

FORMALIZING THE INFORMAL:  
DEVELOPMENT AND ITS IMPACTS ON TRADITIONAL  
DISPUTE RESOLUTION IN BHUTAN

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INTRODUCTION

Bhutan is a small landlocked country with less than a million inhabitants, wedged between the two most populous nations on earth, India and China.<sup>1</sup> It is known for its stunning Himalayan mountain ranges and its national development philosophy of pursuing “Gross National Happiness” (GNH).<sup>2</sup> This paper argues, however, that Bhutan should also be known for its rich heritage of traditional dispute resolution. That system kept the peace in Bhutanese villages for centuries: the product of Bhutan’s unique history and its deep (primarily Buddhist) spiritual heritage.

Sadly, these traditions are today at risk of extinction, victims—it is argued below—of Bhutan’s extraordinary process of modernization. This paper describes and contextualizes Bhutan’s traditional dispute resolution

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1. See *Bhutan Country Profile*, BBC (Feb. 14, 2018), <https://www.bbc.com/news/world-south-asia-12480707> [https://perma.cc/DEU8-ZPJV].

2. See Ritu Verma, *Gross National Happiness: Meaning, Measure and Degrowth in a Living Development Alternative*, 24 J. POL. ECOLOGY 476 (2016).

practices, and describes how they atrophied as a result of Bhutan's investments into its formal justice system. What remains of Bhutan's traditional dispute resolution system is today being completely replaced by the introduction of a formalized "modern" dispute resolution process. This modern model of community dispute resolution is often described as a revival and continuation of Bhutan's traditional heritage of dispute resolution, but in fact it is something quite new. This paper explores the interplay between reforms to the formal justice system and informal dispute resolution practices in Bhutanese villages. It concludes by raising crucial ethical questions about development initiatives aimed at promoting the rule of law, especially regarding their impact on informal, or so-called "alternative," dispute resolution processes in pluralistic legal systems.

#### I. THE BHUTAN LEGAL NEEDS ASSESSMENT

This paper draws on research conducted between 2018 and 2020 into the nature of justice—broadly defined—in Bhutan.<sup>3</sup> The Jigme Singye Wangchuck School of Law (JSW Law), Bhutan's first and only law school, carried out this groundbreaking<sup>4</sup> study as one of its first major research

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3. See STEPHAN SONNENBERG, KRISTEN DEREMER, UGYEN THINLEY & RINCHEN DEMA, JIGME SINGYE WANGCHUCK SCH. OF LAW RESEARCH CTR., BHUTAN LEGAL NEEDS ASSESSMENT (forthcoming 2020) [hereinafter LNA FINAL REPORT] (on file with author). A draft of the *LNA Final Report* was produced for purposes of informal consultations in February 2020, intended to generate input and feedback from key stakeholders. These consultations will ultimately feed into the final report for the LNA, which will be published in November 2020 as part of JSW Law's Research Centre Publishing Series. All page numbers in references to the LNA Final Report are likely to be different in the final published version.

4. While this research is novel in many ways, it also builds on and contributes to foundations already laid by others, notably the former Chief Justice of Bhutan, Lyonpo Sonam Tobgye, see LYONPO SONAM TOBGYE, *THE CONSTITUTION OF BHUTAN: PRINCIPLES AND PHILOSOPHIES* (Royal Court of Justice 2015); Dasho Lungten Dubgyur, who currently sits as a Judge at Bhutan's High Court, see LUNGTEN DUBGYUR, *THE PARASOL OF THE SILKEN KNOT* (Royal Court of Justice 2005) [hereinafter LUNGTEN DUBGYUR, *PARASOL*]; LUNGTEN DUBGYUR, *THE WHEEL OF LAWS* (Royal Court of Justice 2015); and Dasho Lobzang Rinzin Yargay, the Director of the Bhutan National Legal Institute, see Lobzang Rinzin Yargay, *The Mediation in Bhutan: "Saving Faces" and "Raising Heads"*, 4 *BHUTAN L. REV.* 17 (2015); Lobzang Rinzin Yargay & Sangay Chedup, *The Court-Annexed Mediation: Enhancing Access to Justice through In-House Court Mediation Services in Bhutan*, 10 *BHUTAN L. REV.* 92 (2018). Numerous non-Bhutanese scholars have also made significant contributions to the relevant literature on the nature, history, and mechanics of justice in Bhutan, notably Richard W. Whitecross, who conducted important ethnographic research in the early 2000s, before Bhutan's transition to democracy. See Richard Whitecross, *Of Texts and Drama: Delivering Justice in Bhutan*, 2 *BUDDHISM, LAW & SOCIETY* 77 (2016-17) [hereinafter Whitecross, *Of Texts and Drama*]; Richard Whitecross,

projects. I<sup>5</sup> was hired in 2015 to join a small and multinational cadre of specialists tasked with laying the intellectual foundation for that new law school. As part of those efforts, and in keeping with our institutional mandate to teach the law in a way that reflects both universal as well as local understandings of justice, I worked with colleagues to propose a nationwide “Legal Needs Assessment” (LNA) to inform our teaching *before* the arrival of our first batch of students.

Convincing stakeholders that our research could be at once methodologically sound, rigorous, open-ended, *and* truly welcoming of non-western understandings of justice<sup>6</sup> was no easy task. It required difficult conversations with those who hoped for a more simplistic approach. The study is not, as some donors had initially hoped, a naming-and-shaming

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“*Virtuous Beings*”: *The Concept of Tha Damtshig, and Being a Moral Person in Contemporary Bhutanese Society*, 28 HIMALAYA 71 (2008) [hereinafter Whitecross, *Virtuous Beings*]; Richard Whitecross, *Transgressing the Law: Karma, Theft and its Punishment*, 13 Revue d’Etudes Tibétaines 45 (2008) [hereinafter Whitecross, *Transgressing the Law*]; Richard Whitecross, *The Thrimzhung Chenmo and the Emergence of the Contemporary Bhutanese Legal System*, in THE SPIDER AND THE PIGLET: PROCEEDINGS OF THE FIRST SEMINAR ON BHUTAN STUDIES 355-78 (Centre for Bhutan Studies 2004) [hereinafter Whitecross, *Thrimzhung Chenmo*]; Richard Whitecross, *The Zhabdrung’s Legacy: State Transformation, Law and Social Values in contemporary Bhutan* (2002) (unpublished Ph.D. thesis at the University of Edinburgh). Other important non-Bhutanese scholars include Michael Aris, see MICHAEL ARIS, *BHUTAN: THE EARLY HISTORY OF A HIMALAYAN KINGDOM* (1979); Alessandro Simoni, see Alessandro Simoni, *A Language for Rules, Another for Symbols: Linguistic Pluralism and Interpretation of Statutes in the Kingdom of Bhutan*, 8 J. BHUTAN STUDIES 29 (2003); Alessandro Simoni & Richard Whitecross, *Gross National Happiness and the Heavenly Stream of Justice: Modernization and Dispute Resolution in the Kingdom of Bhutan*, 55 AM. J. COMP.L. 165 (2007); James Duffy, see James Duffy, *Nangkha Nangdrik in the Land of the Thunder Dragon: Psychology, Religion and the Potential of Mediation in the Kingdom of Bhutan*, 7 ASIAN J. COMP. L. 319 (2012) [hereinafter Duffy, *Nangkha Nangdrik*]; and Michaela Windischgratz, see MICHAELA WINDISCHGRAETZ & RINZIN WANGDI, *THE BLACK SLATE EDICT OF PUNAKHA DZONG* (2019).

5. For purposes of making this article easier to read, and also to underscore that from this point forward the views in this article are mine alone, I will from this point forward write in the first person. Any inaccuracies, misrepresentations, or oversimplifications, are mine alone.

6. Among anthropologists, there is a longstanding debate whether—and if so how—outsiders can ethically describe how a society works without inherently distorting it with their own cultural biases. For some, the very idea of a “post-colonial” ethnographic research effort is “a most pernicious fiction.” See RADHIKA VIRURU & GAILE CANELLA, *POSTCOLONIAL ETHNOGRAPHY, YOUNG CHILDREN, AND VOICE*, in *EMBRACING IDENTITIES IN EARLY CHILDHOOD EDUCATION: DIVERSITY AND POSSIBILITIES* 158, Susan Grieshaber & Gaile Cannella eds., 2001 (suggesting that only local voices should be the ones empowered to speak for themselves). Others take solace in a “fervid defense of the particular, the local, and the parochial against the onslaught of ‘the global.’” Jean Comaroff & John Comaroff, *Ethnography on an Awkward Scale: Postcolonial Anthropology and the Violence of Abstraction*, 4 ETHNOGRAPHY 147, 154 (2003). Our research, similarly to that described by Comaroff and Comaroff, derives meaning from local interpretations of phenomena but also seeks to embrace potential global influences in the development of those localized meanings.

human rights report detailing a litany of alleged shortcomings of Bhutan's justice sector.<sup>7</sup> Nor is it a work of strict legal anthropology.<sup>8</sup> Nor is our study a policy document presenting evidence structured to justify a proposed policy solution to a problem. Instead, it is a mix of all of the above, designed to document broad understandings of the concept of justice in contemporary Bhutan, and to situate those understandings in the context of a rapidly changing (developing) Bhutan. Most importantly, the study is designed to appeal to academics and policymakers alike. It presents findings, based on a sound methodology, that can also serve the needs of policymakers seeking input into their own efforts to strengthen Bhutan's justice sector.

