JUDGING THE JUDGES

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Introduction

This paper examines the crucial role of judges in the modern judicial system of Bhutan under a democratic system. In order to gain a proper understanding of the role of our present judges, the paper will briefly delve into the historical origins and then examine the evolution of the modern judicial system in Bhutan. It is hoped that through this paper, the general public gains greater awareness and helps increase their knowledge of a vital and irreplaceable institution in the country.

Origins

Society is riddled with disputes, but tranquillity is necessary for symbiotic living. Therefore, justice has been the human solution. As Ronald Dworkin wrote:

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

As per the Jataka text, there are ten duties of a king (dasra-raj dhamma) including the delivery of justice. Further, in Buddhaghosa’s term, dhammika refers to the one who rules with justice (nayena) and impartiality (samena). Justice is the required qualities of a ruler. Consequently, the judges inherited the duties of dasa-raja dhamma as their responsibilities are part of and originates from the curia regis, the king’s court.

In Bhutan, the origin of laws can be traced to Mangpo Kurwai Gyalpo (the Great Chosen One, Mahasammata rajan) and the Monarch is the fountain of justice. However, with the increasingly complex system of governance, the Monarchs of Bhutan appointed and delegated the power of adjudication to the judges starting from 1961. This was reinforced with the appointment of Justices to the High Court as was reported by Kuensel on 30th June 1968:

“The High Court at Thimphu is functioning satisfactorily and disposing of all cases expeditiously. The present judges of the High Court are Dasho Kesang, Dasho Tsang Tsang, Dasho Nidup Namgyel, and people’s representative Dasho Sedo.”

Justice and Independence of Judiciary

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1 Law’s Empire By Ronald Dworkin
3 The separation of powers started with the appointment of late Home Minister, Lyonpo Tamzhing Jagar, as the first Thrimpon on 13th Day of 7th Month of Iron Bull Year in 1961.
To restore and keep up the social equilibrium and protect the social conscience, we need strong justice system, so that the strong does not prevail over the weak and the unjust do not trample over the just.

The justice system requires institutional building, legal framework, infrastructural development, modern technology and human resource development. The institution of justice in Bhutan started since 1961 and its institutionalization progressed steadily as was reported by Kuensel on 15th February 1969:

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

Since then, the Judiciary of Bhutan has metamorphosed over the years with procedural reforms and human resources development.

Independence of the Judiciary, inter alia collective independence (the concept of non-interference, jurisdictional monopoly, transfer jurisdiction, control over judicial administration), personnel and financial independence (qualification, selection and training, conditions of services, suspension, removal and disciplinary measures, security of tenure and protection from arbitrary removal from office) and institutional independence (distinctive court building, distinct kabney and court seal) are all constitutionally guaranteed.

**Professionalism**

Human resource is a national treasure and an institutional necessity. It must be supported by strategic planning, critical analysis and methodological implementation with personal perspectives and national objectives. Hence, the Judiciary of Bhutan has built professionals within the past two decades and the system has symbiotically merged with Bhutanese traditions and modern methods. Learning Bhutanese grammar, literature and law in the National Legal Course has enhanced the utility of judges and mitigated public opposition to them. Following his visit to Bhutan Lord Philips, President of the Supreme Court of United Kingdom, wrote on 9th May 2011 that:

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

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

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4 Refer Kuensel dated 13th July 2001, whereby Mr. Louis Joinet said that “within six years, the Bhutanese legal system, which had been based on individuals, had developed strong and professional institutions....”

5 STUDY VISIT TO BHUTAN from 2nd to 14th April 2012.
“It is to be noted that the majority of the judiciary have been educated in countries whose legal system is based on the common law, India, Australia, USA and the UK... Secondly I was highly impressed by the intellectual calibre of the judiciary, its younger members now all hold both first and master’s degrees in law.”

Many of the laws and systems have certain influences of different philosophical groups and schools of thought such as the classical, utilitarian, renaissance, romanticism, the realistic English tradition of law, the rationalistic French tradition of humanism, the organic German tradition of individualism, rhetoricians, classical liberalism, perfectibility, notions of self-cultivation, natural law, absolutism, humanity, political sovereignty, personal liberty, the Scottish Enlightenment, morality-“private vices, public virtues”, the French enlightenment, classical liberalism, etc. These can be perpetuated through citing doctrines and principles. However, overemphasis on international perspectives signals danger. Unbalanced foreign emphasis, and minimizing and trivializing the national curriculum will weaken the Bhutanization of the legal system. Therefore, the National Legal Course is the best defense against hegemonic and blind incorporation of foreign legal principles and practices that has no relevance to the Bhutanese context. However, as an integral member of the international community, Bhutan cannot afford to have a nihilistic view of the international and global system. Therefore, the curriculum of the National Legal Course comprises of both international and national subjects. Combination of international and national perspectives will acquire global knowledge and national relevance. It builds professionalism by blending western jurisprudence with Bhutanese jurisprudence and making the judiciary comprise of intellectuals. The fusion of international system and the values of the Bhutanese Legal System has been a great success. The courses on international jurisprudence abroad and the study of Rigney and Zhung at home has been a good foundation of introducing intellectual and proficient personnel in the judiciary of Bhutan. It has provided a kaleidoscopic fertilization of international and domestic legal principles into our legal system making our legal system firm and strong.

