*to say what the law is or the Constitution means in light of the separation of powers under the Constitution*". According to the letter and spirit of the Constitution, Parliament has supremacy in the making of law, just as the Judiciary is supreme in the interpretation of laws made by Parliament. The issue before the Hon'ble Court is whether the High Court undermined the principle of separation of power when it admitted and adjudicated on a matter that was and is under legislative consideration. The adjudication by the High Court on the subject matter has the effect of attempting to preempt legislative action by placing legal obstruction to the passage of laws that the opposition does not support. The Opposition Leader had not objected to the motion being adopted by the NA to amend the tax laws which contained ambiguities that gave rise to different understanding. Having accepted this resolution to amend the laws in the very next session, it came as a shock when the respondent filed a case before the Court. He chose to express his opposition in the Court! Unless the Supreme Court strikes down such manipulations to undermine the constitutional arrangements, the Opposition Leader may be inspired now and in the future to rely more on the courts to fulfill his legislative role.



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The Judiciary has also cause to be concerned over the possibility that the Legislature may undermine its status and tarnish its image by exercising its right by law to continue deliberations over matters that are *sub judice* with resolutions that may deviate from the rulings of the courts. This is very likely in this case. As per section 93 of the National Assembly Act [*Dzongkha text*], the Speaker can permit the deliberation in Parliament on a matter that is under consideration of the courts. Undermining of one branch of government by another and possibly creating constitutional crisis must never be allowed. It must have been such worries that gave birth to the wisdom of ‘justiciability’ on such subject matters. In the case under review, certain laws that must be applied are themselves under deliberation for amendment in Parliament. There was therefore, every reason for the Court, as is normal practice, to have refused the admission of the case or at least to delay the case until such time as the legislative process is completed.

6. **The Brandeis Rules:** The appellant begs leave to cite before the august Court the Brandeis Rules in light of its direct relevance. In the United States, the Courts have developed seven guiding rules for the admissibility of a petition and for determining the constitutionality of a statute⁵, which are also known as **Brandeis rules**⁶. Such a guide is

⁵ Justice Brandeis in the case of *Ashwander v. TVA*, (cited as 297 US 288 (1936) laid down seven condition-guideline to review constitutionality of a statute, what is understood as avoidance principle. It holds good till date and they are: **1.** The Court will not pass upon the constitutionality of legislation in a friendly, non adversary, proceeding, declining because to decide such questions 'is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.' [No advisory opinions. No collusive suits]; **2.** The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.'; **3.** The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied'; **4.** The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter. Appeals from the highest court of a state challenging its decision of a question under the Federal Constitution are frequently dismissed because the judgment can be sustained on an independent state ground; **5.** The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation. Among the many applications of this rule, none is more striking than the denial of the right of challenge to one who lacks a personal or property right. Thus, the challenge by a public official interested only in the performance of his official duty will not be entertained [Standing]; **6.** The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits; **7.** 'When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'

<http://dulaw.net/ConLawIISpr10/Documents/Ashwander%20Principles.pdf>, accessed on 30 November 2010.



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particularly important to avoid the path that could lead to direct collision of judicial review with political decision and legislative functions. In the opinion of the appellant, the most striking relevance to this case under dispute are rules 1 and 5 of the *Brandeis rules*. *Rule 1* states that “*it never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.*” *Rule 5* states that “*the Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation.*” In this case, the respondent was neither able nor called upon to show how he was injured.

7. **Canon of constitutional avoidance:** The “*canon of constitutional avoidance*” which the High Court has subscribed to is of the same nature as the Brandeis Rule. It is a rule of judicial construction used by the courts that if ‘a statute is susceptible to two constructions, by one of which grave and doubtful constitutional questions arise and by other of which such questions are avoided, the court’s duty is to adopt the latter.’ This seeks to ameliorate worries about countering majoritarianism will through judicial review with due deference and acknowledgement of legislative supremacy within the lawmaking sphere⁷. Based on this Rule, in the opinion of the appellant, in this case, the High Court should have avoided the constitutional issue.
8. **The doctrine of Political-question:** According to the Black’s Law Dictionary⁸, political question doctrine is defined as “*The judicial principle that a court should refuse to decide an issue involving the exercise of discretionary power by the executive or legislative branch of government*”. This doctrine evolved in the United States and specifically in the case of **Baker v. Carr**, where six-part test was formulated to determine cases of political nature⁹:
 - i. “*Textually demonstrable constitutional commitment of the issue to a coordinate political department;*” as an example

⁶ **Brandeis Rules Law & Legal Definition**, <http://definitions.uslegal.com/b/brandeis-rules/>, accessed on 5 December 2010.

⁷ “**The Executive Branch Shall Construe**”: **The Canon of Constitutional Avoidance and the Presidential Signing Statement**, http://law.ku.edu/~kulaw/publications/lawreview/pdf/Crabb_Final.pdf, accessed on 5 December 2010.

⁸ Seventh Edition, p.1179.

⁹ **Baker v. Carr**, http://en.wikipedia.org/wiki/Baker_v._Carr, accessed on 2 December 2010.



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of this, Brennan cited issues of foreign affairs and executive war powers, arguing that cases involving such matters would be "political questions";

- ii. *"A lack of judicially discoverable and manageable standards for resolving it;"*
- iii. *"The impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;"*
- iv. *"The impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;"*
- v. *"An unusual need for unquestioning adherence to a political decision already made;"*
- vi. *"The potentiality of embarrassment from multifarious pronouncements by various departments on one question."*

Similarly, the appellant is of the view that the High Court's ruling that the Government cannot unilaterally fix and revise tax under the Sales Tax Act, except by tabling before Parliament, has not only changed the form and shape, it has also diluted the essence, purpose and intent of the Sales Tax Act. In the opinion of the appellant, the question of **whether the Government should be empowered to fix or alter rate of tax is political**. And therefore, the High Court should have only determined whether the Sales Tax Act falls within the meaning of "*except by law*" under Article 14(1) of the Constitution.

9. **Concluding submission:** In the humble opinion of the appellant, the High Court has erred in admitting the petition of the respondent which is on a matter that is already under consideration of the NA by wrongfully interpreting Article 18(1) and Article 18(5) of the Constitution. In passing judgement on the subject, the High Court cast aside all caution that is particularly indispensable in the consideration of constitutional issues. The



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High Court has shown disrespect for the independence of the Legislature and the Executive, thereby, undermining the principle of separation of powers and creating conditions for conflict among the three branches of the Government.

PART VI

Question of jurisdictional competence of the High Court in the Matter under review

Argument of the appellant:

In the opinion of the appellant, the High Court has competence and jurisdiction to enforce and adjudicate the rights of a person only provided by Article 7 and Article 23(5) of the Constitution, and not on the issue under consideration by this Hon'ble Court.

1. If it may deem appropriate, the appellant also would like to seek wisdom and guidance from the learned Justices of the Supreme Court, whether the High Court can act as the Court of first instance on matters pertaining to the interpretation of the Constitution. This doubt stemmed from the following reasons:

- (i) Article 1(11) of the Constitution provides that “**The Supreme Court shall be the guardian of this Constitution and final authority on its interpretation**”. As a guardian, it shall be the final authority for interpreting provisions of the Constitution;
- (ii) In the opinion of the appellant, the High Court has competence and jurisdiction to entertain the constitutional matters expressly provided by Article 7 of the Constitution (concerning enforcement of fundamental rights) and Article 23(5) of the Constitution (concerning the disqualification of a person [member] to elective office). This entails that if the subject matter falls outside the scope and ambit of Article 7 and Article 23(5) of the Constitution, the Supreme Court is the sole authority which can adjudicate the matter. This argument is further substantiated by Article 21(9) of the Constitution, which provides that:

“The Supreme Court may, on its own motion or on an application made by the Attorney General or by a party to a case, withdraw any case pending before the



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High Court involving a substantial question of law of general importance relating to the interpretation of this Constitution and dispose off the case itself.”

Therefore, on the basis of Article 21(9) of the Constitution, the issue under consideration involves “a substantial question of law of general importance relating to the interpretation” of the Constitution, namely, the interpretation of Article 13, Article 14 and Article 18 of the Constitution, the Public Finance Act and the Sales Tax Act, which are outside the scope of Article 7 and Article 23(5) of the Constitution; and

- (iii) Further, in the opinion of the appellant, Article 21(18) of the Constitution providing every person to approach “courts”, means, a person can challenge the constitutional validity of a law if his/her right is infringed by a law, before the Supreme Court or the High Court, subject to the competence and jurisdiction submitted in above paragraph (ii). The scope and ambit of the High Court’s competence and jurisdiction is limited to the matters provided by Article 7 and Article 23(5) of the Constitution.

2. **Concluding submission:** In the humble opinion of the appellant, the High Court does not have jurisdiction and competence to interpret the provisions of the Constitution in relation to the case under review. The matter should have been returned to the Supreme Court upon having determined its lack of jurisdictional competence.

PART VII

Erroneous interpretation of the Constitution and relevant laws

Ruling of the High Court:

- i. Section 9 of the Public Finance Act and Article 14(1) of the Constitution do not differentiate between direct tax and indirect tax;
- ii. The Sales Tax Act, and the Income Tax Act are the laws within the meaning of “except by law” under Article 14(1) of the Constitution but the impugned provisions of the Sales Tax Act must be read with section 6.1 [non existent] and section 14(b) of the Public Finance Act 2007;



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- iii. The **specific law will prevail over the general law**;
- iv. The impugned provisions reflected under the Sales Tax Act and the Public Finance Act are **not contradictory**;
- v. The **Sales Tax Act is a specific law and the Public Finance Act is generic** but the impugned provisions are not distinctive and were **intended to apply for the same issues on the methods and procedure** of raising taxes;
- vi. The Government **shall “approve”** the fixation and revision of rates of sales tax, customs duty and excise duty on any range of commodities as per the Sales Tax Act, **and further introduce to the National Assembly for seeking authorization of Parliament** as per the provision of the Public Finance Act, and Article 13 of the Constitution in the form of Bill;
- vii. The raising of revenue and **introducing taxation measures merely along with the budget violates the constitutional mandate of introducing it as a Bill.**

Argument of the appellant:

The appellant begs to submit that the tax revision measures were decided by the Government in complete adherence to the provisions of the prevailing laws to serve the larger interest of the Bhutanese people. As such, no laws have been breached. The appellant has no doubt, however, that the High Court has erred gravely by not differentiating between direct tax and indirect tax according to the two separate laws which require different treatment and procedures for effecting changes in their rates. By so doing, the Court wrongly concluded that there is substantive and procedural violation of the Constitution.

1. **Non differentiation of taxes in the Constitution and the Public Finance Act:** The High Court has correctly pointed out that section 9 of the Public Finance Act and Article 14(1) of the Constitution do not differentiate between indirect tax and direct tax. The absence of specific mention of the two categories is obvious because the Finance Act is a generic law just as the Constitution is the most generic and progenitor of all laws. The Constitution provides the principles and framework for the establishment and functioning of government. Therefore, in providing that “*Taxes, fees and other forms of levies shall not be*



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imposed or altered except by law”, it establishes the guiding principle that, regarding such matters, government cannot act arbitrarily and that it can act only in accordance with law. It is as a consequence of this constitutional principle that such laws as the Public Finance Act, the Sales Tax Act and the Income Tax Act were enacted by Parliament.

If one were to look for specific guidelines beyond the principles in the Constitution for the enactment of any law, then society would either be deprived of many essential laws or be gifted with a Constitution that, for its specificities and details, will suffer the consequence of changing times. It will thus, fail to acquire the sanctity of a sacred and timeless document that it needs to be. Without the Constitution being such, our society will be left without a common and constant set of values to guide our collective endeavours of the kind that will be sustained by an abiding sense of equity, unity, security and justice. Likewise, the Public Finance Act provides the broad frame work for financial and fiscal policies and management and does not deal with the details and complexities of taxation causing the need for the more specific laws on taxation.

2. **The purpose and essence of the direct and indirect taxes:** A primary purpose of taxation is to create the enabling conditions for the pursuit of happiness by all Bhutanese. This is in keeping with the principles of state policy as enshrined in Article 9(7) of the Constitution which requires that “**The State shall endeavour to develop and execute policies to minimize inequalities of income, concentration of wealth, and promote equitable distribution of public facilities among individuals and people living in different parts of the Kingdom**”. These are also to ensure that the country becomes self reliant and that its sovereignty and independence are not compromised through perpetuation of dependence on foreign development assistance.

The differentiation of taxes into two separate kinds is to enable Parliament to authorize Government to act decisively and in an environment of certainty in respect of one kind of taxes so that the purpose of raising resources through taxes to realize these



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policy ends is not left entirely to the politics and uncertainty of Parliamentary approval. Through the Sales Tax Act, Parliament has delegated to the Government a definite share of its unpopular and difficult responsibility to raise the tax base as the ultimate source for the funding of all expenditures in respect of goods and services delivered by the State to the people. As our country progresses and as our people prosper, taxation will eventually affect the lives of every citizen to the extent that citizenship and certain rights may be directly related to payment of tax just as the people, as tax payers will see reason for demanding accountability on how their tax money is spent. Given such importance, and as conditioned by the Constitution, the task of levying and altering various forms of taxes needs to be regulated by law.

3. **Rationale for separate laws on taxation:** In the creation of laws on taxation, the wisdom of separating taxes into two broad categories, as is common everywhere, was applied to establish direct and indirect taxes to be regulated by the two separate laws (the Sales Tax Act and the Income Tax Act). The function of raising and altering direct tax, which has to do with obligatory payment of tax on account of income earnings by individuals or entities, being considered the more important, is retained by Parliament as legislated through the Income Tax Act. Accordingly, any change thereof must have direct parliamentary approval to be sought by Government in the form of Money Bills. In regard to the subject of indirect taxes, Parliament, in its wisdom, took the decision to give full authority to the Government through the Sales Tax Act. This does not mean that Parliament will no longer have any say on indirect taxes.

By virtue of the fact that parliament can question the Government on any issue and action of Government, and thereby hold it accountable, actions taken on such taxes by the Government will be subject to Parliamentary questioning and advice. It is in acknowledgement of this role of Parliament that the Government informed the NA of its decision to bring about certain changes in the indirect taxes before actual implementation (except for vehicles for which the special circumstances are explained under



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“Background of the case”). The essential difference between the two forms is that the incidence of indirect tax can be shifted to the ultimate consumer who has the option of choice in absolute or qualitative terms to buy or not to buy and accordingly pay more, less or no tax at all. In contrast, the incidence of direct tax falling under the Income Tax Act cannot be shifted to the consumer. It is for these reasons that different treatment and process for decision making become necessary.