#### *A. LNA Focus*

The original mandate of the study—namely to feed our teaching at JSW Law—received an important reinforcement in 2016, when Bhutan's policymakers decided, for the first time ever, to coordinate development planning across the entire justice sector.<sup>9</sup> Previous development plans in Bhutan had never treated the justice sector as a coherent unit requiring a coordinated planning process. In anticipation of its inclusion into the national planning process, the various institutions comprising that sector assembled to think about how to strengthen the capacity of the justice sector as an integrated process. To monitor the success of those various capacity building initiatives, they realized that they first ought to come to a consensus about what is meant by the term “justice” in Bhutan.

As a result of Bhutan's unique history, political trajectory, and social dynamics, Bhutanese policymakers have a proud tradition of coining their

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7. Irreconcilable misunderstandings on this point required us to return originally committed donor funds to avoid a fundamental incompatibility between the research objectives and donor expectations.

8. *Cf.* REBECCA REDWOOD FRENCH, *THE GOLDEN YOKE: THE LEGAL COSMOLOGY OF BUDDHIST TIBET* (1995).

9. Bhutan, just like its neighbor India (from which it inherited much of its bureaucratic machinery), plans its developmental activities according to five-year plans (FYPs). All government agencies, regional governments, and non-governmental recipients of government funds are expected to synchronize their institutional planning processes with the overall national planning priorities. The current FYP—Bhutan's twelfth—spans the years from 2018-2023, and—for the first time ever—defines a justice sector. *See* LORNEZ METZNER, *JUSTICE SECTOR STRATEGIC PLAN*, at iv (2018), <https://www.acc.org.bt/sites/default/files/Justice%20Sector%20Strategic%20Plan.pdf> [<https://perma.cc/HRP6-TLE4>].

own political theory, rather than simply adopting so-called “global” concepts. The concept of development, for example, is famously interpreted differently in Bhutan than in other countries, drawing inspiration not from the dogma of international development institutions at the time, but rather from Buddhist concepts. These normative foundations famously resulted in Bhutan’s pursuit of a development policy designed to maximize GNH rather than gross national product.<sup>10</sup> In 2016, the assembled justice sector stakeholders felt that the Bhutanese understanding of what constitutes justice might also be different in subtle but important ways from contemporary global standards—for example those articulated in the 2030 Agenda for Sustainable Development (the so-called “SDGs”).<sup>11</sup> This conclusion necessitates important alterations to the purportedly global approach to rule-of-law capacity-building efforts in Bhutan.<sup>12</sup>

While there was great enthusiasm and almost universal agreement that there might be such differences, no one in the room at the time was well equipped to elaborate on precisely where those differences might lie. Almost all of the key actors in the justice sector were formally educated—usually abroad—and knew as much or more about foreign legal systems than they did about the Bhutanese system.<sup>13</sup> The desire of the policymakers to use an authentically Bhutanese standard to evaluate the successes and failures of their justice-sector capacity-building efforts dovetailed perfectly

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10. See Verma, *supra* note 2; see also KARMA URA, SABINA ALKIRE, TSHOKI ZANGMO & KARMA WANGDI, AN EXTENSIVE ANALYSIS OF GNH INDEX (2012); ROSS McDONALD, TAKING HAPPINESS SERIOUSLY: ELEVEN DIALOGUES ON GROSS NATIONAL HAPPINESS (2010); Stephan Sonnenberg & Dema Lham, *But Seriously Now . . . Lawyers as Agents of Happiness? The Role of the Law, Lawmakers, and Lawyers in the Realization of Bhutan’s Gross National Happiness*, 45 F. FOR DEV. STUD. 461, 461–83 (2018); Julie McCarthy, *The Birthplace Of “Gross National Happiness” Is Growing A Bit Cynical*, NPR (Feb. 12, 2018), <https://www.npr.org/sections/parallels/2018/02/12/584481047/the-birthplace-of-gross-national-happiness-is-growing-a-bit-cynical> [<https://perma.cc/7XXJ-XF4M>].

11. JIGME SINGYE WANGCHUCK SCH. OF LAW, JUSTICE SECTOR PLANNING: A CONTRIBUTION BY THE JUSTICE SECTOR TO THE GROSS NATIONAL HAPPINESS COMMISSION IN PREPARATION FOR THE 12TH FIVE YEAR PLAN (2018-2023) (2016).

12. The approach of embracing global standards in measuring progress with regard to the rule of law, while also adding important national priority areas is consistent with the approach recommended by a high-level group of statisticians laying the groundwork for the development of a global set of indicators to assess progress with regard to the sixteenth goal of the Sustainable Development Goals pertaining to peace, justice and strong institutions. See GARY MILANTE, SUYOUN JANG, HYUNJUNG PARK AND KYUNGNAM RYU, U.N. DEV. PROGRAM, GOAL 16 – THE INDICATORS WE WANT: VIRTUAL NETWORK SOURCEBOOK ON MEASURING PEACE, JUSTICE AND EFFECTIVE INSTITUTIONS.

13. See BHUTAN NAT’L LEGAL INST., PROFILE OF THE JUDGES (2019).

with JSW Law’s interest in answering that same question for its curricular needs. After further deliberation, Bhutan’s development planning commission (GNHC) officially mandated JSW Law to conduct the LNA as part of the overall national justice sector development plan for the period lasting from 2018-2023.<sup>14</sup> This effort was intended eventually to generate an “authentically Bhutanese” and quantitative national justice-sector monitoring and evaluation strategy, incorporating not only global indicators generated by the United Nations Inter-Agency and Expert Group on SDG Indicators (IAEG-SDGs)<sup>15</sup> to measure progress with regard to the targets set forth in the SDGs,<sup>16</sup> but also national-level targets generated from the LNA and other national-level consultations.<sup>17</sup>

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14. Bhutan’s 12th Five Year Plan (“12th FYP”) contains as one of its national key result areas the goal that “Justice Services and Institutions [be] Strengthened.” GROSS NATIONAL HAPPINESS COMMISSION, TWELFTH FIVE-YEAR PLAN 2018-2023, at 18 (2017), <https://www.gnhc.gov.bt/en/wp-content/uploads/2017/05/gnh.pdf> [<https://perma.cc/WCE6-F54R>]. The Justice sector’s strategic plan, which lays out the justice sector’s plan for achieving the objectives listed in in the 12th FYP contains as one of its goals carrying out “research to enhance understanding of justice issues in Bhutan and inform sectoral planning and decision-making.” See JUSTICE SECTOR STRATEGIC PLAN 6 (2018), <https://www.acc.org.bt/sites/default/files/Justice%20Sector%20Strategic%20Plan.pdf> [<https://perma.cc/85T2-ABZ7>]. The implementation strategy document corresponding to this strategic plan lists nine separate areas where JSW Law’s LNA will provide development planners with crucial baseline data to guide and inspire further investments designed to strengthen Bhutan’s justice sector. See IMPLEMENTATION OF THE JUSTICE SECTOR STRATEGIC PLAN BHUTAN (2019-2023), at A1-A9 (2019) (on file with author).

15. See Paul Pacheco & Ze Yar Min, *Indicators’ Page*, E-HANDBOOK ON SUSTAINABLE GOALS (Dec. 13, 2019), <https://unstats.un.org/wiki/display/SDGHandbook/Home> [<https://perma.cc/X6ZH-KGUH>], which lists an evolving list of global indicators associated with efforts to measure progress towards the SDGs. The website is put together by the United Nations Statistics Division in collaboration with relevant substantive agencies. These indicators, once finalized, are to be used by all U.N. member states to report on progress towards achieving the SDGs.

16. See *Transforming our World: The 2030 Agenda for Sustainable Development*, SUSTAINABLE DEV. GOALS KNOWLEDGE PLATFORM, <https://sustainabledevelopment.un.org/post2015/transformingourworld> [<https://perma.cc/HVH3-YRWK>]. For a more detailed description of SDG16 and other SDGs relating to the justice sector more broadly, see also GLOB. ALL. FOR REPORTING PROGRESS ON PEACEFUL, JUST & INCLUSIVE SOC’YS, ENABLING THE IMPLEMENTATION OF THE 2030 AGENDA THROUGH SDG 16+: ANCHORING PEACE, JUSTICE AND INCLUSION (2019), <https://www.sdg16hub.org/system/files/2019-07/Global%20Alliance%2C%20SDG%2016%2B%20Global%20Report.pdf> [<https://perma.cc/GC5P-6JVF>].

