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Bhutan and Modernity: Responding to Change

Building Capacity Without Losing Capacity: Legal Change and Dispute Resolution in Bhutan

Stephan Sonnenberg

The small group of elected village leaders—or *Tshogpas*—sat in the courtyard of a *Gewog* center (local administration office) in the Paro valley. To the left, the Paro Dzong presided majestically over a patchwork of green rice paddies. To the right, the upper reaches of the Paro valley stretched to the border with Tibet, its forested slopes giving way to the granite cliffs above, shrouded in early spring’s mountain mist.

I was sitting with the Paro district’s legal officer and a visiting legal expert from Harvard Law School’s Negotiation and Mediation Clinical Program, interviewing community leaders about how disputes were handled at the village level. Sitting directly across from me, the veteran community leader explained the types of disputes he saw in his village—disputes about water, inheritance, property demarcation lines, etc.—and how he typically approached such cases.

At one point, my colleagues and I asked him how he might handle a hypothetical inheritance dispute between two siblings, and he immediately responded with what seemed—to him at least—as though it required hardly a second thought: “Of course I would give two-thirds of the inheritance to the daughter who took care of her father during his old age. Had the brother been more helpful during his lifetime the split would be fifty-fifty.”

“Why two-thirds?” I asked.

He glanced down at his feet, and after conferring with some more junior *Tshogpas* who were also part of our focus group that day, simply responded: “It has always been this way.”

As was so often the case during our week of interviews in the Paro valley, my colleagues and I once again found ourselves at the intersection of traditional and

modern legal culture in Bhutan. Many of the norms and procedures we were hearing about could not be found memorialised in any textbooks, nor were they dictated by legislation or other sources of “formal” Bhutanese law. And yet they were of palpable significance to the villagers, their elders, and the elected officials in the villages we visited. Indeed—for the vast majority of cases—it was these norms and procedures that constituted the justice system in much of the Paro valley.

In this particular conversation, the *Tshogpa* explained that his continued legitimacy hinged on his ability to fairly, efficiently, and sustainably resolve local disputes. As the *Tshogpa* explained it to us: “I will need to continue living next to the person who feels he was badly treated by me, and so I have an added incentive to make sure everyone feels I was being fair.” And while this particular *Tshogpa* had received some formal mediation training from Bhutan’s judicial training institute (the Bhutan National Legal Institute, or BNLI), the norms he drew upon predated that training, and his own election as a *Tshogpa*, by centuries.

A few days later, I sat with another *Tshogpa* who had walked for two days from his village in the mountain highlands to come speak with us. He was describing the process he used to help resolve disputes in his community: First he would build trust with the respective parties, and thank them for having the courage to discuss their problems. Next, he would ensure that the parties knew that the process was fully voluntary, and that they knew they were the complete ‘owners’ of the outcome.

Third, he would encourage them to tell the truth. “I am a human being, and you are as well. We all speak (the) human language, and we all need to listen to one another.” Illustrating that concept with a common Bhutanese proverb, “our luggage is being carried by the Yak, but it’s the Yak herder who is making all the noise”, he thereby encourages the parties to consider not only their own grievances, but also those of the opposing parties. Next, he would ask the parties to describe their dispute, facilitate what he called a “give and take” negotiation, and ultimately help the parties put the resolution in a note for signature.

When we asked him where he had learned this strategy, he reassured us that it was consistent with BNLI’s mediation guidelines. But upon further prodding, he admitted (as though this were something to be embarrassed about) that it was essentially the same method his own elders had used to resolve village disputes when he was a child, some six decades ago.

Nothing to be embarrassed about indeed! Strikingly, it seems to me that the

practices we typically describe in the United States as ‘alternative’ dispute resolution innovations, are, in fact, “regular” dispute resolution in today’s Bhutan. Estimates vary as to the precise figure, but certainly the overwhelming majority of disputes in Bhutan today are resolved informally, with the help of local dispute resolvers like the ones we met in the Paro valley. Some of these dispute resolvers are elected, while others are unelected but respected village elders.