4. **Why the two kinds of taxes need different treatment:** The very different nature of the two categories of taxes makes imperative the need for different laws that prescribe the conditions for their imposition, variation and administration. While alterations in direct taxes may be undertaken less frequently and swiftly and are meant to respond to the broader and longer term changes in social and economic circumstances and policies, the indirect taxes are normally of the kind that are imposed or altered as instruments to respond to the more specific, immediate and shorter term needs and policy changes. As to why indirect taxes need to be imposed swiftly has been explained under “Background of the case” at page 4. The reason why indirect taxes are not subject to legislative process for their revision has its basis in the belief of the earlier NA that Parliament must give power to the government to raise a reasonable amount of financial resource to deliver the services that it is mandated to without being subject to the cumbersome parliamentary process which could in the future, become highly politicized. It was noted then that raising new taxes, increasing rates etc in particular, would be something that the Members of Parliament would be loath to support and pass quickly.
5. **Legislative process and the need for speedy decision making in indirect taxation:** The structure and the process of our Parliament after the enactment of the Constitution have given cause to appreciate further the foresight of the past NA. Under the present system of legislative process, a government with a simple-majority in the NA will face difficulties to obtain immediate passage of its proposal on indirect taxes (as with all other bills) that are directly linked to the budget. More



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worryingly, obtaining approval of the National Council whose members may inevitably become politically inclined, will be increasingly difficult on unpopular tax increases. This will invariably result in joint sessions that may normally not be held in the same session (a delay of 6 months). In the meanwhile, the extent of politicization and vested interest influence that will come to bear on the Members of Parliament will be considerable. And when the joint session is held, the simple-majority government may not be able to garner the two-thirds (2/3) votes needed to get its tax bill enacted.

By the end of the long process, even if it were favourable, pre-emptive and countervailing action will have been taken by those who will be affected to the extent that in some cases, the reasons for tax alteration will be completely defeated. Such reasons will include, among others, social justice, economic equity, climate change mitigation or adaptation, protection of consumers from inferior goods, hazardous foods and commodities as infact, were the reasons for the revisions that led to this case. Specific example of vehicle import to reduce accident rate, promote social and economic equity, save foreign exchange and reduce pollution in cities has been cited earlier in this document. Such delays will allow importers/dealers to profit by taking advantage of prior knowledge.

6. **Precedence that will make weak governments weaker:** The biggest problem that delayed and uncertain legislative approval will create is a scenario wherein many programmes and plans, often of critical importance, in the approved budget will not be realized. In the extreme case, the Government can be disempowered, the budget rendered meaningless and parliament and government dissolved. It is important to remember that while the current Government is least likely to suffer from such an eventuality, given its strong majority in the NA and the highly apolitical and wise nature of the incumbent National Council, it is worthy precedence that we must create for future governance and governments. It is also true that this Government will not face any crisis for want of the revenue to be realized from the tax increases because of the adequate resources that it has already



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mobilized from development partners. But this happy situation is not going to prevail for too long with many of the donors having made clear their intention to withdraw from the 11th Plan onwards.

7. **Contradiction in Judgement:** The appellant welcomes the ruling of the High Court that the Sales Tax Act, and the Income Tax Act are the laws within the meaning of “except by law” under Article 14(1) of the Constitution and that these laws are not inconsistent with the Constitution. Since the Sales Tax Act is not *ultra vires* to the Constitution, the power to fix and revise rates of indirect taxes as delegated to the Government by authority of Parliament through the Sales Tax Act cannot constitute an unlawful act. This too has been established by the High Court in various words in its ruling. Further, by the same logic and reasoning of the High Court that section 9 of the Public Finance Act and Article 14(1) of the Constitution do not differentiate between direct tax and indirect tax, Article 14(1) of the Constitution also does not specify that fixation of rates of duty and tariff mentioned under the Sales Tax Act shall be done by Parliament.

The High Court has also ruled that “*except by law*” as enshrined in Article 14(1) of the Constitution, means that no taxes, fees and levies shall be imposed or altered except as provided by the “**existing laws**” or based on the new laws. The appellant begs to submit that it is one of these very laws, specifically section 4.2, Chapter 3, Part I of the Sales Tax Act, that mandates (the operative word used in the specific provision is ‘**shall**’) the Government to exercise the power of approving the fixation and revision in rates of sales tax as quoted hereunder:

“The fixation of the rates of Sales Tax and any revision thereof, and the range of commodities and service under the Sales Tax Schedule shall be approved by the Royal Government of Bhutan.”

But then, when the Government ‘approved’ the **indirect tax** revision in accordance with the power of approval granted by the Excise Act, the High Court contradicted its own ruling and



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further ruled that this perfectly lawful action of the Government is in contravention of the Constitution. Here, the appellant would like to submit that had the Government taken decisions on revising rates of income taxes (direct tax), it would have been in violation of an existing law because, the power to make changes on such taxes lies with Parliament as stated in the Income Tax Act. That is why the Government has routed its proposal for income tax changes through Parliament in the form of a Bill.

8. **Erroneous application of the doctrine of harmonious construction:** According to the High Court, by interpreting the provisions of the Sales Tax Act and the Public Finance Act as being harmonious, the power of approval (“approved”) granted to the Government by the Sales Tax Act is to be understood as having the power to submit Money Bills to Parliament. In other words, the **Government shall “approve”** the fixation and revision of rates of sales tax, customs duty and excise duty on any range of commodities as per the Sales Tax Act, **and further introduce to the National Assembly for seeking authorization of Parliament** as per the misinterpreted provisions of the Public Finance Act, and Article 13 of the Constitution in the form of a Bill.

This is at the very least, a ludicrous interpretation and ruling that injures the collective wisdom of the High Court and insults all those who will be affected by it. If the reasoning of the High Court were to hold good, the operative word in the Sales Tax Act should have been “**proposed**” and not “approved”. This interpretation undermines a law that is not *ultra vires* to the Constitution. The government has no need for a law that gives it the approval to submit a bill to Parliament. The preparation of bills and their submission to Parliament is one of government’s fundamental duties in Parliament. As such, why would there be a need to create a special provision in the Sales Tax Act to grant such unnecessary and meaningless power of approval to submit? **An approval is an approval.** And the power to approve variations in indirect taxes has been ‘authorized’ by Parliament through law enacted by it. If it were the intention of the Sales Tax Act to seek approval of Parliament to revise taxes under it, the



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law would have made it clear as it does in the case of land under as cited hereunder:

- (a) **“The Government shall levy and enforce a progressive land tax that shall be proportionate to the size of the landholding, its value, and that shall differentiate between the rural and other land categories”** (Section 312 of the Land Act).
- (b) **“The land tax and its revision proposed by the Government from time to time shall be subject to the approval of the Parliament”** (Section 313 of the Land Act).

9. The High Court further ruled that,

“the Ruling Government by introducing taxation measures has violated the procedural and substantive obligation under the Sales Tax, Customs and Excise Act 2000 and the Public Finance Act 2007 which invariably have also contravened Article 14, Section 1 of the Constitution” and held that the *“Constitution is a supreme law of the State and that any act of legislature or the executive branch, repugnant to the Constitution is void.”*

The High Court seems to have arrived at its decision after “harmoniously” construing provisions of the Sales Tax Act and the Public Finance Act. In the opinion of the appellant, there is a lack of coherence in the reasoning of the High Court and the resultant outcome of its decisions, when it ruled that the Government had contravened provisions of the Constitution in introducing taxation measures. The appellant is confused as to how an act of the Government in keeping with the provisions of the Sales Tax Act can be unconstitutional especially when its own ruling states that the very Act is consistent with the Constitution. Shouldn't the laws construed to be harmonious also result in harmonious action of the Government arising from direct application of the harmonized laws? To say that laws are



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constitutionally valid and that an act of the Government in keeping with such laws is in contravention of the Constitution is in itself an irreconcilable conclusion.

10. **To harmonize is not to destroy:** In this regard, the appellant looks up to the learned Justices of this apex Court to rule whether the High Court has correctly applied the doctrine **of harmonious construction** in support of their ruling against which its arguments are submitted below:

- a. As is popularly known, the doctrine of **harmonious construction** is used in the interpretation of a law, if there are two provisions in a Statute which may appear to be at variance from each other. The court, in such cases, may/should, when possible, construe in a way that both of them will stand and be given effect. The High Court has on the contrary, contrived to construct harmony between the provisions of the Sales Tax Act and the Public Finance Act in such a way as to render the provisions of the Sales Tax Act meaningless and ineffective. The result of the “harmonious construction” by the High Court leads one to believe that “*Parliament had given with one hand what it took away with the other*”. The construction that reduces one of the provisions to a useless slumber or dead letter is not harmonious construction. *To harmonize is not to destroy*¹⁰. It is feared that the doctrine has been applied only to avoid “*a head-on clash*” between the provisions of the two laws which would have caused the High Court to rule that the two laws are contradictory. Should such a ruling be made, then it is obvious that the provisions of the Sales Tax Act would prevail over those of the Public Finance Act as concurred by the High Court that *specific law will prevail over generic law* while having also concurred that the Sales Tax Act is a specific law;
- b. True harmonious construct in respect of the two laws is, indeed, to be found in the coherence of the generic law (the Finance Public Act) having “*authorized*” Government to *approve* certain taxes within the domain of indirect taxes as detailed in the specific law (the Sales Tax Act). As such, there is truly no conflict between the two laws. It is this construct that makes

¹⁰ G.P Singh, **Principles of Statutory Interpretation**, eight edition (Reprint), Wadhwa and Company, Nagpur, 2002, pp. 123-124.



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practical and gives meaning and effect to both the laws in faithful application of the *doctrine of harmonious construction*, as opposed to the contrived rationale offered by the High Court; and

- c. The above (b) construct is further supported by section 21 of the Public Finance Act, which intentionally saves **the obligations, rights, privileges, powers and liabilities acquired or accrued by the Ministry of Finance**". This means that the power to fix or revise rates of taxes as contained in the Sales Tax Act and as accrued to the Ministry of Finance or the Government prior to the enactment of the Public Finance Act, shall remain unfettered. But the High Court conveniently ignored to delve on this provision.

11. **Application of the same ruling in respect of the Public Finance Act:** If the reasoning of the respondent and the High Court were to be accepted, which requires that any revision of tax or levies be routed through Parliament, then anything done contrarily in exercise of the Public Finance Act should also be rendered unconstitutional. Section 78 of the Public Finance Act empowers the Government to regulate the prices of goods and services produced by state enterprises which are monopolies. Section 104(f) empowers the Ministry of Finance to determine any scale of fees, other charges or rates. These demonstrate that it is **not** only the Sales Tax Act which empowers Government to fix rates and fees but the Public Finance Act as well.

Similarly, section 79(b) of the National Environment Protection Act 2007 also empowers the Government to impose taxes and states that **"the Government may levy charges, including: ... Taxes or charges for raw materials or products posing specific environmental risks."**

If the court ruling were to apply here as well, as indeed, it must, then forbidding realities will make implementation extremely difficult as explained in the following section.

12. **Difficulties in implementing the High Court ruling could even cause constitutional crises:** Basing its definition of Money Bill on the practices of other countries where the parliaments are



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structured variously and are different from our unique system, the High Court ruled that anything that falls within the scope of Article 14(1), Article 14(2), Article 14(3) and Article 14(4) of the Constitution will constitute Money Bills. Consequently, this blanket coverage under Money Bills and application of the process thereof, will include:

- a. Taxes, fees and other forms of levies;
- b. The Consolidated Fund containing all public monies;
- c. Appropriation of public money; and
- d. Government loans, grants or guarantees.

When it made the above ruling, the High Court failed to take into account the complexities of the tax administration, our unique legislative process and the consequence of likely constitutional crises.

Firstly, according to the High Court's ruling, all fees and levies, collected by courts, municipalities, *Gewogs*, communities, libraries, museums and educational institutions are unconstitutional because they are not approved by Parliament (The different types of fees and levies are many as listed under **Annexure B**). But parliamentary approval in all such instances is simply not practical for the various governments - national, local and municipalities - to prepare and submit Bills to Parliament whenever any levy, including parking fees, are to be imposed or altered regularly in response to changing circumstances.

Secondly, as even the deposit of monies into the Consolidated Fund falls within the scope of Articles mentioned above, Government will now need to seek Parliamentary approval before any aid mobilization initiative such as the Round Table Meetings and any discussion with donors for development assistance. The fact that the amounts are never certain and will vary during implementation, will present further complications. Seeking funding assistance for development programmes and projects is a continuous process and effort of the Government in a dynamic Overseas Development Assistance (ODA) environment. Opportunities are seized



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whenever and wherever they arise while ensuring that it is not done indiscriminately and that our carefully framed ODA policies are not compromised. Many such opportunities cannot be planned and certainly, offers are not predictable either.

Thirdly, requirement of parliamentary approval for all loans which will include soft loans, will greatly constrain the capacity of the Government to compete and access badly needed resources. Because of the flexibility needed, the Government is authorized to avail such soft loans. The ruling will mean an immediate halt to the many important schemes that are in various stages of finalization and approval. These include, among others, credits from the World Bank, Asian Development Bank, International Fund for Agriculture Development, Austrian Government and Danish Government for improving market access of farmers, urban infrastructure, road network, rural electrification, school building etc.

Fourthly, delay or slowness mean possible loss of opportunity etc. in a world where every developing country is competing for the ever decreasing aid resources. This is not to speak of all the loans and ODA so far availed by the Government in accordance with sections 101, 124, 125, 126 and 127 of the Public Finance Act, becoming illegal. The appellant cannot imagine how even the donors will react when they realize that their grants and generous credits have been declared as illegal transactions. And what are the legal remedies the Courts can innovate? Considering that Parliament meets only twice a year, coupled with the legislative process that it entails, is the ruling of the High Court sensible and practical? In so submitting, the appellant wishes to make reference to the Constitution and the various laws, some of which fall within the purview of the case under review, which ensure, through stringent requirements, that our country will not suffer the consequence of irresponsible financial management. For the sake of our people, for the sake of preventing the gap between the rich and poor becoming wider, Bhutan cannot afford such legal and legislative hurdles that are not there in the laws and could exist only through interpretation.