**Judicial philosophy**

Every human being is manifest with latent philosophy and they are moulded over time, by family values, religious beliefs, the environment, academic training and individual influences. If one is conscious of these entrenched influences, one can improve and change. Of course, old values do not yield to easy conquest of improvement. Nevertheless, we are not doomed to continue in that plight. The constant desire for change, for the sake of improvement must be our hope and weapon.

Bhutan can be proud of the fact that our judges are from ordinary family backgrounds. They share common values with the general public. They use those shared values to be more practical, realistic and humane in the performance of their judicial work. Nevertheless, the judges must be constantly exposed to the vista of learning as Justice Powell of the United States of America said, “The nation’s future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.” Continuing legal education is one of the answers to prevent us from being fossilized, and from becoming obsolete or inflexible.
Laws speak through judges. This is reflected well in the Bhutanese proverb, which says that Judges are earthly Gods during one’s life and Chhokin Gyalpo is the God of the purgatory. Such sentiments were also proclaimed by Shakespeare in the Merchant of Venice:\(^6\)

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

**Selection and appointment of Judge**

The right selection and appointment of judges is a matter of fundamental importance. This is directly proportionate to the efficacy of any justice system. It should gain public trust and confidence. A quiescent and timorous judiciary, unable or unwilling to act impartially or independently of the parties before it would lose public confidence and its decisions would soon lose respect and with that would go respect for laws and the rule of law. Consequently, proper selection,\(^7\) attitude and suitability of the persons for the judges are crucial for the institution and delivery of justice. Therefore, appointment of the judges is important particularly in the higher echelon of the judiciary.

In Bhutan, selection and appointment of judges are constitutional duties of the National Judicial Commission and the Royal Judicial Service Council, and it is the duty of the public to ensure eternal vigilance. The mistake of today will be the curse of tomorrow. The National Judicial Commission can facilitate better selection of Justices as all three branches of the Government represented in the Commission.\(^8\) Selection Guidelines are enumerated under section 68 of the Judicial Service Act. It provides that the Commission and Council shall select and nominate judicial candidates for the post of Drangpons with requisite qualification, moral courage, integrity, and with no political affiliations. The candidates should be evaluated and selected on the basis of objective criteria and those with subjective qualities for a good judge, who has record of adhering to established procedure and rule of law.

**Judicial temperament**

The qualities of judges are their temperament, character, judicial philosophies, and political views. Judges should hear courteously, enquire and decide impartially.\(^9\) The judges are often fossilized into different moulds or schools of thought. They are liberals, conservatives or centrists. In the past, we have followed the golden rule that the words of a statute must *prima facie* be given their ordinary meaning. It was the safest. However, the Supreme Court in future will not have that luxury. The heavy responsibilities will impose higher accountability. The Supreme Court will have to decide not only legal issues, but will have the onerous duty to settle and resolve political conflicts and situations through judicial intervention. However, this is by no means suggesting Machiavelli’s political pragmatism. The judges will have to study the past, for ancient habits and beliefs do not yield to easy conquest. The judgment of today will have an impact on the future. It has normative values.

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\(^7\) Taylor’s Scientific theory of Management.

\(^8\) Refer Section 17 of Article 21 of the Constitution of Bhutan.

\(^9\) Refer Section 107 the Judicial Service Act of Bhutan, 2007, which is similar to Socrates view. He said “Four things belong to a judge: to hear courteously, to answer wisely, to consider soberly, and to decide impartially.”
Code of conduct

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

(a) Not contact with litigants outside of the trial setting. However, if contacted, it should not affect the decision.
(b) Not be swayed by partisan interests, public clamour or fear of criticism.
(c) Exercise the judicial function independently on the basis of the Judge's assessment of the facts and in accordance with a conscientious understanding of the law.
(d) Not do or direct to be done, in abuse of his office or power, any act prejudicial to the rights of any other person knowing that such an act is unlawful or contrary to the law.
(e) Maintain high moral standards and refrain from involving in moral turpitude.
(f) Refrain from indulging in habits of associating with litigants and behaviour that infringe upon the performance of official duties or tarnish the image of a Judge or the Judiciary.
(g) Not engage in financial and business transactions in which he may have a conflict of interest.
(h) At all times, maintain absolute integrity and impartiality and do nothing unbecoming of the High Office held by him/her.