Bhutanese elders have been practicing dispute facilitation and mediation for centuries, long before the country transitioned to democracy in 2008, before Bhutan codified its first body of laws in 1959, and in fact long before even the institution of the Wangchuck dynasty in 1907. The strategies I heard about were consistent with the mediation “best practices” I used to teach my former law students in the United States, and demonstrated a familiarity with human nature that many (if not most) western lawyers sorely lack.

There is tremendous wisdom in the mountains and valleys of Bhutan about how to manage disputes, and the more I inquired, the more I was struck by the need to preserve and build on this rich tradition, even as the country continues to chart its own path towards modernity.

Here in Bhutan, it is the *formal* justice sector that is still in its metaphorical adolescence. Its growth spurt started, arguably, in 2008 with the adoption of Bhutan’s first constitution and its transition from monarchy to democracy. This transition required an explosion of democratic processes, checks and balances, and political debate where in the past the wisdom of the Palace and its faithful cadre of civil servants may have been sufficient.

Eight years later, Bhutan has most of the ingredients of a strong democratic legal culture: courts, laws, an emerging civil society sector, independent media, and an evolving culture of checks and balances within its government. Bhutan does not, however, have many trained lawyers. Estimates are that there are currently no more than 100-200 practicing lawyers in the entire country. This results in a ratio of one to two lawyers for every 7,500 Bhutanese citizens. In India that figure would be roughly 1:1043,¹ whereas in the United States it would be roughly 1:255.²

¹2013 figures (see Kian Ganz, RTI Reveals: 1.3 Advocates, Legally India, Feb. 18, 2013, <http://www.legallyindia.com/201302183448/Bar-Bench-Litigation/rTI-reveals-number-of-lawyers-india>)

²2011 figures (see Jeff Jacoby, US Legal Bubble Can’t Pop Soon Enough, Boston Globe, May 19, 2014, <https://www.bostonglobe.com/opinion/2014/05/09/the-lawyer-bubble-pops-not-moment-too-soon/qAYzQ823qpf4GQJ2OiPZM/story.html>)

The majority of Bhutan's lawyers work in the civil service, leaving only about 20 or so private lawyers—clustered in Bhutan's three major western cities of Thimphu, Paro, and Phuntsholing—who could even entertain the thought of rendering their professional services privately. But of course those lawyers also need to earn a living, and so the availability of pro-bono legal services is virtually nil. Small wonder, then, that Bhutan currently does not have a particularly legalistic tradition of resolving its disputes.

Of course, this situation is likely to change in the very near future. My own presence in Bhutan is part of that transition. Thanks to a Royal initiative, Bhutan will open its first and only law school in 2017, the Jigme Singye Wangchuck School of Law (JSW Law). When its first students graduate five years later, they will be legal pioneers in their own country. Almost certainly, there will be more graduates in that initial class than there will be legal positions to fill in Bhutan's civil service. The result: either a glut of unemployed lawyers or—more optimistically speaking—a dramatic supply-driven expansion of Bhutan's private bar.

Many of those students may join Bhutan's small corporate legal sector. But chances are also good that Bhutan's first full-time environmental lawyer will be a student in that inaugural class. So too, Bhutan's first human rights lawyer, Bhutan's first public defense attorney, and Bhutan's first law and economics scholar. Others will undoubtedly compete for jobs that previously had been the exclusive domain of their peers with degrees in management, public policy, economics, paralegal studies, etc. JSW Law's graduates' professional lives will be regulated by a newly-established Bar Council and a self-regulating Bar Association, both of which are currently being debated by lawmakers in Bhutan's legislature.

Of course, there may also be some future judges in that inaugural class who will join their more senior peers, having benefitted from a full five-year training sequence built explicitly around Bhutanese law, culture and values. Those judges will join a judiciary in the midst of a major infrastructure build-out and series of reforms aimed at making the courts more accessible, more accountable, more “user friendly”, and more efficient.