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13. **Withdrawal of incentives given by government:** Not only has the Government imposed taxes and duties on vehicles, the Government also has provided fiscal incentives to boost private sector and economic growth as per the power granted by the Sales Tax Act and the Income Tax Act. Since all these fall under the category of ‘money’, are these not unconstitutional as well? As a matter of fact, the respondent had not raised any objection when such fiscal incentives were declared. By the logic and reasoning of the High Court and the respondent, any fiscal measure adopted by the appellant should be ruled as unconstitutional, and the incentives availed by various firms and companies reclaimed. Therefore, in the opinion of the appellant, in as much as the Government has the power to provide fiscal incentives to the businesses and companies by the power granted by the respective Acts, the Government also has the power to impose and revise various rates on items which are in the nature of indirect taxes.
14. **Bringing development to a halt and causing constitutional crisis:** The Supreme Court must understand that in the event the ruling of the High Court is upheld, all these incentives will have to be withdrawn. Likewise, all continuing motions for mobilizing development assistance will have to come to a grinding halt. Even the grants and credits for the Rural electrification, Farm Roads etc. that are in the final stages of being signed will need to be stopped with the possibility that the donors will redirect such assistance to other countries. These illustrate the extent to which the Court could be directly interfering not only in legislation but in the functioning of the executive in the areas of economic and social development, fiscal management, foreign policy and aid mobilization. The appellant would beg to submit that the Hon’ble Court must take note of the real possibility of a constitutional crisis that such a ruling will precipitate upon our unsuspecting and tranquil society.
15. **Legislation by the High Court on indirect tax:** In ruling that all tax revisions are subject to the same procedure, the Court pretended, even as it recognized the presence of an entire Sales



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Tax Act dedicated to indirect taxes that no such category of tax existed as far as the case was concerned and therefore ruled that all taxes are subject to uniform treatment. Should not the High Court have tried to understand the intent and purpose of their separate existence instead of denying their need? If the intent of the Public Finance Act were to refer all taxation matters to Parliament, as ruled by the High Court, then the Sales Tax Act and the Income Tax Act should have been either wholly repealed or merged under the Public Finance Act as a single tax law. But it was not the case and in fact section 21 of the Public Finance Act expressly saved the provisions of the laws that empowered the Government in matters relating to taxation.

By denying the existence of the clear difference between these two tax laws, the Court contrived to ignore the existence of the two laws which *ipso facto* require different treatment and mechanism for implementation and instead, has practically undone the intent and purpose of the Government and Parliament. The ruling of the High Court therefore, directly questions the legislative intent and rationale for the two different tax laws and goes beyond its function of interpreting law, to make its own law that is contrary to the legislative intent of the two relevant laws. This is not in keeping with the High Court's own reasoning wherein it was pointed out that while addressing the issue under dispute, common approach of purposive interpretation will be followed, based on the principle that:

"... the words, of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".

Having stated thus, the ruling of the High Court is devoid of *contextual* understanding in respect of the object of the Act and the intention of Parliament. Therefore, the claim of the High Court that the tools and principles sought to be used in interpreting the law is not compatible with its actual interpretation of law and its outcome.

16. **Meaning of the term "approved" and "authorized":** The High Court, ruled that the words "approve" and "authorize" should be



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read complementarily to each other, and cited Black’s Law Dictionary as textual authority to define them. In the opinion of the appellant, these words are contextually *authoritative*. The word “*approve*” is referred to as “*to give formal sanction to; or to confirm authoritatively*” and the word “*authorize*” is referred to as “*to give legal authority; to empower; or to formally approve; or to sanction*” are equally authoritative.

Accordingly, the appellant’s understanding is that an official or legal approval to a request, proposal or act is given by an entity that enjoys the power to do so by virtue of right or authority gained from a legally empowered source. In this case, the source of power is the supreme law-making institution, Parliament. The lawful process by which parliament delegated its constitutional authority to the government is the legislative process that yielded the law, namely, the Sales Tax Act. In so doing, Parliament fulfilled the two provisions of the laws pertaining to the subject of taxes as listed below:

- a. In order to ensure that Government is not compelled to act on tax measures in the absence of law, it fulfilled the Constitutional obligation of establishing a law to guide the government in deciding on indirect taxes as per Article 14 (1) of the Constitution which states that, “*All taxes, fees and other forms of levies shall not be imposed or altered except by law*”; and
- b. It acted to *authorize* the government, through law, to be vested with the power of approval in respect of indirect taxes as per section 9 of the Public Finance Act.

Therefore, the answer to the hypothetical question, ‘By what authority has the government approved revisions in the indirect tax rates?’ is ‘By authority of Parliament through an act of law’.

17. **Connotation of finality in the use of the term “Approved”:** The appellant has no doubt that authority from which power to act is derived is always a higher or lawful entity in a democracy.



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Once such power is authorized, the action taken is no longer subject to further approval of the authorizing entity. To illustrate the point, the appellant humbly submits that the Prime Minister authorizes his ministers to exercise power to approve proposals, requests or actions as may appear before them in their respective areas of responsibility. Once such authority is obtained, particularly through the cabinet, the question of further authorization does not arise. Likewise, the ministers may so authorize their officials to act with finality on matters delegated to them and hold them accountable. If they fail to exercise their power and revert to the minister for further authorization or approval, they are guilty of incompetence or inaction while also being held liable for administrative nonfeasance. In this case, Parliament, by virtue of having the power to make laws, has enacted the Excise Bill to delegate its power to the government to act with finality on matters concerning indirect taxes. Unless the law or the impugned sections of it are repealed by the same authority (Parliament), the government is not bound to “further introduce to the NA for seeking authorization of Parliament” as ruled by the High Court especially upon having also ruled that the Sales Tax Act is valid and is not *ultra vires* to the Constitution.

18. The appellant wishes to further submit that it is aware of instances when the word, authorization, is used to mean finality of decision making. This meaning cannot be applied in this case as Parliament will then have rendered ***null and void*** the impugned provision of the Sales Tax Act. But as the said provision was deliberately not repealed by Parliament, the correct interpretation must be the more commonly accepted meaning as that of a higher/lawful entity giving the power of final action to a lower/relevant entity. Therefore, the phrase “**shall be authorized by the Parliament**” is to be understood as conveying the power of Parliament to **either hold unto itself the responsibility or to delegate it to another entity.** Either way, the decision cannot be taken in any other way “except by law” as per the Constitution.
19. **Interpretation of taxing statute:** With the permission of this Hon’ble Court, the appellant would like to refer and strengthen the argument from external aids. Lord Macnaughten in the case



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of *Williams v. Permanent Trustee Co of New South Wales Ltd*¹¹, ruled that the tax statute must:

“be read and construed as it was enacted. The court has no authority to tear the Act to pieces and to rearrange the sections so as to produce an effect which, on the face of the Act as it stands, does not seem to have been intended.”

And therefore, to pursue such a process in the case of any Act would be a dangerous departure from the principle. It may also be appropriate to determine the validity of the taxation on three conditions developed in other legal systems¹². Namely, if a tax imposed is:

- a. Within the competency of the legislature imposing it;
- b. For a public purpose;
- c. Not in violation of fundamental rights guaranteed by Article 7 of our Constitution.

In the opinion of the appellant, the current taxation measures adopted by the Government are not contrary to any of the above mentioned conditions since the Sales Tax Act was enacted by a competent legislature then; the revision of tax was for a public purpose; and the taxation measure does not infringe any fundamental rights guaranteed under Article 7 of the Constitution.

20. **Power to determine what constitutes Money Bills:** The High Court defined Money Bill based on the practices of other countries where the parliament is structured variously and are different from our unique system, ruled that anything that falls within the scope of Article 14(1), Article 14(2), Article 14(3) and Article 14(4) of our Constitution will constitute Money Bills. In so ruling to define what constitutes a Money Bill, it does appear that the High Court has:

- a. violated section 238 of the National Assembly Act which states that **“If any question arises whether a Bill is a Money Bill or not, the decision of the Speaker thereon shall be final”**; and

¹¹ Cited as [1906] AC 249, 253 in N.S Bindra’s *Interpretation of Statutes* (Editor: Markandey Katju and S.K Kaushik), 9th Edition, Butterworths, Delhi, 2002, at p. 1061.

¹² Markandey Katju and S.K Kaushik (Editors) on N.S Bindra’s *Interpretation of Statutes*, 9th Edition, Butterworths, Delhi, 2002, at p. 1068.



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- b. Transgressed into and usurped the power and role of the Speaker.

In the absence of a definition of the Money Bill, the Constitution vests the Speaker with the power and responsibility for determining what constitutes such a Bill. And his decision is **final**. One must assume that there was a good reason and purpose for giving this task to the Speaker instead of leaving it to the interpreter and guardian of the Constitution. In view of this, the respondent should have first sought the Speaker's view as indeed, whether a Bill is a Money Bill or not, is purely within the domain of the Speaker's ruling. The respondent, therefore, stands guilty of undermining the NA and the role of the Speaker.

21. **Constitutional provision for origination of Money Bills:** Article 13(2) of the Constitution states that “**Money Bills and Financial Bills shall originate only in the National Assembly whereas any other legislative Bill may originate in either House**”. This is a very important provision conveying an important principle that makes clear a fundamental difference between the roles of the two houses of Parliament. **It establishes the origin of Money and Finance Bills.** It makes clear that such Bills cannot originate in the other chamber of Parliament. This is to be understood as meaning that by virtue of the Executive being present in the NA, the constitutional power and responsibility to initiate legislation on this most important matter of money and finance lies only with the government. It is what makes government succeed or fail, and what makes it popular or otherwise. It is the ultimate test of the will of governments to serve the deeper interest of people and nation as opposed to the interest of the rich and privileged as well as popular sentiments.
22. Beyond establishing the origin of such Bills, it is important to note that the provision is not intended to serve any other purpose and certainly not to impose a blanket limitation/prohibition on government against taking any decision on matters of money and finance. Rather, it is a limitation of the power of the National Council. Both in language and spirit, the provision does not



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require all matters pertaining to money and finance to be considered by the NA in the form of Bills. By this, it is to be understood that where the Law specifically requires parliamentary approval to be sought or in the event the government wishes to do so, the NA shall be the house of origin for such Bills. Most certainly, the provision does not constrain Parliament from enacting specific laws that enable it to delegate/authorise certain functions related to money and finance to the Government as it has done in the form of the Sales Tax Act.

23. **Question of “introducing” tax measures by clubbing it with budget:** The High Court ruled that the raising of revenue and introducing taxation measures merely along with the budget violates the constitutional mandate of introducing it as a Bill by defining the Money bill and the Financial Bill. Whether the Government chooses to inform the NA on its decisions on revision of indirect taxes along with the Budget or separately is immaterial in light of the submission being for information. Likewise, it is up to the NA as to whether it chooses to deliberate on the matter or not. However, the reason why the Government chose to present it in the manner it did is because it is directly related to the spending plan of the Government.
24. **Wisdom of respecting the Sales Tax Act:** It is important that taxes as covered under the Excise Act be left within the power of the Government to fix and alter, so that in the name of Money Bill and Financial Bill, it does not need to undergo legislative process that may or may not be approved. In this regard, there are two very instructive examples:
 - a. On 30th November in 1909, in the United Kingdom, the House of Lords rejected the budget proposed by the House of Commons, forcing immediate General Elections in January 1910¹³, which is a good example of constitutional crisis. The Liberal Government then was in need of closing the gap between tax and spending while faced with the dire need to

¹³ Iain McLean, “The 1909 budget and the destruction of the unwritten British Constitution”, <http://www.historyandpolicy.org/papers/policy-paper-94.html#SS>, accessed on 3 December 2010.



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modernize the Royal Navy, in the face of German colonial expansion. The budget proposed was to increase death duties, income tax and tax on spirits and tobacco¹⁴. This led to enactment of the [British](#) Parliament Act of [1911](#) cutting the powers of the [House of Lords](#) to veto any public legislation, budgets or "money bills" (dealing with [taxation](#)) and interfere with and retard [House of Commons](#). This Act was further amended in 1949 to reduce the power of the Lords by cutting the time they could delay bills; and

- b. Similar constitutional crisis happened in 1975 in Australia, when the majority of the Upper House (Senate) was dominated by the Opposition Party and its allies. The Senate refused to vote for the Money Bill. The Government then tried to explore alternative means of funding unsuccessfully which resulted dissolution of Parliament and calling for elections¹⁵. This crisis was received with shock, outrage and mourned as the death of democracy.
25. Warned by such situations, it was the intention of Parliament then that there should be stable **governance** and **responsible Executive**. **Stable governance** is attainable when certain means, tools and process by which the Government is authorized to raise certain internal resources (part of taxes), without having to go through long and uncertain procedures. A **responsible Executive** would mean a Government which will and can seek to ensure the equitable distribution of income and services as enshrined under Article 9(7) of the Constitution. It would also mean the fulfillment of the people's mandate and manifesto of the Government. This argument also draws its strength from the fact that, a small country like ours, considering the geo-political situation, cannot afford to see any kind of political instability that will undermine the security of the nation. If the Government is not able to raise its revenue to fulfill its mandate, it will face the moral compulsion of resigning and returning to the electorate, to

¹⁴ David Moore, "Parliament act 1911: constitutional treason or democratic inevitability?", <http://www.plymouth.ac.uk/files/extranet/docs/SSB/Moore%20final%20edited.pdf>, accessed on 3 December 2010.

¹⁵ **Australian constitutional crisis of 1975 – Definition**, http://www.wordiq.com/definition/Australian_constitutional_crisis_of_1975, accessed on 3 December 2010.



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undermine not only our fledgling democracy but exerting unnecessary stresses on the limited State resources. As mentioned earlier, the possibility of such Bills being passed will become slimmer in future, should the National Council in a possible confrontational mode with the NA, choose to block it and create hurdles aside from the likelihood that future governments will be more of the simple-majority kind. Therefore, it was the intention of the Government then as authorized by Parliament through enactment of the Sales Tax Act to delegate the power of imposing indirect taxes to the Government. Such political decision and wisdom of the Government and the legislature may not be questioned by the High Court, through the veil of Money Bills and Financial Bills, which were left undefined to suit our political scenario. Most certainly, this undefined concept in our Constitution must not be shaped purely by imported ideas without considering the context of our democracy and its unique architecture.

26. **Misquotation of laws:** The appellant would like to bring to the notice of the learned Justices of this Court, that the High Court has cited a few provisions of law which do not exist. These are Section 4.2, Chapter 4, Part II of the Sales Tax Act (*last paragraph, page 9 and page 62 of the High Court's Judgement, English Version*); section 6.1, Chapter 3, Part III of the Sales Tax Act (*paragraph 22.4.2, page 62 of High Court's Judgement*); section 6.1 of the Public Finance Act [*cited by the High Court's Judgement at page 62, paragraph 22.4.2*]. The appellant wishes to submit, that it does not construe this anomaly as deliberate or ill intended. The matter is raised with the prayer that the supreme Justices will correct these flaws to preserve the image and prestige of the judicial system and in order to remove the ambiguities in the Judgement.
27. **Concluding submission:** The appellant most humbly begs to submit that the Hon'ble High Court has deeply aggrieved the appellant in ruling that the decision of the Government to revise indirect taxes was unconstitutional. The pain is all the more difficult to endure when the decision was taken in complete adherence to laws created by Parliament and upheld even by the



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High Court itself as being within the bounds of the Constitution. The rulings of the High Court in this regard are based on lack of deeper understanding of the issue involved and the intent and purpose of the provisions of the Constitution and relevant laws. Likewise, the rulings show no understanding of the intent and purpose of the Government.