Judicial accountability

In a democracy governed by the rule of law under a written Constitution, the Judiciary has been assigned the role of safeguarding, upholding and administering justice fairly and independently without fear, favour, or undue delay in accordance with the rule of law to inspire trust and confidence and to enhance access to justice. Judicial office is essentially a public trust. His Majesty always said that national interest is more important than individual interest. Therefore, trying to preserve the image of the judiciary alone does not garner public faith in the institution. Insulation from public opinion fosters judicial independence. Our authority comes from our integrity and professionalism. The judges must rely on our conduct to vindicate ourselves. Judges must be of high integrity, honesty and required to have moral vigor, ethical firmness and impervious to corrupt or venal influences. They must receive general public acclaim for their integrity and professionalism. Francis Bacon, in his essay on 'Judicature', emphasized that "the place of justice is a hallowed place; and therefore not only the Bench, but the foot pace and precincts and purpose thereof ought to be preserved without scandal and corruption."10

Judiciary in Bhutan cannot preserve unfair privileges for itself. Our authority comes from our own moral authority. This has been clearly articulated in Article 21, section 15 of the Constitution, which states that:

"the independence of the Drangpons of the Supreme Court and the High Court shall be guaranteed, provided that a Drangpon may be censured or suspended by a command of the Druk Gyalpo on the recommendation of the National Judicial Commission for proven misbehaviour, which, in the opinion of the Commission, does not deserve impeachment."11

10 Francis Bacon, Of Judicature, (1612)
11 Similar provision is enshrined in section 131 of the Judicial Service Act of Bhutan, 2007.
The Judiciary cannot be outside the public gaze. A judge must be collegial, non anti-establishment, not vindictive and not have a tainted image. Here, it is relevant to highlight the qualities of a judge as articulated by Justice Krishna Iyer:

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

Judicial restraints

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

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

Although a judge is vested with statutory power yet, he cannot exercise it arbitrarily as it is amenable to challenge. Judges should pronounce reasoned judgments within the parameters set by law. A great American jurist, Justice Holmes’s view was “that judges must show great deference to popularly elected legislature and previous court decision – and thus be slow to make drastic changes in public policy.” It must be balanced with loose construction as advocated by the Chief Justice John Marshall, the Chief Justice of the United States (1801-1835), who said that “the constitution gives general guidance about basic principles but allows play in the joints” and in his judgment in McCulloch v. Maryland (1819) he mentioned that “we must never forget that it is a constitution we are expounding.”

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12 William Shakespeare, Measure for Measure, Act II Scene 2, line 107 & 108
Impartiality

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

Life of a Judge

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

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

Judging

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

Every judge’s judicial philosophies and temperament will have an effect on his or her decision. Judges can be classified as conservative, liberal, aggressive liberalism, pragmatist, skeptical pragmatism, insistent originalist, realist, consequentialist, deontological, etc. However, Judges should not be like Dworkin’s rigid “mechanical” judge who enforces the law for its own sake with no care for the misery or injustice or inefficiency that follows. The good judge prefers justice of law. At present, we have to be constructionists, but it is our hope that Bhutan will be a crucible of wisdom so that Bhutan can be the centre for learning. Nonetheless, it may be better to remember Mr. Armistead Dobie, an American judge of the early 20th century, who said:

13 Friends and families moaned when their people were appointed as judges. They were bewildered and said where did he fail in his duties.
“The goals of the ...legislation are to improve judicial accountability and ethics, to promote respect for the principle that the appearance of justice is an integral element of this country's justice system, and, at the same time, to maintain the independence and autonomy of the judicial branch of government!...”

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

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

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

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

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

Judges should play a creative role through their interpretation. If the law is clear, a judge fulfills a judicial role by drawing problem to notice and saying this is what the law says and this is my duty and I express that. We must be conscious of fidelity to the text and its formulation of the statutory provisions. While doing so, interpretation must be systematic as possible and give credence to meaning. Care, deliberation and concentration on the primary issues and being conscious of the consequences of the decision are sine qua non.

If interpretive principles are generally to grow out of democratic commitments, it follows that a judicial role in social reform will frequently be unjustified. We might even be able to generate a set of criticisms of an aggressive role for the judiciary in the name of the Constitution. These criticisms will help in the development of interpretive principles. Where the law is offensive to

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14 Warren Burger – when the text is clear, the court has no right to refuse to apply it just because the result is silly. “It is not for us to speculate much less to act on whether Congress would have altered its stance had the specific event of this case been anticipated”.
conscience or contrary to the constitution, the judge has the right and the duty to step-in. However, modesty is the judicial garment to defend all the people and to make sure that there is equal justice under the law.

Conclusion

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

The Judiciary must never surrender the sovereignty of the nation, nor silence the freedom or trample on the rights gifted to us by the Wangchuck Dynasty. Sovereignty, security, liberty, justice, freedom, rights and tranquility of Bhutan are not gifts from the past, but it is our responsibility to bequeath them to succeeding generations of the future. On its journey, the Judiciary must be a humble oracle and not a tyrant, and we must remember the enduring and pervasive words and enduring wisdom of His Majesty Jigme Singye Wangchuck’s on 30th November 2009:

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

Tuesday, January 28, 2014