17. This methodology was in keeping with the clear recommendation by the expert panel of statisticians tasked with proposing a baseline set of global indicators to measure progress with regard to SDG-16

that indicator identification is an iterative and consultative process; that every country will need to have a conversation about national targets and indicators to be used to achieve them . . . ; and that new solutions, innovative technologies and

### B. LNA Methodology

The LNA has three substantive focus areas. These were areas that the stakeholders whom we initially consulted felt would yield the biggest qualitative differences between Bhutanese and global understandings of justice. The three areas are (1) traditional dispute resolution practices, (2) what individuals and communities perceive as an “injustice,” and how (or whether) they empirically seek to pursue justice in such situations, and (3) small-business entrepreneurs seeking to develop local and sustainable economies. Each of these three focus areas employs different research methods, a description of which goes beyond the scope of this paper.<sup>18</sup>

This paper draws directly on the first of those substantive focus areas, and indirectly on the other two. During our research, which—at the time of this writing—has already covered seventeen of Bhutan’s twenty dzongkhags,<sup>19</sup> we interviewed more than two hundred dispute resolution practitioners. About half of those were local government (LG) leaders tasked with a modern mediation mandate.<sup>20</sup> The other half might best be described as “village elders,” who in the past used to be responsible for dispute resolution at the village level. Most of the elders we spoke to were in their sixties, seventies, eighties, or older. Some of those village elders still work as traditional dispute resolution practitioners (TDRPs), whereas others had given up their work as TDRPs and spoke to us instead about how they did their work in the past. Almost all of our dispute resolution interviewees were male, except for some still relatively rare examples of female elected LG leaders. Our research took us to numerous cultural zones of Bhutan, including the politically dominant *Ngalop* ethnolinguistic communities in the north and northwest, the *Bumthap* communities in the central-northern part of Bhutan, the *Shershop* communities in the eastern dzongkhags, as well as the *Lhotshampa/Nepali* communities in the south of the country. In between these dominant ethnolinguistic groups, we also encountered

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hybrid models may be necessary to measure complex concepts of peace, justice and institutions.

See MILANTE ET AL., *supra* note 12, at 11.

18. LNA FINAL REPORT, *supra* note 3.

19. These are the first-level administrative divisions of Bhutan. For more detail on the administrative divisions of Bhutan, see *infra* note 117.

20. See *infra* Part 0.

numerous smaller other communities.<sup>21</sup> In each, we sought out elders, seeking to document significant differences in how TDRPs handled disputes. We also spoke with individuals who had a case handled by either an LG leader or a TDRP, to learn from them about their experiences and expectations as they pursued justice.

To get a sense of comparing systematically the approach used by TDRPs, we used a set of fictional case studies drawn from the everyday context of village life in Bhutan. These case studies were designed to set up dispute resolution choices for the interviewee. Once the scenario was clear, we would ask the interviewees how they would think about various inflection points. For example, in a scenario involving a boy being harassed by his classmates because of (essentially) his gender identity, the elder was asked whether it would be more important to express to the boy that he was fine exactly the way he was (thus demonstrating a preference for an approach towards dispute resolution prioritizing the dignity of the parties) or whether instead it would be better not to express such empathy (thus revealing a preference for role neutrality).<sup>22</sup> Listening not only to their answer, but also their explanatory logic, we deduced and subsequently coded<sup>23</sup> the underlying normative principles behind each interviewee's approach to dispute resolution. Over time, we began to notice a preoccupation with the fundamental dignity of the disputants across the many TDRP interviews, which is why we began to describe their style of dispute resolution as "dignity-centric mediation" (DCM). As I describe below, this traditional style of Bhutanese dispute resolution is different from the modern style of mediation (often referred to as "*Nangkha Nangdrik*") practiced by the LG leaders. For the sake of clarity, I will refer below to this modern style as an "administrative adjudication" process. Much of our interviews focused on how dispute resolution practices have changed during the past several decades. These various interviews, even when not

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21. In particular, we spent time in a Layap community in Gasa Dzongkhag, Khengpa communities in Zhemgang and Mongar Dzongkags, a Lhop community in Samtse Dzongkhag, a Brokpa community in Trashigang Dzongkhag, a Gongdup community in Mongar, and a Monap community in Trongsa.

22. For those who are curious, the *overwhelming* majority of those whom we interviewed demonstrated a strong preference for the former—dignity-honoring—choice in this scenario.

23. To code their responses, we used Donna Hicks' Ten Elements of Human Dignity. DONNA HICKS, DIGNITY: THE ESSENTIAL ROLE IT PLAYS IN RESOLVING CONFLICT 25-26 (2011).

specifically cited, constitute the raw material for much of the analysis that follows.

## II. HISTORICAL CONTEXT

This first discussion of this part of the paper briefly describes the traditional Bhutanese model of dispute resolution. The description shall serve as a baseline for the discussion that follows, allowing us to understand how dispute resolution practice has evolved during the past seven decades. Bhutan's recent history allows us to pinpoint the moment—1959—when Bhutan's dispute resolution landscape began to transition. In that year, the then King of Bhutan, His Majesty (HM)<sup>24</sup> Jigme Dorji Wangchuck (commonly referred to as “K3”), began a series of sweeping reforms of the country's justice system.<sup>25</sup> Prior to that time, almost all cases were handled by local dispute resolvers in the manner described below. The only historical exceptions were very serious crimes such as murder, theft or desecration of religious objects, and treason, which were adjudicated by the King himself or his immediate regional representatives.<sup>26</sup> That system, and the norms based upon which those cases were decided, are still well within the living memories of many elders living in Bhutanese communities today. This is especially true given how long it took for the impact of K3's reforms to sink into some of Bhutan's more remote communities.<sup>27</sup>

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24. Throughout this paper, I will use honorific titles for Bhutanese historical figures that correspond to conventions in Bhutan, where it would come across as disrespectful to not describe, for example, a member of the Royal Family with an honorific title and corresponding capitalization conventions. While this may appear unusual from a non-Bhutanese perspective, it is essential to ensure the readability of this text in Bhutan as well as in St. Louis.

25. See Simoni & Whitecross, *supra* note 4, at 172.

26. Interview with Dasho Jambey in Bumthang, Bhutan (Aug. 29, 2019); Interview with Dasho Lhadala in Bumthang, Bhutan (Sept. 6, 2019); see also Simoni & Whitecross, *supra* note 4, at 172–73 (describing the various reforms, including the creation of the National Assembly, that occurred under HM the Third King).

27. This assertion draws primarily on our own research with elders in various parts of Bhutan, but is also reflected in the historical description of the various gradual reforms leading—over forty years after the drafting of the *Thrimzhung Chenmo* in 1959—to Bhutan's adoption of its modern civil and criminal procedure code. See Simoni & Whitecross, *supra* note 4, at 171–78.

*A. A Brief Historical Background on Bhutan*

In order to understand the social significance of K3's modernization process, one must first have some basic working knowledge of Bhutanese history. Bhutan has existed as a unified political entity only since the late seventeenth century, when Zhabdrung Ngawang Namgyel crossed into modern-day Bhutan from Tibet. Zhabdrung came from a lineage of Tibetan rulers, and he promptly set about unifying and "bringing civilization to" the various tribes and principalities living in the territory of today's Bhutan.<sup>28</sup> After consolidating power, he put in place Bhutan's first legal code.<sup>29</sup> Zhabdrung's law code lays forth a number of obligations, many of them specific to one's professional or governance role in society. Other obligations, however, apply to all individuals—regardless of their station in life—and are described in terms of ten "unvirtuous deeds" and sixteen "pure rules of human conduct," all of which ought to guide our daily conduct.<sup>30</sup> Taken together, these rules define what is commonly called "*tha damtshig*,"<sup>31</sup> and embody the essence of what makes one a good human being.<sup>32</sup>

Broadly speaking, the immoral acts described in Zhabdrung's Code include some which can typically be enforced in a court of law (for example murder or theft), but also others that are almost impossible to grapple with in a traditional courtroom setting (for example, respecting one's elders). From a Buddhist perspective, however, the "justiciability" or "enforceability" questions are of only secondary relevance. The concept of Karma—by which all sentient beings' rebirth in the next life corresponds to the amount of virtue they were able to accumulate (or squander) during their

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28. The culturally loaded terminology of "bringing civilization" to Bhutan is intentional, and was seen as an essential quality of a good leader. See WINDISCHGRAETZ & WANGDI, *supra* note 4, at 15-16.

29. This code is sometimes referred to as the *Khathrim*, although according to one scholar, "the Kathrim dates from around 1729, almost eighty years after the death of the Zhabdrung." See Whitecross, *Of Texts and Drama*, *supra* note 4, at 80; see also WINDISCHGRAETZ & WANGDI, *supra* note 4, at 10-13 (discussing the controversy surrounding the authorship and nomenclature of the code actually written by Zhabdrung or his immediate successors).