The appellant prays that the Hon'ble Justices of this Court will resolve the contradictions in the rulings of the High Court and uphold laws made by Parliament that are derived from the spirit and letter of the Constitution so that the lawful decision of the Government is given effect.

Part VIII
Concluding Submission

It is with deepest humility and sincerity that the appellant submits its appeal against the judgment of the High Court that would bear grave harm for governance, democracy and the future well being of the Bhutanese people. The consequences of this seemingly simple ruling are indeed far beyond the immediate matter of raising or lowering certain taxes. The ruling will redefine the functioning and capacity of government to deliver and to serve the people. In a very profound and definite way, the Bhutanese democracy will be deprived of strong and effective governance with little or no work for the powerful over-sight instruments that are meant to check and balance strong and active governments that our country deserves. And as successive governments fail without capacity to deliver, disillusionment with democracy will be inevitable and the compulsions arising thereupon, unpredictable.

The historic ruling creates conditions that will steer the executive and the legislature into conflicts to bring down governments for their failure to obtain parliamentary approval to raise resources for the funding of government programmes. Having created room for judicial adventurism and activism, the ruling, if not corrected, gives to the Courts power to dispense with prevailing laws on flimsy grounds and transgress into the realms of legislation and the executive. It provides the judiciary with the dangerous precedence of callous disregard for the judicious principles of "constitutional avoidance" and political questions.



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Most worryingly, Parliament faces the prospect of an opposition party that will wreck the House when it can and gladly walk into the courts to see its will prevail through adjudication if not through legislation. The ruling effectively compromises the noble intent and purpose of Article 18 of the Constitution.

How the Supreme Court will judge the case will be a test for both democracy and the judiciary itself. As the guardian and ultimate interpreter of the Constitution, it is a heavy burden. The wise Justices are well aware that this judgment, more than any other judgment, will be cited as the most historic. It will be scrutinized, analyzed and publicized by the media as it must. It will be recounted by our citizens now, and in the future, with pride or with regret. It will define the Supreme Court and the new judiciary.

This is when the true independence of the judiciary must shine. The appellant is confident that this highest and most learned Court of our land will demonstrate not only independence from the Executive as already recognized, but from popular sentiments, from pressures within or outside and from persuasions of the rich and powerful whose direct interests are involved. Above all, as Justices with independent mind and opinion, free from the domination of peer influence, the appellant has no doubt that, as empowered and willed by our laws, the erudite Justices will demonstrate their ultimate independence by departing from the tradition of collective anonymity and diffused accountability.

Mindful of not only the historic nature of the case and deeply conscious of the ramifications of its outcome for the future of our democracy and the interest of good and effective governance, the appellant has committed all its resources and time to present to the august Court, all the facts that are of relevance and which may be of use to the wise Justices. To that end, the Appellant has submitted in this appeal, among others, that:

- i. Despite the inadmissibility of the Respondent to petition against the government as per the law, the petition was admitted upon dismissing the prevailing law as “*outdated technical hitches*” and by making the case an exception from the very rule that the High Court established at the same time for such purpose;



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- ii. The High Court has opened the door to unlimited public-interest suits that could paralyze government and inundate the Supreme Court with frivolous ‘constitutional’ cases;
- iii. The High Court violated the principle of separation of power and transgressed into the domain of legislation by admitting and adjudicating a matter that is under legislative process;
- iv. The High Court has erroneously interpreted the provisions of the Constitution and the relevant laws to arrive at a ruling that is the outcome of flawed interpretation of law; one that cannot be implemented; and one that creates numerous conditions for constitutional crises; and
- v. The Government will be weakened, especially of those in the future with simple-majority, to the extent that it will be ineffective, being deprived of the basic means to mobilize resources, from within and without, to carry out its mandate.

Prayers

In light of the above submissions, the appellant prays before this Hon’ble Court to rule:

- (i) That this case should have been dismissed by the High Court for want of legal standing; or
- (ii) That the High Court should not have interfered in a matter that is already a concern of the National Assembly and as such, is under legislative consideration to be deliberated upon in the 6th Session of Parliament;
- (iii) That the resigned or retired *Drangpon* cannot appear and practice before the courts;
- (iv) On whether or not the High Court has jurisdiction and competence to interpret other provisions of the Constitution besides Article 7(23) and 23(5) of the Constitution; and
- (v) That the High Court has erred in ruling that the Government has carried out taxation measures in breach of provision of laws in revising the indirect taxes, assuming (but not yielding) that the respondent has legal standing to challenge the act of the Government and that the consideration of the case by the Court is



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deemed not to be an act of judicial interference in the legislative process.

3.2. Rebuttal by the Opposition Party, dated 19/01/2011 pages 9 in English.

MAY IT PLEASE THE HON'BLE SUPREME COURT,

The Opposition Party (the “Respondent”) prays to submit its response to the Appeal Petition dated 10 January 2011 of the Office of the Attorney General (the “Appellant”) against Judgment No. (Majority 10-100) rendered by the Hon’ble High Court on 18 November 2010 as follows:

***Part I:* General grounds of appeal**

The Respondent feels that despite being the first Constitution Case, the High Court has rendered a landmark judgment with so much conviction and reasoning that this case is bound to set a precedent which only time will testify. The Respondent therefore, has high regard for the manner in which the High Court has proved itself worthy of the faith and trust reposed in the Courts by the people.

***Part II:* Background of the case**

The Respondent once more reiterates that the Opposition Party fully acknowledges the power and responsibility of the Government to raise resources through means such as taxation. However, the Opposition is convinced that exercise of such powers must be within the ambit of our laws, in particular our sacred constitution. Therefore, it is not the substance but the manner in which the tax on motor vehicle and a host of other items is being sought to be levied by the Government without due regard to our laws and Parliamentary procedures as enunciated under Article 13 of the Constitution, that has compelled the Opposition Party to file this case before the Hon’ble High Court.

***Part III:* Inadmissibility of Opposition Leader to submit petition against the Government**

As submitted in our statement to the Hon’ble High Court, the Opposition Party has valid locus standi to move the Courts for redressal of a blatant violation of our laws, especially Article 13 and Article 14



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(1) of the Constitution, and Section 9 of the Public Finance. Therefore, in accordance with Article 18(1) read with Article 21(18) of the Constitution and Section 31.2 of the Civil and Criminal Procedure Code (CCPC) of Bhutan, the Opposition has not only a right to initiate this case but the responsibility to ensure that the Government acts in accordance with the provisions of the constitution and does not infringe upon the very law that it had enacted. Therefore, the Respondent concurs with the ruling of the High Court that the Opposition does have the right to move the Court in the matter before the Hon'ble Court.

Part IV: Error in the interpretation of the Jabmi Act

The Respondent fully agrees with the ruling of the High Court that Dasho Damchoe Dorji is neither a 'retired' Drangpon nor a 'resigned' Drangpon. He was transferred as the Director of the Office of Legal Affairs while serving as the Drangpon of Punakha District Court and he resigned as the Attorney General and not as a Drangpon.

Further, the Respondent prays to inform this Hon'ble Court that the Jabmi Act was passed in 2003, five years before the commencement of the Constitution. Read in the light of Article 7(10) of the Constitution, there is danger that Section 24 of the Jabmi Act violates the fundamental right of a person to practice a lawful trade. Therefore, the Respondent prays that the Hon'ble Court render null and void Section 24 of the Jabmi Act in accordance with Article 1(10) of the Constitution.

Part V: Constitutionality of judicial consideration of a matter under legislative process

As submitted in our statement dated 15 October, 2010 before the Hon'ble High Court, the National Assembly passed a motion to amend the Section 4.2 (Chapter 3, Part I); Section 6.1 (Chapter 4, Part II); and Section 4.1 (Chapter 3, Part III) of the Sales Tax, Customs and Excise Act in accordance with the provisions of the Constitution. The motion was introduced by the Chairperson of the Legislative Committee of the National Assembly.

On 23 August 2010, the Opposition Party submitted a petition to this Hon'ble Court that the implementation of the Government's taxation



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measures, without obtaining the approval of the Parliament in accordance with Article 1(10), Article 13(2), and Article 14(1) of the Constitution, and Section 2, Section 9 and Section 14(b) of the Public Finance Act, was unlawful and unconstitutional.

The **motion** by the Chairperson of Legislative Committee sought to amend the above mentioned provisions of the Sales Tax, Customs and Excise Act, whereas the **petition** of the Opposition Party sought to question before the Hon'ble High Court the action of the Government, viz., the implementation of tax measures without the approval of the Parliament.

Therefore, the said motion and the said petition sought to address completely different issues, and the Respondent cannot argue that the case "*was under consideration simultaneously by the Legislature and the Judiciary*".

In any event, the Respondent's argument that the consideration of the case by the Hon'ble High Court "*tantamount to judicial interference in the legislative process*" is erroneous in view of Section 93 of The National Assembly Act that states, "*Members shall refrain from referring to any matter in relation to which legal proceedings are active.*" Therefore, rather than the Judiciary interfering in the Legislative, the Opposition feels that the Legislature has interfered in the Judicial process by:

- (a) Amending the above mentioned sections of the Sales Tax, Customs and Excise Act and Public Finance Act while the case relating to the violation of these acts were under adjudication by the High Court; and
- (b) Suspending the import of all light vehicles pending the case before the Supreme Court, without any type of injunction or order from the Hon'ble Supreme Court.

Therefore, the Respondent is of the opinion that the Government has knowingly and intentionally committed contempt of Court, as well as violated Article 7(10) of the Constitution for violation of "**the right to a lawful trade.**"



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Part VI: Question of jurisdictional competence of the High Court in the matter under review

The Respondent has no doubt whatsoever, that the Hon'ble High Court has jurisdiction to adjudicate this case in view of Article 1(11), Article 21(9), and Article 21(18) of the Constitution. Therefore, the allegation of the Appellant that the Hon'ble High Court lacks jurisdiction is not only unreasonable but irresponsible.

Part VII: Erroneous interpretation of the Constitution and relevant laws.

1. "Except by law" under Article 14(1)

The Appellant argues that the Government has revised the tax rates as per the existing laws viz., Sales Tax, Customs and Excise Act, 2000 which provides that the fixation and revision of sales tax, customs tariff and excise duty shall be approved by the Government and therefore, has not infringed any provision of the Public Finance Act, 2007 or Article 14(1) of the Constitution which states "*Taxes, fees and other forms of levies shall not be imposed or altered except by law.*"

The Respondent maintains that the clause "except by law" in Article 14(1) of the Constitution ("*Taxes, fees and other forms of levies shall not be imposed or altered except by law*") must be interpreted to mean that specific legislative must be passed every time taxes are imposed or altered. This is also consistent with Section 9 of the Public Finance Act which states that "Raising of revenue through taxes shall be **authorized by the Parliament**"; and with Section 14(b) of the Public Finance Act which states that: "*The Minister of Finance shall be responsible, inter alia, for proposing taxation measures to the Parliament....*"

If, as the Appellant argues, "except by law" must be understood to mean that "taxes may be imposed or altered as per the provisions of the laws enacted thereof" then, having enacted such laws, Parliament would have no authority to question the imposition or increase of taxes. On the other hand, the Government would be able to impose or increase taxes unilaterally, and checks and balances between the Legislature and the



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Executive on taxation, as intended in the Constitution, would be completely undermined.

Taxes, especially increasing taxes, have an important impact on the lives of the people and therefore, is given specific mention in the Constitution. As such, people expect their representatives in Parliament to engage in through discussions, each and every time the Government proposes to impose or increase taxes. That is the intent of Article 14(1) of Constitution, the implementation of which is clearly specified in Article 13 (2) of the Constitution which states that “*Money Bills and financial Bills shall originate only in the National Assembly whereas any other legislative Bill may originate in either House.*” Taxation is a money bill and therefore, must necessarily fulfill the procedures under Article 13 of the Constitution, in order to be effective.

2. “Taxes” referred to in the Public Finance Act and the Constitution mean all taxes, including direct, indirect and any other tax measures.

“Taxes” mentioned in Section 9 of the Public Finance Act must refer to all forms of taxes, including what the Appellant calls “the indirect taxes”, as the Act regulates all aspects of the financial management of the Government. This is evidenced by the Preamble of the Public Finance Act which reads “*An Act to regulate the financial management of the Royal Government of Bhutan in order to promote the effective and efficient uses of public resources, strengthen accountability and provide statutory authority and control for sound and sustainable fiscal policy*”, and by provisions in the Act which cover all aspects of financial management including public finance, revenue, accounts, budgets, appropriates, loans and grants.

Similarly, the “taxation measures” that the Minister of Finance is responsible for proposing to the Parliament as required by Section 14(b) of the Public Finance Act must also refer to all forms of taxes, and not just “indirect taxes” as argued by the Appellant.

3. Provisions of Sales Tax, Customs and Excise Act are inconsistent with the Public Finance Act and the Constitution.



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The Respondent maintains that if Section 4.2 (Chapter 3, Part I) of the Sales Tax, Customs and Excise Act which provides that “*The fixation of the rates of Sales Tax and revision thereof shall be **approved by the Royal Government of Bhutan***” is construed to mean that the Government may fix or revise taxes without authorization of Parliament as interpreted by the Appellant, then it would conflict with Section 9 of the Public Finance Act which states that “Raising of revenues through taxes shall be **authorized by the Parliament.**”

Furthermore, such interpretation of Section 4.2 (Chapter 3, Part I) of the Sales Tax, Customs and Excise Act would be inconsistent with Article 14(1) and Article 13(2) of the Constitution. Therefore, such interpretation of the above Section would also necessarily be rendered null and void under Article 1(10) of the Constitution.

Similarly, Section 6.1 (Chapter 4, Part II) and Section 4.1 (Chapter 3, Part II) of the Sales Tax, Customs and Excise Act would also conflict with Section 9 of the Public Finance Act, and would be inconsistent with Article 14(1) and Article 13(2) of the Constitution if the interpretation of the Appellant is to be admitted. Accordingly, the above sections would also be rendered null and void under Article 1(10) of the Constitution.