Taken together, these many reforms foreshadow an imminent seismic shift in the way Bhutan handles its disputes. All—or almost all³—of these reforms are aimed

³The one significant exception is the creation of the Bhutan Alternative Dispute Resolution Centre, called for by the Alternative Dispute Resolution Act of Bhutan (2013, Chapter II). But even this Centre's mandate veers towards a formalisation of dispute resolution practices in Bhutan; essentially seeking to create a parallel and formalised system of Alternative Dispute Resolution options that Bhutanese citizens can turn to as an Alternative to both the formal judicial system and the traditional village dispute resolution mechanisms. The ADR Centre's mandate focuses heavily on commercial arbitration (as opposed to facilitated person-to-person “negotiated settlement” or mediation), and instructs the Centre to “[l]ay down procedure to administer arbitration and negotiated settlement when the parties have agreed to refer it to the Centre,” and “[l]ay down a code of ethics for arbitrators and negotiators listed with the Centre.” (Chapter II-16 [1] & [6]), thus essentially formalising the process. Since, in 2016, the Centre has yet to be established, it is unclear to what extent these procedures will reflect and draw upon the traditions of Bhutanese dispute resolution described in this article.

at expanding the capacity of the *formal* justice system, not the *informal* dispute resolution procedures we were learning about in the Paro valley. If all goes well, these changes will facilitate Bhutan's continued development progress, and ensure that Bhutan's record of promoting good governance, political stability, and the rule of law will continue to shine.

But if things do not go well, this surge of institutional innovation and capacity building may also portend enormous social and legal confusion for Bhutan. This turbulence could be especially disruptive for those involved in the more mundane variety of disputes—those that have arisen predictably and across the generations as a result of simple human nature. It is unclear to me whether justice in Bhutan would be better served if the dispute resolution procedures that have evolved to handle those kinds of “mundane” disputes were slowly to erode due to a one-sided investment into Bhutan's new, glossy, formalised, and yet largely untested “modern” Bhutanese legal culture.

The outcome of this countrywide governance experiment, in my opinion, depends on the degree to which the Bhutanese people as a whole will warm to a formal versus an informal way of resolving disputes. Cultural generalisations are never a good analytical tool for making such predictions, but I worry that the social processes driving many of these reforms—modernisation and development—are not necessarily as pronounced at the village and local level as they are in the Bhutan's administrative and economic capital Thimphu.

If so, Bhutan's policy makers face the enormous challenge of either convincing their citizenry to embrace a more formal model of dispute management, or instead expanding the scope of their capacity building efforts to safeguard the continued vitality of Bhutan's informal dispute management traditions. Already, some of the judges we spoke to in the Paro valley described the unjustified expectations they sensed among some of the disputants appearing before them.

One judge described to us how he encouraged, and even insisted that certain types of disputes be handled at the local level, where in his opinion they could be more efficiently and equitably managed. He worried that disputants had misunderstood that courts are constrained by procedural rules that might be less accepting of legally inadmissible (but contextually relevant) discussions, and that judges typically are empowered only to render a more blunt, win-lose style of justice.

“No matter what we do,” the judge told us, “one party will walk out from my courtroom disappointed, and probably thinking that justice was not done, whereas

in the village the elder can find a solution that makes both parties feel as though they won, to some extent.”

Worse still, he speculated as to whether some disputants were actually motivated to seek justice through the formal court system *precisely because* they were drawn to this all-or-nothing style of decisive justice, hoping—presumably—that they would not only win the case but also decisively crush their opponent. If his anecdotal observations are evidence of a wider trend, one might legitimately worry that the expansion of the formal court system could weaken Bhutan’s more gentle and restorative style of traditional justice practiced at the local level.

As an outside observer, I feel that it would be a lamentable outcome if Bhutan’s significant investment into its judicial system were to render Bhutanese society more litigious, more legalistic, and less trusting! Could the specter of a lawsuit ever be wielded in Bhutan as though it were some sort of a threat, the way it is sometimes done in the United States?