30. See WINDISCHGRAETZ & WANGDI, *supra* note 4, at 22-23.

31. This term translates literally as "'the highest promise' or 'ultimate vow'" from the word *damtshig*, referring to the Buddhist vows (*samaya*). Whitecross, *Virtuous Beings*, *supra* note 4, at 71.

32. See *id.* for a discussion also of how the concept of *tha damtshig* has been politicized, giving the term a modern-day social and political significance built on top of its original Buddhist connotations.

current lifetimes—exists to take care of any imperfections inherent in a human-made legal system.<sup>33</sup>

Zhabdrung’s reign in Bhutan lasted from approximately 1639 to 1708.<sup>34</sup> As strange as it may sound, Zhabdrung himself was not alive for most of that reign, since the fact of his death, likely in 1651, was hidden from the people until 1708 for fear that this might cause the country to descend into renewed political chaos.<sup>35</sup> Indeed, such fears were appropriate: following Zhabdrung’s death, the country descended into a state of prolonged civil strife that ended only with the consolidation of power by Bhutan’s first modern-day monarch, HM Ugyen Wangchuck, in the late nineteenth century.<sup>36</sup> During the interim period, a number of regional lords (*penlops*) wielded tremendous power within their fiefdoms, but were highly vulnerable to rivals contesting that power. A tumultuous history of assassinations, intrigues, periodic raids by Tibetan invaders and bandits, and conspiracies make Bhutan during the eighteenth and nineteenth centuries<sup>37</sup> seem remarkably different from the Bhutan of today, which is often idolized in tourist literature as the world’s “last Shangri-la.”

To make matters worse, Bhutan during that time was beginning to come into contact with a new regional hegemon. Prior to the late eighteenth century, the local hegemon in Bhutan had always been Tibet.<sup>38</sup> Tibet was a

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33. In the Buddhist tradition, *Karma* is not to be understood as “fate.” Rather, it is “created and perpetuated by our actions as we continue living—by our individual actions, and by our interactions with others.” TRALEG KYABGON, *KARMA: WHAT IT IS, WHAT IT ISN’T, WHY IT MATTERS* 57 (2015); see also REBECCA FRENCH, *THE GOLDEN YOKE: THE LEGAL COSMOLOGY OF BUDDHIST TIBET* 63 (Cornell Univ. Press 1995) (describing how Tibetan dispute resolvers would frequently refer to the concept of Karma in adjudicating disputes: “Tibetan law . . . is situated in a present that expands into otherworldly realms of the past and the future. Since any act done by anyone at any time is the result of both previous karma and the present possible exercise of will, a crime could have its cause in a previous life, its commission in this life, and its punishment in a future life in a lower or more difficult rebirth”). Whitecross also alludes to the role of Karma when he describes how debates over whether to abolish the death penalty for those accused of robbing religious sites: “The immense [karmic] negativity associated with these crimes was . . . so awful that many felt that it was not necessary to execute these criminals. Rather, it would be better for them and for society, to try to rehabilitate them.” Whitecross, *Transgressing the Law*, *supra* note 4, at 69-70.

34. See KARMA PHUNTSO, *THE HISTORY OF BHUTAN*, 207–304 (Haus Publ’g 2013).

35. *Id.* at 249-51; see also KARMA CHODEN & DORJI WANGCHUK, *BHUTAN – CULTURE SMART!: THE ESSENTIAL GUIDE TO CUSTOMS & CULTURE* (2018) 19.

36. PHUNTSO, *supra* note 34, at 273–512.

37. *Id.* at 305-41, 371-85, 389-440, 468-78; see also CHODEN & WANGCHUK, *supra* note 35, at 20.

38. “Until the beginning of the 17th century, Bhutan’s history was primarily one of minor invasions from Tibet, the movement of lamas across the Himalayas on missionary ventures and the

large and powerful empire, and Bhutan was situated along its borderlands. Consequently, Bhutan's trade, cultural, religious and also security relationships were all oriented principally around its complicated relationship with Tibet.<sup>39</sup> This dynamic began to change in 1773, when the British Empire first took an interest in Bhutan.<sup>40</sup> Bhutan—in the eyes of the British cartographers—was considered important only as a potential trade route between their Indian possessions and the Tibetan empire, and thus a strategic priority.<sup>41</sup> Later, the British also saw Bhutan as a potential bulwark against a rebellion by some Nepali elites against the British presence in the Himalayan region.<sup>42</sup>

The British presence was arguably one of the factors that precipitated the consolidation of Bhutanese political power into a unified monarchy in 1907. Ugyen Wangchuck, who by 1886—at the age of 24—had essentially consolidated his power over all of Bhutan, enjoyed the trust of the British Empire's representatives, and was famously awarded with the insignia of the Knight Commander of the Indian Empire in 1905.<sup>43</sup> Two years later, in 1907, he was crowned as the hereditary monarch of Bhutan, with the British envoy in attendance.<sup>44</sup> That said, Bhutan's new King had to play Bhutan's diplomatic hand skillfully to avoid the gradual absorption of the Bhutanese state into the British fold. In 1910, in response to increasingly aggressive claims by the Chinese that Bhutan fell under its jurisdiction,<sup>45</sup> Bhutan's King signed a treaty granting the British the right to assume control over

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spread of Buddhism." Thomas A. Marks, *Historical Observations on Buddhism in Bhutan*, 2 TIBET J. 74, 74 (1977); see also K. Dhondup, *Tibet's Influence in Ladakh and Bhutan*, 2 TIBET J. 69 (1977).

39. Dawa Norbu likens the role of ancient Tibet to "the Vatican of Mahayana Buddhism" with Tibet's relationship to Bhutan falling into the mold of a "priest-disciple relationship." Norbu continues that "religion is the idiom and format of such diplomacy but its content can vary including political, military, economic matters." Dawa Norbu, *The Europeanization of Sino-Tibetan Relations, 1775-1907: The Genesis of Chinese "Suzerainty" and Tibetan "Autonomy"*, 15 TIBET J. 28, 38 (1990).

40. In 1773, Major James Rennell, first Surveyor-General of India, launched a military expedition against Bhutan in response to the Bhutanese kidnapping a regional power broker in Cooch Behar, which Bhutan saw as a crucial buffer state to the British East India Company's presence in Bengal. This military intervention marked the beginning of the British Empire's military, diplomatic and economic entreaties towards Bhutan (and Tibet). See A.R. Field, A NOTE CONCERNING EARLY ANGLO-BHUTANESE RELATIONS, 13 EAST & WEST 340 (1962). See also PHUNTSO, *supra* note 34, at 347-54.

41. PHUNTSO, *supra* note 34, at 354.

42. *Id.* at 401.

43. *Id.* at 508.

44. *Id.* at 520.

45. *Id.* at 525-27.

Bhutan's foreign policy.<sup>46</sup> In return, the British acknowledged Bhutan's uncompromised sovereignty over its territory and domestic affairs.<sup>47</sup> This suited the British well, who had no interest in governing Bhutan *per se*, but wanted only to guarantee that the country wouldn't cause trouble for Britain's broader regional ambitions.<sup>48</sup> This arrangement, which essentially split Bhutan's sovereignty into a domestic half and a foreign-policy half, was only formally undone in 2007.<sup>49</sup> It also explains the obsessive focus of contemporary Bhutanese policymakers on the preservation, cultivation and reinforcement of an uncompromised and integrated sense of national sovereignty. Coming as close as it did to political annihilation during the nineteenth and twentieth centuries, Bhutan's entire political system today is oriented around the preservation of Bhutan as a sovereign nation.<sup>50</sup>

### *I. Diversity of Traditions*

Turning now from a discussion of Bhutan's neighborhood politics to the local level, one can see how Bhutan's elite during the tumultuous era lasting roughly from the time of Zhabdrung's death in the seventeenth century to the establishment of the Wangchuck Dynasty in 1908 were far too preoccupied with the geopolitical dimensions of maintaining their power to care too deeply about matters of local governance. To be sure, this is undoubtedly an oversimplification. Presumably, the various *penlops* and

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46. See T.T. Poulou, *Bhutan's External Relations and India*, 20 INT'L & COMP. L.Q. 195, 196-98 (1971).

47. *Id.*

48. *Id.*

49. When the British ended their colonial presence in India in 1949, the newly formed Indian state inherited the rights and obligations of the former British counterparties to the Treaty of Punakha. *De facto*, this state of affairs began to erode with Bhutan gradually and carefully asserting its own diplomatic presence, becoming a member first of the Colombo Plan and later the United Nations in 1971. Each such diplomatic step had to be carefully negotiated and coordinated with the Indian foreign policy establishment, and thus necessitated a very delicate process. See, e.g., Manorama Kohli, *Dragon Kingdom's Urge for an International Role*, 37 INDIA Q. 227 (1981) (describing India's diplomatic consternation over Bhutan's decision to break with Indian policy with regard to the recognition of Cambodia's Khmer Rouge government). In 2007, the Treaty of Punakha was formally renegotiated, with Bhutan legally regaining its full and uncompromised sovereignty. Nonetheless, the reality of Bhutan's geopolitical situation, wedged between the two most populous nations on earth—China and India—both of which happen to be embroiled in an intense and highly militarized regional power contest, requires that it continue to play a very careful diplomatic game to appease the two leering giants beyond its tranquil borders. See PHUNTSHO, *supra* note 34, at 572-76.