Therefore, the only way to interpret Section 4.2 (Chapter 3, Part I), Section 6.1 (Chapter 4, Part II) and Section 4.1 (Chapter 33, Part III) of the Sales Tax, Customs and Excise Act is to harmonize them with Section 9 of the Public Finance Act, so as to mean that rates of Sales Tax, Customs or Excise duties and revision thereof, shall first **be approved by the Government** as per the above sections of the Sales tax Act and then **authorized by Parliament** as per Section 9 of the Public Finance Act and Article 13(2) of the Constitution.

Such inclusion of provisions giving authority to Parliament to authorize fixation or revision of taxes was not a new concept, especially for acts which were passed on the eve of Parliamentary democracy besides the Public Finance Act. A good example, as pointed out by the Appellant, is the Land Act of 2007, which deliberately subjects the power of the Government to levy land tax under Section 312 to the approval of the Parliament under section 313. Similarly, fixation and revision to pay and salary by the Pay Commission must first be approved by the Lhengye



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Zhungtshog and then authorized by Parliament as per Article 30(3) of the Constitution.

4. Legislative procedure for introducing taxation measures in Parliament.

The Respondent maintains that the legislative procedure for introducing all taxation measures is provided in Article 13(2) of the Constitution according to which “*Money Bills and financial bills shall originate only in the National Assembly whereas any other legislative Bill may originate in either House*”.

“**Money Bills and financial bills**” includes all tax measures and all forms of taxes, and are not limited to “fixation and alteration of taxes which are within the purview of the Income Tax Act” as argued by the Appellant. As such, any measure to fix and alter any taxes must be deliberated in the Parliament. This requirement is further elaborated in Section 14(b) of the Public Finance Act which states that “The Minister of Finance shall be responsible, inter alia, for proposing taxation measures to the Parliament....”

Conclusion

The Appellant’s main argument that the Sales Tax, Customs and Excise Act provide provisions for “indirect taxes” while the Public Finance Act should apply only to “direct taxes” is wrong. Section 9 of the Public Finance Act, which was enacted a good seven years after the Sales Tax, Customs and Excise Act, states that “Raising of revenues through taxes shall be authorized by the Parliament” and does not distinguish between different types of taxes. “**Raising of revenue through taxes**” means all forms of taxes, including “indirect taxes” as indirect taxes also intended to raise revenue.

The provisions of the Sales Tax, Customs and Excise Act that empowers the Government to fix and revise taxes must be read with Section 9 of the Public Finance Act and Article 13 and Article 14(1) of the Constitution. This was also the view of the Chairperson of the National Assembly Legislative Committee who submitted a motion to “make



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necessary amendments to the Sales Tax, Customs and Excise Act of the Kingdom of Bhutan, 2000” in order to ensure that “any change in Sales Tax and Customs duty needs to be done in concurrence with the Parliament.”

Prayers

In view of the above, the Petitioner prays before the Hon’ble Supreme Court to:

- (a) Uphold the landmark judgment No. (Majority 10-100) dated 18 November, 2010 of the Hon’ble High Court.
- (b) Rule that the implementation of the tax measures by the Government without the approval of Parliament violates Section 9 and 14(b) of the Public Finance Act and Article 13 and 14(1) of the Constitution;
- (c) Rule that the taxes collected by the Government without the authorization of Parliament be returned with interest to the affected parties, and hold the Government liable for violation of their rights under Article 7(10) of the Constitution.
- (d) Rule that all forms of taxes shall be henceforth, regarded as money bills and subject to the “*procedure of bills*” as enunciated under Article 13 of the Constitution.
- (e) Hold the Government liable for contempt of Court for suspending the import of all light vehicles without obtaining the permission of the Hon’ble Supreme Court; and
- (f) Order the Government to revoke its circular suspending the import of all light vehicle and pay appropriate compensation to the affected parties with immediate effect.

3.3. Closing argument by Office of Attorney General, dated 27/01/2011 pages 8 in English.

**MAY IT PLEASE THE MOST ILLUSTRIOUS SUPREME COURT
THAT,**



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Most humbly, as directed by this Hon'ble Court, the Office of the Attorney General, representing the appellant, the Royal Government of Bhutan (hereinafter referred to as the "the appellant") begs to submit, hereunder, its closing argument and additional Annexures as directed by this Hon'ble Court:

A. RESPONSES TO THE ARGUMENTS SUBMITTED BY THE RESPONDENT

1. The respondent argued that "*it is not the substance but the manner in which the tax on motor vehicle and a host of other items is being sought to be levied by the Government without due regard to our laws and Parliamentary procedures as enunciated under Article 13 of the Constitution, that has compelled the Opposition Party to file this case before the Hon'ble High Court*".

The appellant deeply appreciates the acknowledgement of the respondent that the filing of the case has nothing to do with the substance of the Government's action. This is an extremely important and significant statement as it recognizes the purpose and intention of government as being not only lawful but good for society. On the essence of his argument, the appellant is compelled to submit that it is the respondent who has wilfully violated the procedures prescribed by law in initiating the petition before the courts as reasoned below:

- (a) *Firstly*, the respondent did not have legal standing to file petition in accordance with section 31.2 of the Civil and Criminal Procedure Code since he failed to prove how he was injured;
- (b) *Secondly*, the respondent misinterpreted Article 18(1) and Article 18(5) of the Constitution and wrongfully took the Government to court when he was personally not aggrieved. This was done in the name of public interest, in violation of section 31.2 of the Civil and Criminal Procedure Code;
- (c) *Thirdly*, the respondent falsely claimed that the case was that of the Opposition Party, when he neither sought the consent of the Opposition Party nor produced any evidence of the consent of any other member;
- (d) *Fourthly*, the respondent, as leader of the Opposition Party, has inappropriately used the letterhead and letter number of the



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National Assembly of Bhutan while his petition is against the Government and the National Assembly; and

- (e) *Lastly*, the rebuttal by the respondent violates the most basic procedural requirement of affixing a legal stamp to his submission before this Hon'ble Court as required under section 133.2 of the Civil and Criminal Procedure Code. By law, the respondent's submission is invalid and, as such, has no standing in a court of law.

The respondent is, therefore, guilty of the very charge he has levelled against the Government while the appellant's action is completely in accord with the letter and spirit of the laws of the land and, as such, violates no Parliamentary procedures as shall be further explained under point 6 while explaining section 9 of the Public Finance Act.

2. The respondent argued that section 24 of the *Jabmi* Act violates the fundamental right of a person to practice a lawful trade as enshrined in Article 7(10) of the Constitution. In the opinion of the appellant, this argument is irrelevant because the appellant does not consider it to be its responsibility to submit its views on this argument concerning the constitutionality of the *Jabmi* Act as the appellant is not the defender of a law made by Parliament. Such views, regardless of their validity, ought to be expressed by Members of Parliament in Parliament in order to change the laws if necessary. Amending laws is a legislative function and the attempt to involve the Hon'ble Court betrays, yet again, the respondent's lack of respect for the principle of separation of power and his preference to legislate through the courts. Furthermore, this idea has no direct bearing on the case under review.
3. The respondent argued that the Legislature has interfered in the judicial process by amending the provisions of the Sales Tax, Customs and Excise Act (hereinafter referred to as the "Sales Tax Act") and the Public Finance Act even while the case relating to the violation of these Acts were under adjudication by the High Court. In the opinion of the appellant, this argument does not hold good because:
 - (a) This argument may have had some validity had the High Court been considering the case before it was, in fact, taken up by the Legislature as it did in its 5th session by requiring the Government to submit proposals for amendment to the relevant laws in the very next session (last winter session). For the respondent to raise such an argument upon having taken the



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very same issue to the Courts immediately after the National Assembly decided to consider amending the laws is a misrepresentation of truth and a deliberate attempt to create misunderstanding between the Judiciary and the Legislature; and

- (b) The appellant argued in its appeal under Part V, pages 23 - 30, dated 10 January 2011 that the acceptance of the case by the courts would amount to direct judicial interference in the process of legislation. This new argument of the respondent simply confirms its insistence on violating the principle of separation of power and brings closer the possibility of a constitutional crisis arising from conflict between the three branches of the Government.
- 4. The respondent also argued that the Government has knowingly and intentionally committed an act of contempt of court, and violated Article 7(10) of the Constitution which guarantees “the right to a lawful trade”. The appellant would like to submit the following:
 - (a) Allowing the import of cars under the revised tax rates would have been a violation of the court injunction thereby constituting an act of contempt of court;
 - (b) Allowing vehicles to be imported under the earlier tax rates would have rendered this appeal purposeless; and
 - (c) Given that the case was admitted as public interest litigation and, since a breach of fundamental rights may only be challenged by a person who is directly affected, the appellant is moved to inquire as to how the respondent sustained personal injury? The appellant is not aware that the respondent is a car dealer. In this regard, the Hon’ble Court may wish to note as submitted in **Annexure A and Addendum to Annexure A**, that the revision of tax rates for import of light vehicles has not prevented the car dealers from selling 1426 cars in the five months before the temporary halt. Therefore, rather than worry about how the car dealers may be affected, one needs to worry about how the court case is resulting in revenue losses which would otherwise benefit the poorer sections of our society.



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5. The respondent argued that the High Court has jurisdiction to adjudicate this case. The opinion of the appellant was submitted on 6 January 2011 before this Hon'ble Court under Part VI, pages 31-32.
6. Assuming but not yielding that the respondent has legal standing and assuming that this Hon'ble Court chooses to determine the merit of the case, the appellant would like to clarify on the application of section 9 of the Public Finance Act as desired by the respondent as follows:
 - (a) This Hon'ble Court may wish to refer to the argument of the appellant submitted on 10th January 2011 [*at page 34, paragraph 1*] on this issue. In recalling the essence of the argument, it may be noted that the Hon'ble High Court had very wisely harmonised the contested provisions of the **Sales Tax Act** and section 9 of the Public Finance Act thereby concluding that the two laws are not in conflict and that they are equally valid as neither is in violation of the Constitution. Furthermore, as generic laws, the Constitution and the Public Finance Act establish clearly that Government cannot arbitrarily impose or alter taxes "*except by law*" and as may be "*authorized by Parliament*". It is in pursuit of Article 14(1) of the Constitution that Parliament enacted the tax laws so that "*taxes, fees and other forms of levies*" cannot be raised by government in any other way "*except by law*" in order that the government will be bound to abide by stringent terms and conditions. Likewise, it is in keeping with section 9 of the Public Finance Act that the specific law on **Sales Tax** was enacted so that Government can be "*authorised by Parliament*". Being thus "*authorized by Parliament*", the tax revisions were "*approved by the Royal Government of Bhutan*" in accordance with Section 4.2, Chapter 3, Part I of the Sales Tax Act and in adherence to the Constitution; and
 - (b) That the generic Public Finance Act and the specific Sales Tax Act are harmonious and equally valid are again made clear by section 21 of the Public Finance Act which states that "*The provisions of this Act shall not affect the obligations, rights, privileges, powers and liabilities acquired or accrued by the Ministry of Finance prior to this Act.*" This clause saves the power of the Government acquired *under the Sales Tax Act*. It may further be noted that while both the Acts were in existence before the Constitution which came into effect only in 2008, the Public Finance Act was enacted seven years after the Sales



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Tax Act. The saving clause is therefore, all the more pertinent and significant as it is meant to ensure that no rights, powers etc. of the Ministry of Finance as specified under the Sales Tax Act and other relevant Acts are altered by the later Act. Had this not been the intention, the Public Finance Act would have repealed such powers of government accrued through a previous law. To insist otherwise is to assume that the legislators were ignorant of the previous laws and undermine the wisdom and sagacity of the Legislature.

This Hon'ble Court may kindly note that the High Court had conveniently ignored this particular provision of the Public Finance Act.

7. The respondent, concurring with the reasoning of the High Court argued that revision of rates for taxes must be **first approved by the Government** as per the provisions of the Sales Tax Act and then be subject to authorisation of Parliament. As an analogy, the respondent cited Article 30(3) of the Constitution to substantiate his argument that fixation and revision of pay and salary by the Pay Commission must be first approved by the *Lhengye Zhungtshog* "and subject to such conditions and modifications as may be made by Parliament". This very effectively supports the argument of the appellant, i.e, if Article 14(1) of the Constitution was intended to convey that alteration of tax rates must require some form of further consideration by Parliament, then the Article would have made this very clear as in the case of pay revision. But it does not. Here again, the clause, "subject to such conditions and modifications as may be made by Parliament" is not to be understood as meaning the same as "further introduce to the National Assembly for seeking authorization" which is a clause that does not exist in any of the laws referred to by the Hon'ble High Court. The provisions of the Sales Tax Act delegating power to fix and revise rates of tax to the Government, is therefore, consistent with Article 14(1) of the Constitution.

B. CONCLUDING ARGUMENT

8. The appellant begs leave to reassert its arguments submitted before this Hon'ble Court on 10 January 2011 that it is convinced beyond doubt that:
 - (a) The respondent has no legal standing to sue the Government for the alleged breach of law in revising indirect taxes;



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- (b) The *Jabmi* Act does not differentiate between the ‘retired’ and ‘resigned’ *Drangpon* and therefore, the prohibition to appear and practice before the courts applies to all former *Drangpons*;
 - (c) It is unconstitutional for the respondent to submit to the courts a matter that is under legislative consideration and furthermore, it is not correct for the High Court to entertain such an attempt;
 - (d) The appellant is firm in its view that the High Court has no jurisdictional competence to interpret and adjudicate on a matter “involving a substantial question of law of general importance relating to the interpretation” of the Constitution; and
 - (e) Assuming but not yielding that the respondent has legal standing to file petition before the court, the appellant wishes to reiterate its firm conviction that the Government decision to revise certain indirect taxes is not unconstitutional and that it was taken in accordance with prevailing laws and the Constitution.
9. As ordered by this Hon’ble Court, the appellant would like to submit the following Annexures:
- (a) **Annexure C**, the Resolution of the National Assembly, containing 9 pages, along with the National Budget – Financial Year 2010-11, proving that the issue under dispute before this Hon’ble Court was/is under Legislature’s consideration [*relevant paragraphs of the resolution, pages 3 and 7 and page 72 of the Budget highlighted*];
 - (b) **Annexure D**, the list of tax revision carried out by the Royal Government of Bhutan since the enactment of the Sales Tax, Customs and Excise Act 2000, proving that the Government has been revising the indirect taxes as per the laws;
 - (c) **Annexure E**, the list of tax revision carried out by the Royal Government after enactment of the Public Finance Act 2007; and



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- (d) **Addendum to Annexure A**, the list of vehicle imported since revision of sales tax rates.