In 2012, a poll conducted for a non-partisan U.S. government reform coalition found that 86 percent of American voters felt there was an increasing tendency for Americans to threaten legal action when things went wrong, and 51 percent believed the threat of frivolous lawsuits had actually discouraged people from engaging in normal activities.⁴ As a relative newcomer to Bhutan, drawn not only to its natural scenery but also its unabashed embrace of “happiness” as a concept worthy of serious study and promotion, this would be one of the saddest by-products of modernity that I could imagine for this inspirational country.

This is not to say, of course, that Bhutan should abandon its investment in its judicial sector. Nor is it to suggest that Bhutan’s dispute resolvers are all fully equipped to handle Bhutan’s contemporary disputes. Blind conservatism will not solve Bhutan’s problems any more than would a policy of reckless reform.

At times, Bhutanese citizens will require the services of a trained lawyer and easy access to a formal court. When disputes resolved at the local level prove unsustainable, or too complex for local officials to handle, they must be referred to the formal court system. In the Paro valley, this was especially true for some kinds of property disputes, where local officials told us it was sometimes simply more expedient to refer those types of cases to the court system. According to the laws in place, the same also holds for disputes relating to criminal matters.

⁴Common Good, “New Nationwide Poll: Most Voters Distrust U.S. Legal System,” *PR Newswire*, June 26, 2012.

Indeed, the Bhutanese constitution guarantees defendants the right to counsel—a right that if taken seriously, will result in a huge increase in the demand for lawyers in Bhutan. To the extent that traditional dispute resolvers shall be considered to be acting as “arbitrators”, they are also arguably precluded by law from handling marriage and child custody disputes, guardianship determinations, insolvency, inheritance issues, tax disputes, and all “such other matters which are against public policy, morality or any other existing provisions of the law for the time being in force in Bhutan”.⁵

Absent a clarification of this law, all of the above types of cases must be handled by the formal court system. Of course, even for cases that do not fall into these categories, there may still be disputants who simply prefer having their disputes handled by a judge, and their ability to access the courts (if they prefer to do so) cannot and should not be impeded.

Furthermore, accelerating economic shifts in Bhutan are resulting in more of the types of disputes that exceed the capacity of local dispute resolvers to manage. Large-scale development projects are leading to new types of human interactions that are no longer contained to neat communities.

For instance, pollution upstream may cause tremendous impacts in villages many kilometers downstream, but no single traditional dispute resolver or village elder would have the legitimacy or enjoy the trust necessary to conciliate all relevant stakeholders. Construction projects bring scores of workers—many of them from India or even further afield—into small Bhutanese villages that are unaccustomed to hosting large numbers of temporary migrant laborers, not to mention unprepared for the long-term changes these development projects may bring to their communities.

Also, contracts are being drafted in alien legal terms that are incomprehensible to the majority of Bhutanese, for whom a person’s reputation used to be an entirely sufficient proxy for trustworthiness. Increasingly complex financing arrangements for some of these projects introduce a bewildering array of stakeholders—many of them with no or only poorly-defined accountability mechanisms—into direct conflict with communities that have little or no knowledge of how these relationships work, and little recourse when things go wrong. Already, there is a barely audible hum of apprehension in some rural communities about these changes; one that could easily become louder, harsher and more disruptive if left to fester.

Bhutan is also changing socially. Younger generations of Bhutanese are exposed to influences their parents and grandparents could have never dreamed of (television,

⁵§46 of Alternative Dispute Resolution Act of Bhutan 2013.

international travel, social media, etc.). Speaking in generalities, it seems that most young Bhutanese still feel that they can express themselves while also maintaining a strong connection with their traditional values and communities. However, this too, may change with time.

Already today, the urbanised elite in Thimphu and other urban areas in Bhutan have a much broader sense of what constitutes “their” community, focusing not just on their village and their families, but also their workplace, their broader professional networks, their colleagues and friends around the world, their social media connections, etc. Many of these globalised Bhutanese continue to respect the authority of their elders. But their elders no longer enjoy a monopoly over their role as authority figures, nor are their opinions trusted and respected for all kinds of disputes. Indeed, many of the more traditional dispute resolvers we spoke to lamented the erosion of their authority and legitimacy with younger generations; some even spoke of an outright attack.