50. TOBGYE, *supra* note 4, at 24.

other local governors still had some presence in the communities. First and foremost, they had to ensure that taxes were collected and local political allegiances maintained, lest they run out of the raw materials necessary to continue running their fiefdoms. Consequently, the principal institutions of government with a presence in the region were those related to the collection of tax.<sup>51</sup> These positions were generally given out as rewards to loyal patrons of the regional governors, and came with great power and generous benefits (today, one might describe this more appropriately as a license to engage in moderately unchecked corruption<sup>52</sup>). Echoing this ancient role of the formal and non-local institutions, even today, many whom we interviewed still describe the formal national law as a “predator, not a protector” (in other words, a force to be feared, not a source of resilience for those who suffered an injustice).<sup>53</sup> The only significant exception to that is any initiative associated with the Wangchuck Monarchy, which since its origins in the late nineteenth century, has in many ways become the embodiment of justice incarnate in Bhutan.<sup>54</sup>

Other than the centralized collection of taxes, however, the management of local affairs was historically left almost exclusively to the discretion of local officials.<sup>55</sup> This is the key point from a dispute resolution perspective. It means that local leaders were the ones to resolve the vast majority of disputes and lower-level criminal offenses. Except for very serious crimes, or crimes that affected the narrow interests of the national authorities (taxation, treason, or very serious crimes such as murder or the desecration of religious monuments), local leaders were left to their own devices to

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51. Ardussi and Ura describe a document describing a celebration commemorating the enthronement in 1747 of a new religious head of state in which all families in Bhutan are enumerated based on their taxpayer status, revealing the complex system of tax collection that lasted largely unchanged until the 1950s. John Ardussi & Karma Ura, *Population and Governance in Mid-18th Century Bhutan, as Revealed in the Enthronement Record of Thugs-sprul 'Jigs Med Grags pa I (1725-1761)*, 2 J. BHUTAN STUD. 36 (2000).

52. According to our interviews, if local tax collectors got too bold in their efforts to enrich themselves, the King—at least during the reign of the Wangchuck Dynasty—might come down on them quite hard. Language to this effect also exists in Zhabdrung’s law code. See WINDISCHGRAETZ & WANGDI, *supra* note 4 at 29, 35–36. Judging from our conversations with elders, however, our impression is that during the period between Zhabdrung and the Wangchuck Dynasty, the regional tax collectors engaged in widespread, sometimes arbitrary, and often unchecked abuse of their power. *Id.*

53. Anonymous interview in Samdrup Jongkhar Dzongkhag, Bhutan (Dec. 9, 2019); see also Simoni & Whitecross *supra* note 4, at 174.

54. Consistently across a majority of our interviews, the role of the monarchy was described to us as taming the unruly and oftentimes unjust governance structures described above.

55. See Whitecross, *supra* note 14, at 86.

manage their communities' disputes.<sup>56</sup> Indeed, not only were they *allowed* to do so, they in fact had a very strong *incentive* to handle such community disputes. Given the political environment at the time, elevating any dispute to the national level risked having it resolved by political actors with little interest in the maintenance of peace and harmony. Instead, communities kept their heads down, selecting local leaders who were skillful at resolving disputes quietly, sustainably, and locally. Thus, in pre-1907 Bhutan, the concept of community leadership became closely intertwined with the concept of skillful conflict management.

The other point that bears some emphasis is that there was not—at that time—one unified national Bhutanese model of dispute resolution. While there was certainly a trend,<sup>57</sup> there remained ample opportunity for local innovation and diversity. These innovations in dispute resolution style might vary based upon the cultural, religious, and social dynamics particular to each region of Bhutan, as well as the individual dispute resolvers' capacity for creativity. Until much more recently, the central authorities simply did not care much *how* disputes were resolved, only that indeed they *were* ultimately resolved.<sup>58</sup> As a result, one might describe the two centuries between Zhabdrung's time and K3's reign as an extraordinarily vibrant laboratory for various locally-grounded dispute resolution methods, evolving over time to ideally meet the unique nature of Bhutanese society.

## 2. Political History Since 1907

As mentioned above, the Wangchuck Dynasty was established in 1907, with the consolidation of power under Ugyen Wangchuck. The subsequent reign of the Wangchuck Dynasty is typically organized by rulers. HM the First King, Ugyen Wangchuck's reign (1907–26) and HM the Second King, Jigme Wangchuck's reign (1927–52), are often described as periods of

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56. Whitecross, *Of Texts and Drama*, *supra* note 4, at 84.

57. *Infra* Subsection III.A.0.

58. Simoni and Whitecross described in 2007 how, since the late 1970s, policymakers have begun to think of dispute resolution as part of a unifying nation-building narrative, according to which certain non-Buddhist dispute resolution practices, notably the Nepali/Lhotshampa dispute resolution practices common in the southern regions of Bhutan, were "rendered officially invisible." Simoni & Whitecross, *supra* note 4, at 188-90. In contrast, our own research, which took place more than a decade later, found no evidence of official aversion to the Samaach system.

political consolidation.<sup>59</sup> These two first Monarchs had to overcome some residual resistance to the centralization of political power, for example a tussle over power between the Second King and an ambitious reincarnation of Zhabdrung.<sup>60</sup> At the international level, the time period was also a tumultuous one, with the world plunging into two world wars, violent revolutions, and political turmoil.<sup>61</sup> As a result of this unrest, the dynamics described above, with local communities retaining maximal authority to handle their own affairs, remained largely unchanged.

This situation began to change in the 1950s, during K3's reign (1952–72). K3 is generally seen as Bhutan's modernizer and reformer.<sup>62</sup> He first opened Bhutan's doors to outsiders and opened the eyes of the Bhutanese to the outside world.<sup>63</sup> He embarked upon an aggressive campaign to build

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59. See Whitecross, *Of Texts and Drama*, *supra* note 4, at 86; see also DORJI WANGCHUK, FOUNDATIONS OF BHUTAN HISTORY: A CONSISE GUIDE 66-91, 107-28 (2016) (providing a more detailed history of the rise to power of HM the First King Ugyen Wangchuck and the moves to consolidate and cement that power under the HM the Second King Jigme Wangchuck, primarily by means of administrative and tax reforms).

60. See PHUNTSO, *supra* note 34, at 550–56.

61. In India “[a]s many as 74,187 Indian soldiers died during the [First World W]ar and a comparable number were wounded” serving “the very British Empire that was oppressing their own people back home.” Back in India, the country was “wracked by high taxation to support the war and the high inflation accompanying it, while the disruption of trade caused by the conflict led to widespread economic losses—all this while the country was also reeling from a raging influenza epidemic that took many lives.” Following the war, the British imposed strict anti-sedition laws that led to more death, repression and suffering. Shashi Tharoor, *Why the Indian Soldiers of WWI Were Forgotten*, BBC (July 2, 2015), <https://www.bbc.com/news/magazine-33317368> [<https://perma.cc/N3FH-99SX>]. A few decades later, the Second World War came again to deplete Indian families. “When it ended in 1945, over two [and a] half million Indians had borne arms voluntarily. Over 90,000 of these had been killed or had gone missing in action. Many millions more had been employed in the war effort, in manufacturing, agriculture, construction, services to the military and transport.” Nigel Collett, *India's War: World War II and the Making of Modern South Asia*, DIPLOMAT (Mar. 27, 2016) (reviewing SRINATH RAGHAVAN, *INDIA'S WAR* (2016)), <https://thediplomat.com/2016/03/review-indias-war-world-war-ii-and-the-making-of-modern-south-asia/> [<https://perma.cc/XX45-5S8E>]. Tibet, on the other side of Bhutan, gave “positive and generous” support to Britain and her allies during the First World War, but remained strictly neutral during the Second World War. Nirmal Sinha, *Tibet's Status During the World War*, 2 BULL. TIBETOLOGY 31, 35 (1965). In Southeast Asia, the First World War cost an estimated twenty thousand lives, “mostly conscripts from the French colonies.” David Hutt, *The Great War's Impact on Southeast Asia*, SOUTHEAST ASIA GLOBE (Nov. 11, 2018), <https://southeastasiaglobe.com/wwi-centenary/#> [<https://perma.cc/8MXK-3QQU>]. And, of course, the ravages of World War II on Asia as a whole are well known and well beyond the scope of one footnote to summarize in all of their horrifying detail. Throughout this period, Bhutan was diplomatically isolated from the rest of the world, and save for some minor monetary contributions in solidarity to the British, completely unaffected by these humanitarian calamities. See PHUNTSO, *supra* note 34, at 560.