FOR THIS ACT OF PATIENT HEARING AND KINDNESS, THE APPELLANT IS DEEPLY INDEBTED TO THE ERUDITE JUSTICES OF THIS ESTEEMED COURT

3.4. Closing argument by Opposition Party, dated 27/01/2011 page 1 in English.

May it please the Hon'ble Supreme Court,

The Respondent in the above Appeal prays that we have made all our submissions to the Hon'ble High Court and in our response dated 19 January, 2011 to the Hon'ble Supreme Court.

In this closing hearing, the Respondent further prays that in our petition to the Hon'ble High Court the Opposition Party had requested for an Order of the Court to direct the Government to provide us with a lawyer or appropriate fund to hire a lawyer. The Hon'ble High Court in its judgment has not made any specific ruling on this submission.

Therefore, in view of the fact that the Opposition Party is also an institution of the Royal Government just as the Ruling Party is, and also this is a constitutional case that has an important bearing in the interest of the country and the people, we once again pray the Hon'ble Supreme Court to rule that the Government either provide lawyers or necessary and appropriate funding to hire lawyers, by the Opposition in such cases in future.

- 4. Decision of the Constitutional Bench of the High Court (Translated version):**
The Court constituted as above, after extensive deliberation on facts and issues and the application of laws and commonly accepted legal principles and the Constitution, do hereby unanimously rules as follows:

22.1. Locus Standi and the Scope of Court's Jurisdiction



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Based on Findings No. 16, the Court hereby rules that:

22.1.1 No *locus standi* of the case be cited as precedent invoking Article 18, Section 1 of the Constitution by Opposition Leader or by any individual members of the Opposition Party unless a written consent is availed in writing of all the Opposition Party Members countersigned by the Secretary General of the National Assembly to file a constitutional case;

22.1.2 Article 18, Sections 1 and 5 do not guarantee *personam* jurisdiction without securing a written consent as (22.1.1) above of all the Members of the Opposition Party for filing constitutional case or seek Writ Petition under Article 21, Section 10 of the Constitution; and

22.1.3 No Members of the National Assembly in the Ruling Government, either individually or *en bloc* shall have the right to invoke jurisdiction and initiate constitutional proceeding on Parliamentary matters. It shall be construed as defection in violation of Article 15, Section 10 of the Constitution.

22.2 Ex-Drangpon: *quo standi* issues

Based on Findings No. 17, the Court hereby rules that:

22.2.1 the representative of the Petitioner although an Ex-Drangpon does not come within the ambit of the word "retired Drangpon" as his past service records are evident that he was appointed as the then Attorney General, and have thereafter resigned from the post to contest an election;

22.2.2 the representative of the Petitioner by then had not reached the age of superannuation and therefore, not a "retired Drangpon;"



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22.2.3 the representative of the Petitioner's *quo standi* in the current case can not be construed as "practice" before the Court; and

22.2.4 the particular section bars the retired Drangpons to practice before any courts as a *Jabmi* and shall not apply to retired Drangpons from appearing for his own cause or as *ngotsab*.

22.3 Government funding: issues related to hiring a lawyer to represent the Petitioner

Based on Findings No. 18, the Court hereby rules that in absence of any substantive law, Legal Aid:

22.3.1 should be granted only to meet the ends of justice, uphold the fundamental principle of fair trial, equal justice before the law and effective protection of laws;

22.3.2 should be granted when the person is in need of legal assistance by reason that he or she is indigent to obtain the legal services of a private legal practitioner in the interests of justice; and

22.3.3 is only meant to be applied in cases where the person is an indigent as provided under section 34 of the Civil and Criminal Procedure Code. Thus, the Court dismisses the issues related to funding for the legal aid to the Opposition Party.

22.4. Breach of procedural and substantive obligations and alleged violation of Constitution

Based on Findings No. 19 and 20, the Court hereby rules that:

22.4.1 the taxes referred in Section 9 of the Public Finance Act 2007 and the Article 14, Section 1 of the Constitution means all taxes and do not differentiate between direct or indirect taxes;



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22.4.2 the Sales Tax, Customs and Excise Act and Income Tax Act are the laws within the meaning of “*except by law*” under Article 14, Section 1 of the Constitution and that both laws are not inconsistent with the said Article. The impugned provisions of Section 4.2, chapter 4, Part II; and Section 4.1, chapter 3, Part I; Section 6.1, Chapter 3, Part III of the Sales Tax, Customs and Excise Act, 2000 must be read with Section 6.1 and Section 14(b) of the Public Finance Act, 2007 and not in isolation;

22.4.3 in the instance of conflict between the provisions of two laws, the provisions of the later law will prevail over the provisions of the previous law when the two are repugnant to each other or that specific law will prevail over general law when general law is silent on the subject matter. Therefore, the Court hereby rules that:

22.4.3.1 the particular impugned provisions reflected under two laws (Sales Tax, Customs and Excise Act, 2000 and the Public Finance Act, 2007) are not contradictory; and

22.4.3.2 the matter contested conforms to the same subject matter on the issues of taxation in reference to the particular provisions of both the laws and is not a separate subject matter.

22.4.4 Although, the Sales Tax, Customs and Excise Act is a specific law and that the Public Finance Act is generic, the said impugned provisions are not distinctive and were intended to apply for the same issues on the methods and procedure of raising taxes;

22.4.5 the fixation or alteration of taxes by the Government simply by submission of information and upon sole



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approval of the National Assembly is in contravention to Article 14, Section 1 of the Constitution. Further, Article 8, Section 8 of the Constitution mandates a person to pay taxes, but in accordance with laws.

Hence, the action of the Government mandating the payment of taxes beyond the prescribed limit as provided under the prevailing laws after the adoption of the Constitution is both procedural and substantive violations;

22.4.6 The impugned sections of the Sales Tax, Customs and Excise Act and the Public Finance Act should be interpreted as to mean and construe that:

22.4.6.1 the Government as per Section 4.2 of Chapter 3, Part I and Section 6.1, Chapter 4, Part II of the Sales Tax, Customs and Excise Act, 2000 has the power to “approve” the fixation of the rates of Sales Tax and Customs Tariff and any revisions thereof and also to approve the range of commodities and services under the Sales Tax Schedule;

22.4.6.2 once the Government or the Cabinet has “approved” as (22.4.6.1) above, the Finance Minister must propose and introduce such taxation measures as Money Bill before the National Assembly for the authorization of Parliament as per Chapter III, Sections 9 and 14(b) of the Public Finance Act, 2007; and

22.4.6.3 the word “authorized” by Parliament as ((22.4.6.2) above must be read with Article 14, Section 1 of the Constitution which means that such taxation as proposed must be passed as law after introducing it as Money Bill under Article 13, Section 2 of the Constitution.

22.5. The term “except by law” and its relevant issues



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Based on Findings No. 20, the Court hereby rules that:

22.5.1. the term “except by law” as envisaged in Article 14, Section 1 of the Constitution means that no taxes, fees and levies shall be imposed or altered except as provided by the existing laws or based on the new laws; and

22.5.2. the term “except by law” for the purpose of this case must apply to both the existing laws i.e., the Sales Tax, Customs and Excise Act, 2000 and Income Tax Act, 2001 as well as to the future laws that relate to such imposition or alteration of taxes.

22.6. Article 13, Section 2 of the Constitution and whether Government can raise revenue through taxes by clubbing it with budget

Based on Findings No. 21, the Court hereby rules that:

22.6.1 All taxation measures, be it direct or indirect, intended to impose new or alter the existing taxes structure must be introduced as a Bill as per Article 13, Section 2 of the Constitution;

22.6.2 Taxes as revised or imposed thereof must be done only through the procedure of passing of Bills under Article 13 of the Constitution; and

22.6.3 The raising of revenue and introducing taxation measures merely along with the budget violates the constitutional mandate of introducing it as a Bill.

5. COURT FINDINGS

5.1. *Locus standi* of the Opposition Party to file constitutional case:

The appellant submits that the respondent did not have legal standing to file petition in accordance with Section 31.2 of the Civil and Criminal Procedure Code and that the respondent misinterpreted Sections 1 and 5 of Article 18 of the Constitution and wrongfully took the Government to the Court when the



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respondent himself was personally not aggrieved. In this regard, the Court found that the respondent himself was not an aggrieved party, neither was his interests closely related (Class action suit) to establish *locus standi* under Sections 116 and 149 of the Civil and Criminal Procedure Code. However, it is an essential condition for parliamentary form of government that the Opposition raises constructive and justifiable objection in accordance with Section 1 Article 18 of the Constitution which states that:

“The Opposition Party shall play a constructive role to ensure that the Government and the ruling party function in accordance with the provisions of this Constitution, provide good governance and strive to promote the national interest and fulfil the aspirations of the people”.

The Opposition Party has an institutional role to ensure constitutionality and perform important political and public function. The involvement of the Opposition Party in filing cases as a last resort contributes positively to the development of democracy as it helps to clarify issues and encourages political debate and deliberation – providing a source of information to the general public. The Opposition Party has the obligation and the constitutional duty to ensure that the ruling party functions in accordance with the provisions of the Constitution. Moreover, the members of the Opposition Party have the right to vote on any issue that is discussed and required to be passed in the National Assembly.

Furthermore, in a representative democracy, existence of an Opposition Party and public participation is the cornerstone of the system. It is a bedrock principle that connects government to the governed. It legitimizes the system and helps to make government accountable. Participation by the public and the Opposition Party in government is a creed by which a democratic nation lives. Nevertheless, participation must be authorized and encouraged by procedures and forms at every level of every branch of our government. Filing of petition against the Government by the Opposition Party and individuals who have *locus standi* and a concrete case or controversy must be allowed. Preventing the Opposition Party or an individual from engaging in petitioning activities must be deemed to be antithetical to the principles of constitutional democracy. However, the Opposition Leader to file a suit in the court of law on behalf of the Opposition Party must fulfil the following requirements:

- (a) While filing the constitutional case, the Opposition Leader must produce signed document by all party members of the Opposition



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Party in Parliament demonstrating the support of the Party as a whole for the issues brought before the Court. Only the Opposition Leader may file such cases on behalf of the Opposition Party; and

- (b) Supporting document for filing a constitutional case must bear the names of the Opposition Party Members of Parliament, Citizenship Identity number, name of the constituencies from which they have been elected and their signatures. Such a document must bear the sign and seal of the Secretary General of the National Assembly on every page, thus attesting that every person who has signed is a Member of Parliament and that the signatures are that of the Members of Parliament concerned.

5.2. The Opposition party's submission that the Government has knowingly and intentionally committed contempt of court, as well as violated the right to a lawful trade under Section 10 Article 7 of the Constitution is not tenable. Suspension of the import of all light vehicles by the Government is viewed as an administrative action post decision rendered by the High Court. The Opposition Party is not the real or directly affected party by the executive decision of the Government. Hence, the Opposition party does not have legal standing to file a case against the executive decision of the Government on suspending the import of all light vehicles.

5.3. **Interpretation of the Jabmi Act:**

The appellant submitted that by differentiating between a retired Drangpon and a Drangpon who has resigned would bring an undesirable ambiguity to the existing law as well as the very case under consideration to deliberately undermine the purpose and intent of the Jabmi Act in order to strengthen the legitimacy of Damcho Dorji's appearance before the Court. The Court observed that the relevant provision of the Jabmi Act may be in contravention to Section 1 Article 7 (right to life – to earn a livelihood) and Section 10 Article 7 (right to practice any lawful trade, profession or vocation) of the Constitution as raised by the respondent. Therefore, the Court affirms the decision of the Constitutional Bench of the High Court.

The argument put forward by the appellant under Part IV 7 (a) – (d) is deemed redundant as there are adequate conflict of interest provisions to prevent a Drangpon practicing as Jabmi from interfering and unduly influencing an outcome of a case. Relevant guidelines may be



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established for individuals to practice as jabmi after having held the post of Drangpons by Parliament through an amendment that may include:

- (a) Requirement of having to register as a jabmi;
- (b) Being allowed to practice only in courts which are higher than the one that s/he has last held the post of Drangpon; and
- (c) Need to require such individuals to adhere to the conflict of interest issues.

5.4. Constitutionality of judicial consideration of a matter under legislative process:

The Opposition Party has taken judicial recourse. The judicial recourse of a constitutional matter must exhaust parliamentary process for the Court to ensure its constitutionality. Parliamentary process means deliberation in the National Assembly, review by the National Council and submission to His Majesty the King. Thus, the Court will not usurp the legislative and executive power but it is duty bound to obey Section 11 Article 1 of the Constitution which mandates that “*the Supreme Court shall be the guardian of this Constitution and the final authority on its interpretation.*”

The Court does not accept the reasoning of the appellant that “*in order to remove perceived anomalies and ambiguities in the tax laws, towards the conclusion of the Session of Parliament, a motion was moved to amend and reconcile relevant sections of the laws. This motion was welcomed by the Government, subsequent to which, the House resolved that the Government should submit amendment proposals at the Winter Session (6th Session) of Parliament*”. Besides, the admission by the appellant that the Government had not implemented the tax measures except on import of vehicles, prior to informing the National Assembly is not reasonable and justifiable.

The argument of the appellant that the “*implementation of tax increases on vehicles was compelled by the media which, having accessed government documents on the subject before presentation to the National Assembly, had alerted potential car importers. Not putting into immediate effect the new tax rates would have resulted in a rush for importation of cars thereby defeating the very purposes behind the tax increases which include environmental, rising economic disparity, uncontrollable drain on foreign exchange reserves, high accident rates, lack of parking space and congestion in the capital and Phuntsholing*” is deemed unacceptable. The revised Sales Tax and Customs Duty for the import of vehicles to be effective from 17th June 2010 through public notification no. DRC/STD(Policy) 1/2010/12016 dated 16th June 2010 of the Director General, Ministry of Finance did not comply with the



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legislative procedure.

Powers, however extraordinary, which are conferred or sanctioned by statute, are never really unlimited, for they are confined to the words of the Act itself, and, what is more, by the interpretation put upon the statute by the judges. Parliament is the supreme legislator, but from the moment Parliament has articulated its will as lawmaker, that will become subject to the interpretation put upon it by the judges of the land.

Judicial review is the doctrine under which legislative and executive actions are subject to review, and possible invalidation by the judiciary. Specific courts with judicial review power must annul the acts of the state when it finds them incompatible with the provisions of the Constitution. Judicial review is an example of the functioning of separation of powers in a modern governmental system. Section 10 Article 21 of the Constitution explicitly provides that judicial review may be used to seek as may be appropriate in the circumstances of each case, declarations, orders, directions or writs. Judicial review is the procedure by which one can seek to challenge the decision, action or failure to act by a public body such as a government department or a local authority or other bodies exercising a public law function.