Finally, Bhutan’s informal dispute resolution practices may also need to evolve to reflect changing social and legal norms in Bhutan. For starters, not all dispute resolvers are aware of the laws outlining the limits of their mandate, and even some that do choose willfully to ignore those limits. This is often done at the insistence of the disputants themselves, who often prefer that disputes not reach the formal court system.

Despite an intensive outreach effort by BNLI to try to clarify these limits, many dispute resolvers allegedly still accept cases they really should be forwarding to the courts. Activists for gender rights, for example, cite cases of underage sexual assaults being resolved quietly, by means of an apology or a trivial compensatory payment, rather than being referred to the formal judicial system. Some of the dispute resolvers we met insisted that domestic violence did not constitute a criminal offense, and that their role as mediators in such cases should focus on keeping the family together, regardless of the violence that transpired or the wishes of one or both of the spouses.

This hybridised role, where community elders assume a role of part “neutral intermediary”, part “enforcer of community values”, was common among some of the dispute resolvers we met. This hybridised role may be precisely the right mediator ethic for certain types of cases, such as disputes over land, disputes over water rights during the growing season, or disputes over which family members should be responsible for taking care of their older relatives. But other types of cases might require a mediator subscribing to a very different and much more exclusively

process-oriented set of mediator ethics.

For all of these reasons, it is important that Bhutan continue its drive to strengthen the capacity of its formal judicial system, and that it also continue to diversify the dispute resolution options available to individual disputants. Crucially, Bhutan should ensure that this capacity building process takes place in a way that is not only respectful of, but also accountable to, the pre-existing diversity and wisdom of its dispute resolution tradition. Bhutan is one of the few places in the world where these traditional dispute resolution practices have not been relegated to the realm of distant memory. Bhutan was never colonised, and even today it retains a praiseworthy scepticism of simply importing foreign traditions at the expense of what existed before.

Bhutan's informal dispute resolution traditions should be carefully documented and cultivated in domains where they are appropriate. Furthermore, judges, lawyers, and other actors in the formal justice system should be given ample opportunity to learn from and appreciate the value of these age-old dispute resolution practices.

To their credit, the architects of Bhutan's judicial institutional capacity building efforts have insisted on precisely this point. Bhutan has already made the decision to significantly expand the role of legal professionals in this country. But it has also insisted that these new lawyers be trained consistently with Bhutanese values and norms. One manifestation of what it means to be a Bhutanese-trained lawyer should, in my opinion, be an ethical imperative to be conversant with, and respectful of, both the formal and the informal models of delivering justice in Bhutan.

Bhutan's policy makers may also wish, with time, to rely more on Bhutan's local dispute resolution traditions. For example, Bhutanese lawmakers may wish to reconsider the full list of matters that traditional dispute resolvers should not accept pursuant to the 2013 ADR Act.

One example might be divorce and inheritance. In the United States and other western countries, many families have learned that the most pain-free way to approach emotionally laden family disruptions such as divorce and complicated family inheritance disputes is, with the help of a skilled third-party mediator, following a process closely resembling the one that apparently has been practised in the Bhutanese highlands for decades, if not centuries. Divorce Mediation is a new and "innovative" discipline in the United States. In Bhutan, the knowledge on how to manage such difficult disputes has already been practiced for centuries. A

similar argument could be made for several of the other entries on the list of matters excluded from domestic arbitration under the current law.

Bhutan's policy makers have a laudable tendency to reflect carefully before enacting reforms, and to resist the forces of globalisation intent on steamrolling a global monoculture across the entire world. Those tendencies are precisely the ones that may allow Bhutan to succeed where other legal systems have failed: namely to allow Bhutan to strengthen its legal sector in light of modernity's challenges, without at the same time abandoning the proven dispute management traditions that have brought peace and justice to Bhutanese families and communities for centuries.