62. See, e.g., Simoni & Whitecross, *supra* note 4, at 170.

63. *Id.* at 169-70.

the nation's infrastructure, beginning with the country's first road from the Indian border to Thimphu, the country's new capital. K3 also reaffirmed the strong diplomatic, financial and military relationship that his predecessor had established with a newly independent India. K3 also made a major push to modernize the country's bureaucracy, adopting the Indian practice and vocabulary of prioritizing its national investments according to five-year development plans.<sup>64</sup>

Of central significance to K3's modernization push was the creation of an independent judiciary. Early during his reign, K3 drafted an important legal code—the *Thrimzhung Chenmo*. Unlike those drafted in the eighteenth century, however, the *Thrimzhung Chenmo* had a distinctly modern flair.<sup>65</sup> K3 himself oversaw and meticulously scrutinized the *Thrimzhung Chenmo*'s drafting process.<sup>66</sup> The text of Bhutan's first modern legal code went into much more granular detail than any of its predecessors in terms of how Bhutanese citizens should behave, how crimes were defined, etc.<sup>67</sup> The *Thrimzhung Chenmo* also explicitly delineated the limits of traditional dispute resolvers to oversee “negotiated settlements”—in other words, to mediate a case.<sup>68</sup> According to the new code, it defined any case—criminal or civil—as eligible for mediation as long as it was not what in today's language we might refer to as a felony.<sup>69</sup> Given that the code only graded certain offenses in those terms,<sup>70</sup> this standard merely reaffirmed the previous jurisdictional division of labor between the King and the village elders, transferring the King's former adjudicative function to the newly-minted courts.<sup>71</sup> The courts, therefore, were initially designed to handle only the very most serious of criminal cases. This legacy persists to this day, where the courts and large parts of Bhutan's legal community continue to look at the world through what I describe as “criminal-tinted sunglasses.”

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64. See *supra* note 9. The first development plan spanned from 1963-68.

65. See Whitecross, *Thrimzhung Chenmo*, *supra* note 4.

66. Interview with Dasho Lhadala, *supra* note 26. See also Simoni, *supra* note 4, at 34. But see Whitecross, *Of Texts and Drama*, *supra* note 4, at 86 (claiming, somewhat controversially, that “[t]he new law code was less a codification of existing Bhutanese laws than an entirely new law code drawn mainly from India”).

67. Whitecross, *Of Texts and Drama*, *supra* note 4, at 87.

68. Duffy, *Nangkha Nangdrik*, *supra* note 4, at 336.

69. The term in the *Thrimzhung Chenmo* was a “non-compoundable” offense, which today equates with a felony charge. See Penal Code of Bhutan art. 70 (2004).

70. Including murder, treason, and vandalism of religious monuments.

71. See also Simoni & Whitecross, *supra* note 4, at 173.

This is the point where I will momentarily pause our description of Bhutan's process of *judicial* or *justice* landscape modernization. As I hinted above, our research considers the establishment in 1959 of Bhutan's modern judiciary as the moment when the country's entire system of understanding right and wrong—in other words its “justice cosmology”—began gradually to transition. After briefly describing the country's economic development during this same time period, and presenting a sketch of the style of mediation prevalent in Bhutanese communities *circa* 1959, I will describe how that gradual transition slowly unfolded in Bhutanese communities.

### 3. Development Context

K3 also instituted a number of economic reforms. Those reforms only continued and accelerated under the reign of his two successors, HM Jigme Singye Wangchuck (K4) and HM Jigme Khesar Namgyel Wangchuck (K5). The first was that Bhutan put in place specific economic reforms aimed at cultivating economic growth. The country opened itself to foreign direct investment (primarily from India) and increasingly large-scale international tourism.<sup>72</sup> From the outset, Bhutan's tourism policy was designed to bring crucially necessary foreign hard currency into the country.<sup>73</sup> The country also increasingly supported private individuals to engage in lucrative, if carefully regulated, income-generation opportunities.<sup>74</sup>

The gradual introduction of cash-based economic activities fundamentally altered the nature of Bhutan's society. This process is ongoing even today. For one, it facilitated the growth of Bhutan's urban areas, allowing (even requiring) more and more people to move to the cities and participate in an exclusively cash-based economy.<sup>75</sup> The cash economy also started to change economic life in Bhutan's rural areas. Historically, families living in Bhutan's rural communities (still today a majority of

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72. Tandin Dorji, *Sustainability of Tourism in Bhutan*, 3 J. BHUTAN STUD. 84 (2010); see also Tara Limbu, *Bhutan Opens its Doors, but Few Foreign Investors are Ready to Come In*, NIKKEI ASIAN REV. (May 5, 2016), <https://asia.nikkei.com/Economy/Bhutan-opens-its-doors-but-few-foreign-investors-are-ready-to-come-in> [<https://perma.cc/GY2W-N5LZ>]; *Bhutan Approves 64 FDIs in 15 Years*, KUENSEL (May 23, 2018), <https://kuenselonline.com/bhutan-approves-64-fdis-in-15-years-2/> [<https://perma.cc/2M5C-78FT>].

73. Dorji, *supra* note 72.

74. LNA FINAL REPORT, *supra* note 3.

75. *Id.* at 29-31.

Bhutan's population) relied on their own cultivation to sustain themselves throughout the year.<sup>76</sup> As markets grew in Bhutan's urban areas, and demand for certain types of "cash crops" grew, households in rural areas began to respond by cultivating or even monocropping those cash crops for sale in urban and even international markets.<sup>77</sup> Some regions of Bhutan experienced an explosion of wealth as a result. For example, Bumthang—a district in Bhutan's central region—went from being one of the poorest regions of Bhutan to one of its most prosperous on the back of the humble potato.<sup>78</sup> But this infusion of cash also changed those rural economies. Whereas before, people had largely relied on an informal system of helping one another in times of need, the introduction of cash began to dry up those informal bartered exchanges of goods and services, replacing them instead with cash-based transactions.<sup>79</sup>

The psychological impacts of these various changes were profound, and frequently commented upon by the elder dispute resolvers we interviewed, who described to us how the gradual "monetization" of local economies went hand in hand with a more "win-lose" mindset among parties embroiled in a community dispute.<sup>80</sup> Whereas in the past, values such as compassion and neighborly collaboration would color how people might approach a dispute, increasingly, elders described for us how parties gradually became more concerned about "winning and losing," or "getting what one is due."

However, one should not paint an overly one-sided picture of Bhutan's economy. Indeed, Bhutan today is globally perhaps best known for the concept of GNH.<sup>81</sup> From an economic perspective, one of the major talking

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76. SNV, a Dutch nonprofit international development organization, estimates that sixty-nine percent of Bhutan's population is rural, and most of them are dependent on subsistence farming. See *Climate Smart Agriculture—Bhutan*, SNV, <https://snv.org/project/climate-smart-agriculture-bhutan> [<https://perma.cc/62GR-29X8>]. This situation is gradually changing, however. See Tashi Dendup, *Agricultural Transformation in Bhutan: From Peasants to Entrepreneurial Farmers*, 23 *ASIAN J. AGRIC. EXTENSION, ECON. & SOC.* 1 (2018).

77. Interview with Dasho Neten Zangmo & Dasho Tashi Dorji in Samdrup Jongkhar Dzongkhag, Bhutan (Dec. 9, 2019).

78. Interview with Dasho Fritz Maurer in Bumthang Dzongkhag, Bhutan (Aug. 8, 2019).

79. Interview with Kuenzang Peldon in Trashiyangtse Dzongkhag, Bhutan (Nov. 8, 2019).

80. LNA FINAL REPORT, *supra* note 3, at 29-31. By "win-lose mindset," I refer to the idea that one person's "win" must come at the expense of another person's material interests, as is often the case in a classical bargaining or haggling scenario, in which a merchant "wins" to the extent he or she can increase the price of a good, at the direct expense of the consumer (and vice versa). The opposite of such a zero-sum mindset (the "win-win" mindset) looks to identify and build on other interests, for example a reputation for fairness, repeat business, and the value of social trust.

81. McCarthy, *supra* note 10.

points for GNH was for Bhutan's planners to chart a Buddhist-inspired "middle path" for the economy.<sup>82</sup> In concrete terms, this meant neither ignoring the need to foster the nation's economic growth, nor sacrificing all other social, environmental, cultural, or governance priorities in favor of *only* unbridled economic growth. This development philosophy, which was first articulated in the early 1970s by K4<sup>83</sup> led, for example, to a ban on the rampant deforestation of the country and a very reasoned approach towards the extractive industries. GNH also introduced a strong and unifying narrative in Bhutan, emphasizing the need to "go slow" on economic growth, especially if that growth begins to threaten the integrity and cohesion of Bhutanese village life.<sup>84</sup> Whether this "middle-path" approach towards the country's economic development can survive the pressures of democratic governance is a question that is increasingly being raised by those concerned that modern politicians have perhaps abandoned the core principles of GNH.

#### B. "Dignity-Centric Style of Mediation"

As described above,<sup>85</sup> the survey of Bhutan's modern history "pushed pause" around 1959, when K3 breathed life into Bhutan's modern legal system. By way of establishing a baseline for subsequent discussions, I will

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82. MCDONALD, *supra* note 10, at 107.