Under the Constitution only His Majesty the King has been provided with the authority to command “abstract judicial review” as provided under Section 8 Article 21 of the Constitution:

“Where a question of law or fact is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court, the Druk Gyalpo may refer the question to the Supreme Court for its consideration, which shall hear the reference and submit its opinion to Him”.

- (a) The Abstract Judicial Review provides a form of action to review the constitutionality of laws enacted by Parliament without it being a subject matter of a concrete proceeding. It allows for the broadest of reviews of a statute possible. The review takes place detached from any particular case and refers to the compatibility of the statute with the provisions of the Constitution. Therefore,



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no other individual or entity may request the Courts for an “abstract judicial review” except His Majesty the King.

- (b) Except His Majesty the King, all other individuals and entities may file constitutional cases by establishing legal standing and only in matters involving a clear case or controversy under the Concrete Judicial Review. Under the concrete judicial review, the Constitutional Bench of the High Court and the Supreme Court on appeal review the constitutionality of a statute raised by individuals or entities with legal standing. The Court must be convinced of the unconstitutional character of the statute and clarification of the matter has to be relevant to the case or controversy. The concrete judicial review is conducted on the basis of the concrete legal proceeding involving two opposing parties and in compliance with the due process of law.

It is the prerogative of the Courts which is vested with judicial authority in accordance with Section 13 Article 1 and Section 2 Article 21 of the Constitution to decide the justiciability of a matter in consonance with the provisions of relevant laws and the Constitution and not for other branches to assume or decide such matters. Therefore, based on the principle of separation of powers enshrined under the Constitution, once the Court has taken cognizance of any matter, Parliament must comply with rules of procedure pertaining to abstaining from discussing matters that are *sub-judice* to avoid complications.

5.5. Jurisdictional competence of the High Court in the matter under review:

In accordance with the provisions of the Constitution, the Dzongkhag and Dungkhag courts do not have jurisdiction to hear constitutional matters *involving a substantial question of law of general importance relating to the interpretation of this Constitution* as in the diffused system and at the same time the jurisdiction is not vested directly with the Supreme Court in constitutional matters as under the concentrated system. Therefore, the Supreme Court of Bhutan is not purely a constitutional court but a Court of last resort with general jurisdiction.

Analysis of Section 23 Article 7, Section 5 Article 23 and Sections 9 and 18 Article 21 of the Constitution which states that:

Section 23 Article 7: “*All persons in Bhutan shall have the right to initiate appropriate proceedings in the Supreme Court or High*



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Court for the enforcement of the rights conferred by this Article, subject to section 22 of this Article and procedures prescribed by law”;

Section 5 Article 23 stating that “*Any disqualification under Section 4 of this Article shall be adjudicated by the High Court on an election petition filed pursuant to a law made by Parliament under Section 7 of this Article*”; and

Sections 9 and 18 Article 21 enshrining that “*The Supreme Court may, on its own motion or on an application made by the Attorney General or by a party to a case, withdraw any case pending before the High Court involving a substantial question of law of general importance relating to the interpretation of this Constitution and dispose off the case itself*”; and “*Every person has the right to approach the courts in matters arising out of the Constitution or other laws subject to section 23 of Article 7*”

The above Sections and Articles designates the High Court as the court of first instance for all constitutional matters involving a substantial question of law of general importance relating to the interpretation of the Constitution. However, once the matter has been registered with the High Court and pending adjudication, the Supreme Court may, on its own motion or on an application made by the Attorney General or by a party to a case, withdraw any case pending before the High Court and dispose off the case itself. Therefore, it is very clear that cases cannot be registered directly with the Supreme Court, but the Supreme Court may *suo moto* adjudicate important constitutional matters after it has been first registered with the High Court.

The High Court being designated as the court of first instance in all constitutional matters involving a substantial question of law of general importance relating to the interpretation of the Constitution provides for efficiency and is in consonance with the principles of appeal enshrined in the statutes and natural justice. It provides an opportunity for at least one appeal to the Supreme Court for review of the judgment rendered by the High Court in all constitutional matters.

5.6. Interpretation of the relevant provisions of the Constitution and other laws:



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The understanding of ‘by law’ under Section 1 Article 14 of the Constitution as delegated authority by the Government, may be an expression of bonafide intention. However, all laws enacted should be consistent with the provisions of the Constitution.

Section 10 Article 1 of the Constitution states that “...*the provision of any law, whether made before or after the coming into force of this Constitution, which are inconsistent with this Constitution, shall be null and void*”.

With the adoption of the Constitution and change in governance as a Democratic Constitutional Monarchy, the democratic government cannot seek to assume authority as it existed prior to the adoption of the Constitution. Further, Section 9 of the latter law “Public Finance Act 2007” states “*Raising of revenues through taxes shall be authorized by Parliament*” is deemed to overrule the inconsistent Section 4.2, Chapter 3, Part I, Section 6.1 Chapter 4, Part II and Section 4.1 Chapter 3, Part III of the Sales Tax, Customs and Excise Act 2000 by application of the principle of last in time rule and strict interpretation applicable to tax statutes.

Similarly, the first part of Section 21 of the Public Finance Act 2007 which states that “*The provisions of this Act shall not affect the obligations, rights, privileges, powers and liabilities acquired or accrued by the Ministry of Finance prior to this Act*” must be deemed severed under the doctrine of severability as it conflicts with Section 9 of the Public Finance Act 2007 and other relevant constitutional provisions. However, the second part of Section 21 of the Public Finance Act pertaining to the liabilities acquired and accrued prior to the enactment of the Public Finance Act 2007 is operational as the Ministry of Finance must be held liable based on institutional obligation.

Further, Section 4.2, Chapter 3, Part I of the Sales Tax, Customs and Excise Act 2000 which provides that:

“The fixation of the rates of Sales Tax and any revision thereof, and the range of commodities and service under the Sales Tax Schedule shall be approved by the Royal Government of Bhutan”,



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Section 6.1 Chapter 4, Part II of the Sales Tax, Customs and Excise Act 2000 which provides that “*Customs Tariff and revision thereof, shall be approved by the Royal Government of Bhutan*” and Section 4.1 Chapter 3, Part III of the Sales Tax, Customs and Excise Act 2000 providing that “*Rates of Excise duty on excisable goods shall be fixed and revised by the Royal Government*” are deemed inconsistent with the provisions of the Public Finance Act and the Constitution unless the phrase “Royal Government” in the Act is replaced by “Parliament”. The inconsistent provisions of the Sales Tax, Customs and Excise Act 2000 must be deemed to have been eclipsed by the latter law, the Public Finance Act 2007 which under Section 2 provides that:

“the Act shall supersede all laws, regulations, rules and notifications that are inconsistent with the provisions of this Act, except the Constitution of the Kingdom of Bhutan, or as otherwise specified herein”.

It is plausible to construe that the Public Finance Act 2007 when being drafted must have been compared with the relevant provisions and principles enshrined in the then available draft Constitution for consistency. Further, the drafters and Parliament that adopted the Constitution on July 18, 2008 were aware of the existence of the Sales Tax, Customs and Excise Act 2000 and the Public Finance Act 2007. Therefore, inconsistent Sections 4.2, Chapter 3, Part I, 6.1 Chapter 4, Part II and 4.1 Chapter 3, Part III of the Sales Tax, Customs and Excise Act 2000 must be suitably amended. The rights, privileges and powers exercised prior to the adoption of the Constitution cannot be perpetuated by a provision that is inconsistent with the provisions of the Constitution.

While discussing the issues of the provisions of laws being *ultra vires* the Constitution, the Court also observed that Section 18(b) Article 22 of the Constitution which provides that:

“The local government shall be: Entitled to levy, collect, and appropriate taxes, duties, tolls, and fees in accordance with such procedure and subject to limitations as may be provided for by Parliament by law” and



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Section 57 of the Local Government Act 2009 providing that Gewog Tshogde shall levy the enumerated taxes “as may be approved by Parliament” is consistent with the constitutional requirement. However, Section 64 of the Local Government Act 2009 provides unrestrained delegated authority to the Thromde Tshogde to levy the same taxes by stating “in a manner and at such rates as may be approved by it as per the laws in force” is inconsistent with the constitutional provisions related to taxation. Therefore, it is incumbent on the Executive and Parliament to provide clarity and synchronize the laws related to taxation. The law must clearly delineate the powers of the local government to levy, collect and appropriate taxes - especially specifying the subject matter to which such authority applies and the extent of such levies and taxes to avoid confusion and unrestrained exercise of such an authority by the local governments. Delegated authority must be exercised in strict conformity with the terms of the statute.

5.7. Taxes can be imposed or altered only by Parliament:

Section 1 Article 14 of the Constitution pertains to the supremacy of Parliament to impose taxes as representatives of the people. The relevant provision of the Constitution clearly mandates and embodies the important constitutional principle that no tax shall be levied or collected except under the authority of law. The argument of the Government regarding delegated authority to impose “indirect taxes” and the need to raise such taxes every now and then does not have legal basis.

Since, the adoption of the Constitution and the present Government assuming power in 2008, “rationalization and the broadening of the existing tax structure” which includes the disputed vehicle tax appears to be the first initiative by the ruling government to alter the tax, contrary to the argument raised by the appellant. In the summary of tax revision submitted to the Court by the appellants, there have been only three instances of the tax being revised under the delegated authority in 2008 as submitted by the Government (Annexure “D”). The appellant was unable to substantiate it with exact dates to confirm that it was post adoption of the Constitution. The said alterations were not included in the Annual Budget Report and hence, never even reported to Parliament by the Government. It does not comply with the political decision-making process required under a democratic system of governance providing for transparency and accountability.

The argument of the Government that “whether the government chooses to inform the NA on its decisions on revision of indirect taxes along with the budget or separately is immaterial in light of the submission being for information. Likewise, it is up to the NA as to whether it chooses to deliberate on the matter or not” is erroneous and inconsistent with the principles of



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

The power of taxation is indispensably necessary to constitute an efficient government. Therefore, it is the prerogative of the National Assembly to impose taxes and the duty of the citizens to pay taxes. The Government under Section 6 Article 14 of the Constitution has the responsibility of ensuring that the cost of recurrent expenditures is met from internal resources of the country, it is the prerogative of the government to declare and grant fiscal incentives or to propose taxes to meet expenses of the government. However, the exercise of the power to alter the rate of taxes by the government alone under the *ultra-vires* provisions of the Sales Tax, Customs and Excise Act 2000 under the implied authority to impose indirect taxes or by any other branch of government amounts to usurpation of power not granted by the Constitution. Imposing and altering of taxes must be decided by the elected representatives of the people in its entirety and not only by a sub-group represented by the executive. According to the constitutional provisions it must be approved and passed by Parliament. This understanding is based on the principle that the government derives its powers from the consent of the governed substantiated by the concept of parliamentary supremacy over the Executive enshrined under Section 2 Article 10, Section 8 Article 20, and Section 13 Article 1 of the Constitution.

Tax authority has been vested in Parliament to ensure adequate checks and balances, avoid arbitrariness, limit discretion, and to ensure compliance with due process in a democratic system of governance.

5.8. All taxes must be imposed by Statute:

The matter related to land tax cited as an example by the appellant is deemed to be tax imposed by a permanent Act and this tax would continue to be payable even though Parliament is not convened for years. However, if there are taxes imposed by yearly Acts, then if Parliament does not convene for a year, no one would be under any legal obligation to pay the said tax. This distinction between revenue depending upon permanent Acts and revenue depending upon temporary Acts is important, but the main point, to be borne



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in mind is that all taxes are imposed by statute, and that no one can be forced to pay a single ngultrum by way of taxation which cannot be shown to the satisfaction of the Court to be due or altered under an Act of Parliament as provided under Section 1 Article 14 of the Constitution. The requirement of raising taxes or alteration except by law implies that it must follow the normal bill passing process and hence, will become applicable as law only after grant of Royal Assent.

The raising, collection and expenditure of the revenue and all matters related thereto must be governed by strict rules of law. The basic issues pertain to the source of revenue, the authority for expending the public revenue and the securities provided by law for the due appropriation of the public revenue and ensuring that it is expended in the exact manner which the law directs.

5.9. Effective date of imposition or alteration of tax:

The apprehension of the Government that any leakage of information on tax by having to table it in Parliament would result in pre-emptive hoarding or profiteering by dealers and consumers resulting in loss of substantial revenue is unfounded. Firstly, as rightly suggested by the appellant, the Finance Minister on behalf of the Government must be responsible to ensure the confidentiality and security of such tax measures prior to being submitted to Parliament. Secondly, the bill relating to imposition or increase of tax must be deemed to come into force immediately on the day the bill is introduced. Therefore, the legislative procedure is same as in the case of other money bills, it has to be passed by Parliament and Royal assent sought in the same session.

5.10. Delegated authority of Government to raise loans, make grants or guarantee loans:

The argument of the Government that with the ruling of the High Court, the Government now will have to seek Parliamentary approval for raising loans and aid mobilization is illogical and unfounded. The Government may raise loans, make grants or guarantee loans in accordance with Sections 124 – 128 (Loans) of the Public Finance Act 2007 which is consistent with Section 4 Article 14 of the Constitution. It is the function of the Government to raise loans or deal with national financial issues. The provision of the Constitution provides discretion upon the government to raise loans, make grants etc. but all such activities have to be in the interest of the public and in accordance with the law. The ruling government must be mindful and not burden the tax payers and future governments unnecessarily by ensuring a secure balance of payment. The loans raised by the government under the delegated authority must be reported to Parliament during the submission of the budget for



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transparency and accountability. The Government is collectively responsible to the Druk Gyalpo and to Parliament according to Section 7 Article 20 of the Constitution for their programmes and policies.

5.11. No distinction between direct and indirect tax in the Constitution:

The Constitution does not differentiate direct and indirect tax. Tax is tax. It is clear. The direct and simple meaning of Section 1 Article 14 of the Constitution, “*taxes, fees and other forms of levies...*” leave no room for further interpretations and interpretation of the Constitution is within the emphatic domain of the Supreme Court. Therefore, the argument of the appellant that there exists a separate law related to direct and indirect tax is an assumption and hence not tenable. It must be *de lege lata* and not *de lege ferenda*.

Except for the fees and levies imposed or altered by the budgetary bodies for services provided to the public as under Sections 171 – 172 (Fees and Charges) of the Public Finance Act 2007, all other fees and levies generally charged to the public can be imposed or altered only by Parliament. The exercise of the delegated authority must be in strict conformity with the terms of the statute. Based on the principles of democracy, the government must inform Parliament in the immediate session as to the imposition or alteration of fees and other levies for transparency and accountability.

5.12. Legislative procedure related to enactment of laws:

In accordance with Section 1 Article 10 of the Constitution under the non-delegation doctrine, only Parliament which includes the Druk Gyalpo, the National Council and the National Assembly is vested with legislative authority to consider bills and enact them as laws. A bill, which is a draft Act of Parliament, may be presented to either House by one of its Members. Before a Bill can become an Act and therefore the law of the land, it must pass through a number of similar stages in each House, and then receive Royal Assent. Therefore, a bill is a proposed law or piece of legislation put before a legislature for approval. Bills can be introduced in Parliament in either the National Assembly or the National Council except for “money” bills, those bills relating to “spending or taxation” which can originate only in the National Assembly must be initiated by the government in accordance with Section 2 Article 13 of the Constitution.

The need to follow the legislative process as required under Section 1 Article 10 of the Constitution is supplemented by the reading of the constitutional provision related to passing of budget under Section 9 Article 14 of the Constitution which provides that “... *revenues shall be*



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collected and disbursements made in accordance with the law in force at the end of the preceding year...” The said provision clearly implies the necessary process required to be followed in adopting the annual budget and other matters related to raising of taxes.

With regard to budget, the Constitution provides for a scheme whereby the process includes preparation of the Budget by the Executive; its consideration and adoption by the Legislature; its implementation by the administration and government agencies; and post-evaluation of achievement and performance by the Royal Audit Authority and the Public Accounts Committee of the National Assembly.

The annual budget required to be presented by the Finance Minister to the National Assembly under Section 8 Article 14 of the Constitution is the Government’s most important economic policy tool and provides a comprehensive statement of the nation’s priorities. As representatives of the people, Parliament is the appropriate place to ensure that the budget best matches the nation’s needs with the available resources. Therefore, the issues related to raising of taxes must be incorporated in the annual budget report, which must be then debated and deliberated in Parliament and endorsed as law after completion of the legislative process.

5.13. Bills related to spending or taxation form part of Money Bill:

Taxation and Appropriation Bills concern government’s raising of revenue and expenditure. These are the Bills that provide the Executive with the financial means to govern. Section 237 Chapter 20 of the National Assembly Act 2008 which relates to the legislative procedures regarding “money bills” states: “*when a money bill passed by the national assembly is presented to the National Council, the speaker shall endorse that it is a money bill*”. Therefore, with regard to bills relating to “spending or taxation” that form part of the money bills, the rule explicitly enunciates the requirement of presenting the bill to the National Council in compliance with the bill passing process. However, with regard to money and financial bills that can originate only in the National Assembly, the National Assembly has primacy. In view of the relevant provisions of the Constitution that provide for establishment of a consolidated fund to meet the expenditure of the State and that “*Public money shall not be drawn from the Consolidated Fund except through appropriation in accordance with the law*” confirms that the budget is a bill and hence, it must be presented in the form of appropriation bill for consideration by the National Assembly. Relevant portion of Section 5



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Article 13 of the Constitution states that “...in the case of Budget and Urgent Bills, they shall be passed in the same session of Parliament”. Hence, the budget bill must follow the normal bill passing process but comments and proposals made by the National Council is not binding on the National Assembly. The role of the National Council as the House of review was explained by His Majesty the Druk Gyalpo during the public discussions in Punakha as:

“... the duties and responsibilities of the National Council are to see how the Ruling and the Opposition party are functioning for the people and the country. If the Council is not made apolitical then having a separate body of Council is of no use. Moreover, if there is affiliation between the Council and political parties including the opposition party, then it will be difficult for the Council to carry out its duties and responsibilities”.

It is the prerogative of the National Assembly to submit the budget bill for Royal Assent without incorporating changes suggested by the National Council if deemed irrelevant. Nevertheless, comments on the budget by the National Council is important, as it serves as a source of information and understanding of the general public regarding the budget proposed by the government. The process of passing the budget in this manner is analogous to the representatives of the people in the National Assembly authorizing the Government to raise revenue and incur expenditure from the consolidated fund on behalf of the electorate as representatives in accordance with law.

5.14. Primacy of the National Assembly over bills that can originate only in the National Assembly:

Preparation, submission and passing of the annual budget are important aspects of a democratic system of governance. At times the success of governments is dependent on the budget they propose. Therefore, the National Assembly has primacy with regard to money bills and hence, does not have the obligation to incorporate the recommendations of the National Council if it deems that it is unnecessary. The apprehensions raised by the appellants that budget will not be passed or tax proposals will be blocked by the National Council is unfounded. The passing of bills in each house requires only a simple majority in accordance with Section 4 Article 13 of the Constitution and the ruling government through its command of a majority in the National Assembly should normally be in a position to confirm the taxes proposed each and every time.



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6. **DECISION**

The Supreme Court as the guardian of the Constitution is deeply impressed with the paramount importance of ensuring and establishing a firm foundation for democracy and the functioning of the democratic institutions based on the tenets enshrined in the Constitution. As mentioned by His Majesty that:

“... the key to success is the manner in which new democratic institutions learn to work in harmony, and with unity of purpose, in the interest of the Nation and People. If we can set this tradition in place in the first years, our democratic future will be forever strengthened”.

Therefore, this Court after granting full opportunity and consideration to all the submissions of the Appellant and Respondent decides as follows:

- 6.1 In accordance with Court finding No. 5.1, the plea submitted by the appellant regarding the lack of *locus standi* of the respondent is not tenable. The matter related to raising of tax did not comply with the legislative process as provided under the Constitution, denying the members of the Opposition Party the right to vote on the issue. The issue raised by the Opposition Party does not relate to the authority of the Government to impose tax but pertains to the non-compliance of procedure in raising and implementing the altered vehicle tax which is the main subject of litigation. Hence, the *locus standi* of the Opposition Party to file constitutional cases is deemed justified under Section 1 Article 18 of the Constitution as held by the High Court. However, while filing constitutional cases the Opposition Party henceforth, must comply with guidelines enumerated in the Court findings No. 5.1.
- 6.2 In accordance with Court finding No. 5.3, provision of the Jabmi Act may be in contravention to Section 1 (right to life – to earn a livelihood) and Section 10 (right to practice any lawful trade, profession or vocation) Article 7 of the Constitution. The Court affirms the decision of the High Court with regard to the appearance of Damcho Dorji the only other member of the Opposition Party in Parliament to appear before the Court on behalf of his Party.
- 6.3 In accordance with Court finding No. 5.4 regarding the constitutionality of judicial consideration of a matter under legislative process, the Court affirms



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that judicial recourse of a legislative matter must exhaust the legislative process for the Court to ensure its constitutionality. The Court abides by the doctrine of constitutional avoidance that flows from the canon of judicial self-restraint, and is intertwined with the debate over the proper scope of judicial review and the allocation of power among the three branches of the government. The doctrine of constitutional avoidance dictates that a Constitutional Bench should refuse to rule on a constitutional issue, if the matter can be resolved on a non-constitutional basis that is, if there is also present some other ground upon which the case may be disposed off. However, Parliament has failed to resolve the matter related to the procedure concerning the passing of the budget which includes the contested raising of taxes under the “*rationalization and the broadening of the existing tax structure*” quoting the provisions of Sales Tax, Customs and Excise Act 2000 during the winter session (Nov – Dec, 2010). Therefore, it is the duty of the Supreme Court to obey Section 11 Article 1 of the Constitution that mandates “*the Supreme Court shall be the guardian of this Constitution and the final authority on its interpretation*”. The imposition of taxes by the Government without the approval of Parliament is not in accordance with the provisions of the Constitution, and so it has sabotaged the fundamental principle of constitutional law. Explicit and implicit meaning of Section 1 Article 14 of the Constitution restricts unbridled freedom of interpretation. Therefore, this Court affirms the findings and the decision of the High Court with regard to constitutionality of judicial consideration of a matter under legislative process.

- 6.4 In accordance with Court finding No. 5.5, the Constitution of Bhutan as provided under Section 9 Article 21 has adopted a variation from the diffused and concentrated systems. The Constitutional provision provides for judicial restraint and imposes restrictions on an activist court from unduly interfering in the functioning of the government as a safeguard. The High Court in accordance with Section 23 Article 7, Section 5 Article 23 and Section 18 Article 21 read with Section 9 Article 21 of the Constitution is the designated Court of first instance in all constitutional matters involving a substantial question of law of general importance relating to the interpretation of this Constitution, which is in compliance with the principles of appeal enshrined in the statutes and natural justice. Such an interpretation provides for efficiency and at least one appeal to the Supreme Court for review of the judgment rendered by the Constitutional Bench of the High Court in all constitutional matters. Therefore, the High Court has the requisite jurisdiction to adjudicate constitutional matters involving a substantial question of law of general importance relating to the interpretation of this Constitution.
- 6.5 In accordance with Court finding 5.6, Section 4.2, Chapter 3, Part I, 6.1 Chapter 4, Part II and 4.1 Chapter 3, Part III of the Sales Tax, Customs and



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Excise Act 2000 and a part of Section 21 of the Public Finance Act 2007 perpetuating the rights, privileges, and powers prior to enactment of law is inconsistent with Section 1 Article 14 of the Constitution. Therefore, the provisions of the Sales Tax, Customs and Excise Act 2000 quoted by the Government are *ultra-vires* the constitutional provisions related to the subject matter. The doctrine of eclipse and severability enshrined under Section 10 Article 1 of the Constitution, states that:

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

Hence, the provisions of the Sales Tax, Customs and Excise Act 2000 relied upon by the Government is deemed null and void as it is inconsistent with the provisions of the Constitution.

- 6.6 In accordance with Court finding No. 5.7, 5.8 & 5.9, if the Nation does not tax the few, who are rich, the State shall fail in its “endeavour to develop and execute policies to minimize inequalities of income, concentration of wealth, and promote equitable distribution of public facilities among individuals and people living in different parts of the Kingdom” as mandated by Section 7 Article 9 of the Constitution.

This concept of progressive tax is not politically popular neither it has an easy legislative journey. Therefore, Court applauds the Government for its policies to tax but we deplore the non compliance of the legislative process. Parliament must represent the popular views of the grassroots, collective wisdom and it should embody the national conscience. This august body should be the custodian of legislative values and 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 pursuant to Section 2 Article 10 of the Constitution.

Under no circumstances the authority to impose or alter taxes may be delegated to the Executive. The alleged authority to impose or alter indirect taxes has no legal basis under the Constitution. Therefore, the imposition or alteration of taxes must comply with the legislative process for making laws at all times as provided under Sections 234 - 238 of the National Assembly Act 2008. Moreover, the Bill relating to imposition or alteration of tax shall come into force on the day the Bill is introduced in Parliament.



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Implementation of the revised tax, without following the required process, is unconstitutional as deemed by the High Court. Therefore, the Government must refund all the taxes collected under the *ultra vires* executive act, as it amounts to wrongful gain.

6.7 In accordance with Court finding No. 5.11 the argument of the Government regarding delegated authority to impose “indirect taxes” does not have legal basis as the Constitution does not differentiate between direct and indirect tax. Tax is tax. The language of Section 1 Article 14 of the Constitution is clear and unambiguous. It leaves no room for further interpretations. Therefore, the argument of the appellants that there exists a separate law related to direct and indirect tax is not tenable.

6.8 In accordance with Court finding No. 5.12, 5.13 & 5.14, Money Bills and financial Bills can originate only in the National Assembly under Section 2 Article 13 of the Constitution. On the basis of Section 8 Article 14, Section 5 Article 18 and Section 7 Article 20 of the Constitution, the Government is to be responsible and accountable to Parliament and the people. The Constitution mandates assessment of the responsibility and accountability of the Government to Parliament and the people. This is exercised through ministerial responsibility of responding to questions in Parliament, catering to the dispositions of their people and the periodic assessment by the electorate starting from the date of first sitting of the respective Houses and after the tenure of five years in accordance with Section 24 Article 10 of the Constitution. Responsibilities and authorities entail exercise of power for the public good. Moreover, as provided under Section 12 Article 15 of the Constitution, out of the two Houses in Parliament, it is only the National Assembly that may be prematurely dissolved under Section 11 Article 15, Section 24 Article 10 and Section 7 Article 17 of the Constitution. Thus, the National Assembly has the sole authority in money and financial bills. This is further substantiated under Section 9 Article 14 of the Constitution which provides for an alternative, if the National Assembly fails to approve the budget. Therefore, the Court concludes that financial and money bills that include taxation shall be within the emphatic domain of the National Assembly.

COURT ORDER

The Constitution is the guide which the Court shall never abandon. The Court shall recognize and respect the roles of other governmental institutions without abdicating its role as the guardian of the Constitution. Parliamentary democracy in Bhutan is a majoritarian democracy within the tapestry of constitutionalism. Thus, constitutionalism is an entrenched principle in the Bhutanese Constitution.

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The interpretation of the legality of Acts passed by Parliament and actions of government agencies vis-à-vis the provisions of the Constitution by the Supreme Court is final not because it is infallible, but because the Constitution which is the Supreme Law of the State provides that the Supreme Court is the guardian and the final authority to interpret the Constitution. His Majesty the King clarified the legislative intent that the Supreme Court as the final authority on the interpretation must not allow the Constitution to be undermined at any time. It must inspire the trust and confidence of the people in the Constitution by safeguarding its integrity as the fountain of justice and it must maintain the independent authority of the Constitution from all other power centre and institutions in the land.

Constitutionalism is an anti-thesis to autocracy. Therefore, the Constitution has different centers of power under vertical, horizontal and intra check and balance ensured through separation of power. The Constitution has carefully crafted the checks and balance inherent to constitutionalism. It prevents power from being concentrated in too few hands, which could result in an autocratic and dictatorial government. Constitutionalism embodies the philosophy of limited government and Bhutan has established a constitutional democratic system of governance as clarified by His Majesty the King during the public consultation of the Constitution in Trashi Yangtse that “*in future we must have strong and stable country befitting to the people’s welfare*”. Therefore, the Constitution prevents power from being fragmented in a manner that could lead to an ineffectual and unstable government.

The Court while enumerating relevant directives unanimously concurs with and modifies the decision of the Constitutional Bench of the High Court with supplemental reasoning and justifications under Section 111(b) of the Civil and Criminal Procedure Code on this Twenty Second Day of the First Month of the Iron Female Rabbit Year corresponding to the Twenty Fourth Day of the Second Month, 2011.

(Sonam Tobgye)
Chief Justice of Bhutan

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(Rinzin Gyaltshen)
Justice

(Tshering Wangchuk)
Justice

(Rinzin Penjor)
Justice