83. Lyonchhen Jigmi Y Thinley and Dr. Ron Coleman both claim that HM Jigme Singye Wangchuck coined the term "Gross National Happiness" in 1974. *See id.* at 1, 22.

84. Justifying Bhutan's critique of gross domestic product (GDP) (or gross national product) as the sole measure of economic progress, Jigmi Y Thinley, Bhutan's first Prime Minister, in 2011 warned that the

use of [GDP] as the singular driver of development resulted in our pursuit of limitless growth in a finite world . . . . It failed to take into account those aspects of development or changes that matter equally or more to human wellbeing. We ignored those mounting costs arising from activities to raise GDP. In the process, we have destroyed much of real and natural wealth that belong not only to our generations but to those unborn as well and all other life forms with whom we share this planet. We have done so for the sake of what we now begin to see are destructive illusions of prosperity, bringing upon ourselves an escalating number and magnitude of crises.

Jigmi Y Thinley, Gross National Happiness: A Holistic Paradigm for Sustainable Development, Fourth Professor Hiren Mukerjee Memorial Lecture Before the Indian Parliament (Dec. 20, 2011), <http://apfanews.com/commentary/gross-national-happiness-a-holistic-paradigm-for-sustainable-development.html> [<https://perma.cc/HA28-HXRN>].

85. *Supra* Subsection II.A.13.

briefly describe what Bhutan’s *informal* dispute resolution processes—which I describe as “dignity-centric mediation”<sup>86</sup> (DCM)—looked like around that time.

### 1. *Buddhist Normative Anchors*

First, it will perhaps come as no surprise that the normative anchors of Bhutan’s style of traditional dispute resolution—DCM—is a series of powerful Buddhist ideas about right and wrong. Strictly speaking, this situates our description of DCM geographically in the northwestern part of Bhutan, and culturally in what might best be described as Bhutan’s *Ngalop* (Dzongkha-speaking and Buddhist) ethno-linguistic heartland.<sup>87</sup> As we documented in our research, however, the DCM style of mediation also has a great deal of resonance in non-Buddhist and other minority communities, facilitated by the spread of secular (albeit Buddhist-inspired) “modern” national narratives such as GNH.<sup>88</sup> During the 1900s, large numbers of Nepali migrants began to settle throughout southern Bhutan at the invitation of the early Bhutanese Kings, who wanted to more heavily populate this border region and maximize its agricultural potential.<sup>89</sup> These Nepali (or *Lhotshampa*) migrants brought with them very different normatively grounded traditions of dispute resolution, steeped in Hindu legal concepts.<sup>90</sup> While the form and outward manifestations of these dispute resolution traditions were perhaps novel to Bhutan, their function turned out to be quite similar, and, as I will describe below, they began to converge quite fluently with the introduction of more secularized, unifying and state-centric normative ideas in the late twentieth century.

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86. In addition to DCM, there were also other ways in which third parties might have historically intervened in a dispute. Individuals familiar with bureaucratic processes, for example, would sometimes serve as *jabmis*, essentially representing the interests of their clients involved in a bureaucratic or judicial process. These *jabmis* served a similar function to today’s lawyers. Elders within the family also provided an important source of dispute resolution, primarily with regard to disputes within the family. Finally, influential individuals within the community would sometimes weigh in with decisionmakers on appeals concerning the interests of less influential individuals in their communities, amplifying the priority accorded to that case. This paper focuses only on DCM.

87. See also Simoni & Whitecross, *supra* note 4, at 188.

88. LNA FINAL REPORT, *supra* note 3, at 79-80, 86-90.

89. See PHUNTSO, *supra* note 34, at 494.

90. Interviews with Lhotshampa elders in Chuckha, Samtse, Samdrup Jongkhar Sarpang, Tsirang and Dagana Dzongkhags, Bhutan (Jan., Feb. & Dec. 2019; Jan. & Feb. 2020).

In the northern parts of Bhutan, the elders we interviewed had a strong fluency with Buddhist principles. Many of them were religiously educated. Most did not consider their familiarity with these principles to be representative of any education. In fact, most initially apologized to us for being “uneducated,” and thus unable to help us with our research. Instead, they thought of their awareness of these principles as a wisdom that comes with piety and increasing age. As we describe in the final report for the LNA, the core concept that articulates the focus of a mediator practicing a “dignity-centric” style of dispute resolution is—as the name would imply—the preservation and enhancement of human dignity throughout the process.

[W]hy “dignity?” . . . The concept of dignity can be derived from an examination of the Buddhist concepts of interconnectedness, impermanence, and compassion. It comes from the realization that if, as Buddhist teachings would suggest, there is no such thing as an “individual” human being, the quest for individual satisfaction or happiness in a dispute must also be an unattainable aspiration. The concept of interconnectedness requires of a disputant that his or her personal quest for a satisfactory outcome be indistinguishable from efforts to ensure that others in society—indeed all others in society—are also satisfied by that outcome. This discourse resonates strongly with the often-used mantra of a mediator to seek out so-called “win-win” solutions, as opposed to the “winner-take-all” model of deciding who in a dispute is “right,” who is “wrong,” and allocating blame and punishments accordingly.

Buddhism does not merely encourage a quest for win-win solutions, however. It also suggests a particular focus for the dispute resolver’s value creating and problem solving. Firstly, the Buddhist concept of impermanence suggests that any material gains (or losses) associated with a legal dispute are meaningless. Secondly, the Buddhist concept of compassion focuses on how we must treat all of our fellow human beings (and in fact, all sentient beings), even if they happen to be on the other side of a dispute. Taken together, these two concepts suggest a clear priority

for a dispute resolver, namely that when the dust of a dispute settles, the nature of a relationship between the disputants matters as much or more than the substantive outcome to their dispute.<sup>91</sup>

## 2. General Characteristics of This Style of Mediation

As mentioned above, one of the key purposes of DCM was to keep disputes from bubbling up beyond the confines of the community. Thus, TDRPs had as their primary objectives to keep the peace. One of the most frequently repeated parables we heard from elders in the community was the rhetorical question of “who will help you most when you are sick: your relative living in in another valley or your immediate neighbor in the village?” The clear implication was the crucial need to maintain reliable and trusting relationships within the village. This was the key selling point that elders would use to describe the advantages of their style of DCM vis-à-vis the formal court system.

As we describe in more detail in the LNA’s final report, the centrality of dignity was ubiquitous throughout the mediation process.<sup>92</sup> Not only would the TDRP use the idea of dignity as the ideal for how the parties should rework their relationship with one another, but also as his<sup>93</sup> own personal template for interacting with the parties. The TDRPs we interviewed insisted that their own interactions with the disputing parties should also be guided by a steadfast commitment to honor and respect the dignity of other human beings.

The TDRPs’ focus on treating disputing parties in ways that honor their dignity, and likewise encouraging the disputants to reconceptualize their relationship to result in more dignity-honoring interactions amongst themselves, resulted in a style of dispute resolution with six noteworthy hallmarks.

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91. LNA FINAL REPORT, *supra* note 3, at 98.

92. *Id.*

93. I am intentionally using gendered language here. While perhaps uncomfortable to read in today’s modern era (also in Bhutan, where increasingly men *and* women serve as dispute resolvers today), the focus on male dispute resolvers in this historical discussion reflects the fact that until recently only men were called upon to serve as dispute resolvers in any capacity in Bhutan. *See id.*

First, TDRPs demonstrated extraordinary patience in dealing with the parties. Cases could take months and even years to complete, and the TDRPs would see it as absolutely essential that they proceed only as fast as the parties themselves were ready to go when settling a dispute. Furthermore, even for seemingly “resolved” disputes, TDRPs would often reopen a case without hesitation if ever one or more of the parties expressed reservations about a prior agreement.<sup>94</sup>

Second, TDRPs would never turn down a case, no matter how seemingly trivial that case might appear at first glance. The mere fact that disputants agreed to entrust an elder with the task of helping to resolve a dispute was fully sufficient to ensure that the elder would take that case seriously, regardless of how large or small that dispute might appear. Furthermore, quite often a seemingly trivial case would be the outward manifestation of a much more profound—if sometimes difficult to articulate—grievance, that the skillful TDRP would begin to unravel as he started work on the initial dispute as it was originally presented to him.

Third, most of the TDRPs we interviewed felt strongly that in order for any outcomes to be truly sustainable, they must never seek to impose certain preferred solutions on the parties, but rather allow the parties themselves to generate ideas.

Fourth, the dispute resolution parties were very clear in distinguishing neutrality from impartiality. Most TDRPs we spoke to rejected the notion of their own role as a strictly “neutral” intermediary (in the sense that they would afford each party exactly the same opportunities to speak and be heard), and embraced rather a vision of themselves as “impartial” intermediaries (in the sense that they would afford to each party exactly the degree of support, space, and coaching that they needed to participate equally in the mediation). The standards of when a mediator might intervene tracked closely with the elements of dignity described above. Thus, for example, if one party would dominate another and actively threaten their sense of psychological safety, the TDRP might intervene on behalf of the target of such aggression, seeking to rebalance the dynamic. While some rare parties would take such interventions as evidence of partisanship or

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94. That said, if the dispute resolution involved a recidivist—someone who demonstrated a pattern of similar disputes—either with the same individual or with different individuals in the community, most dispute resolvers expressed some limits to their willingness to reopen multiple disputes with that same individual, referring those kinds of cases instead to formal dispute resolution processes.

bias, the elders' prestige as trusted and honorable dispute resolvers would usually allow them to stage such careful interventions.

Fifth, the TDRPs we interviewed were typically masters of symbolism. They would often skillfully deploy locally meaningful imagery, rituals, and stories to mark key points of the dispute resolution process. Of particular concern to many of the TDRPs was the conclusion of a dispute—formally marking the laying aside of past grievances in favor of a new and more harmonious relationship moving forward. Of central importance in this process was the issuance of a meaningful apology. In fact, across all regions of Bhutan, spanning the various ethno-linguistic communities in which we interviewed, the centrality of a meaningful apology as the hallmark of a resolved dispute stood out prominently. One experienced dispute resolver even felt that his primary added value in a dispute situation was to coach parties on how properly to apologize to one another.<sup>95</sup> These apologies were then almost always memorialized in the form of a written contractual document, or, if no one in the village was available who knew how to write such a document, a formal proclamation in the presence of witnesses. These written agreements (*goenjas*), which were drafted in the form of a contract, were not specifically intended to be enforceable in court, but nonetheless held tremendous value as official markers of the conclusion of a dispute.

Finally—and crucially—our interviews demonstrate that TDRPs worked with parties to articulate disputes in terms of individual responsibilities towards others—towards one's community, one's neighbors, one's culture, one's Nation, one's King, and one's counterpart in a dispute. TDRPs were quite skillful in helping parties reframe a dispute away from a grievance suffered—in other words “someone owes me something, and I'm angry”—and towards a discussion of responsibilities—“what responsibility do I personally have towards others in this situation?” This reframing from rights to responsibilities allowed the TDRPs to refocus many disputes away from a sense of grievance and towards a more forward-looking and problem-solving mindset.

Our research also documented a remarkable tradition of passing along dispute resolution wisdom from one generation to another. When asked how they originally developed their “wisdom” as a dispute resolver, most TDRPs

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95. Interview with Koencho Gyeltshen, in Damji Village, Gasa Dzongkhag, Bhutan (Nov. 11, 2018).

mentioned an informal village culture of “gossip” about disputes that surrounded them from an early age. Just like modern office workers might debate their armchair coaching theories after a hotly contested sports match, so too villagers in Bhutanese communities would discuss their theories on how best to work with disputing parties, and gradually accumulate their personal collection of dispute resolution anecdotes. Through such banter, certain individuals would emerge as particularly wise dispute resolution experts. As individuals became known for their wisdom, parties would approach them with requests for help resolving a dispute. Younger “novice” dispute resolution experts might seek the formal advice of their elders, sometimes even co-mediating a dispute. In these ways, the local dispute resolution wisdom would be refined and passed down from one generation to the next.

### III. “MODERNITY” AND CHANGE IN THE BHUTANESE DISPUTE RESOLUTION LANDSCAPE

This part of the paper explores how “modernity” in Bhutan has impacted dispute resolution practices found in rural<sup>96</sup> Bhutanese communities. According to our research, DCM is on the verge of extinction in Bhutan. As described below, I personally consider this to be a regrettable loss for Bhutanese communities. To begin, however, I provide a primarily descriptive analysis of this gradual extinction process, derived largely from our field research.<sup>97</sup> Throughout, I seek to elaborate on some of the reasons for this gradual dying off of Bhutan’s traditional dispute resolution practices. My discussion focuses on three factors that all had a profound impact on the nature of dispute resolution in Bhutan. The first is the subtle but important changes in how development itself is framed in Bhutan, and the feedback loop that those subtle shifts have had on those who concern

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96. I am limiting this discussion only to rural communities, since the existence of significant urban communities is a new phenomenon in Bhutan, and thus the dispute resolution practices in those communities cannot be compared to any meaningful precedent.

97. This description resonates strongly with Sally Engle Merry’s 1987 critique of what might be considered the classic text on Dispute Resolution, in which she describes “an historical pattern of oscillation between formal systems of dispute resolution and informal reforms that gradually became more formalized, leading to new calls for informal reforms of the now calcified older reform.” Sally Engle Merry, *Disputing Without Culture*, 100 HARV. L. REV. 2057, 2068 (1987) (reviewing STEPHEN B. GOLDBERG, ERIC D. GREEN & FRANK E.A. SANDER, *DISPUTE RESOLUTION* (Little, Brown & Co. 1985)).

themselves with the development of Bhutan's justice sector. The second is the reform processes underway in Bhutan's formal justice system, including its courts and its laws. The final factor is the equally ambitious process to formalize and harmonize the *informal* dispute resolution processes as part of Bhutan's modernization process.

This gradual extinction process was never the result of an intentional decision by any one decisionmaker or institution to phase out traditional dispute resolution in Bhutan. Quite the opposite: an intention to preserve and cultivate traditional dispute resolution practices continues to pervade popular narratives about justice sector reform efforts in Bhutan. Instead, it is the result of a gradual and almost imperceptible process of replacement, where the rhetoric of preserving traditional dispute resolution covers for the reality of those very processes being replaced by something altogether different. The irony (and presumed controversy) of this analysis is that even amidst this good-faith decision by almost<sup>98</sup> all relevant stakeholders in Bhutan to preserve Bhutan's dispute resolution traditions, DCM has gradually given way to a new and more "modern" style of dispute resolution administered by different actors, steeped in a different normative ether, and justified with regard to different social objectives.

#### *A. The Quantification of Development*

Bhutan's history of national development has necessitated changes in the language and logic uses to describe progress. These semantic shifts have changed the way development is typically discussed in Bhutan, and who is empowered to have such discussions.

When it was first coined in the 1970s, the concept of GNH was simple, easy to comprehend, and largely subjective. In one simple sentence—that, in Bhutan, policymakers concern themselves with maximizing GNH, not gross national product—Bhutan's King captured the humanity and wisdom of Bhutan's approach to development. Even today, this simple phrase continues to make intuitive sense, without much need for further

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98. I write "almost" since, as I describe in the conclusion of this article, I wonder whether the international community, represented in concrete form by Bhutan's international development partners, shares a genuine concern for the preservation of Bhutan's informal dispute resolution traditions, or whether instead they are content merely to pay convenient lip service to this priority whenever it is raised by their Bhutanese counterparts, but in reality are either agnostic to the fate of these traditions or in fact actively opposed to their preservation.

elaboration. Former prime minister of Bhutan Lyonchhen Jigmi Y Thinley described how the idea immediately took hold. “[I]n all [of Bhutan’s] development activities, whatever strategies [policymakers] came up with, any kind of policy, any kind of development, there has always been the question of whether they would really promote the happiness of the people.”<sup>99</sup> According to Lyonchhen’s account, the subjective nature of GNH at the time was perfectly adequate for Bhutan, because

developing indicators raises a whole lot of questions and the possibility of succumbing to a materialist view of what constitutes value. There are many difficult questions about what is really valuable and what you can actually measure. There is also the danger that only those which can be made measurable will be pursued while everything else will be rendered inconsequential.<sup>100</sup>

Namgay Zam, a prominent Bhutanese journalist-blogger puts it more pithily: “You don’t quantify Buddhism.”<sup>101</sup>

Nevertheless, Bhutan has come to fully embrace the quantification process about which Lyonchhen originally expressed his reservations. Lyonchhen credits this turn towards quantification to the effort to defend and promote GNH internationally. In order to sell the concept of GNH as a serious concept to the outside world, Bhutan needed to back up its assertions by virtue of supposedly objective “happiness metrics.”<sup>102</sup> Or, if I might editorialize: “happiness metrics” *that would be considered sufficiently robust in the eyes of skeptical outside observers to make it a bit more challenging for them to reflexively dismiss GNH as naïve and scientifically irrelevant.*<sup>103</sup> Lyonchhen would know: he was the one who in late 1998 first elaborated Bhutan’s GNH development policy on the international stage. He did so in the keynote speech of the Asia-Pacific Millennium meeting, a global forum designed to lay the intellectual groundwork for the process

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99. MCDONALD, *supra* note 10, at 1.

100. *Id.* at 2.

101. McCarthy, *supra* note 10.

102. MCDONALD, *supra* note 10, at 1–2.

103. See also Seth Mydans, *Recalculating Happiness in a Himalayan Kingdom*, N.Y. TIMES (May 6, 2009), <https://www.nytimes.com/2009/05/07/world/asia/07bhutan.html> (quoting Dasho Kinley Dorji: “Once Bhutan said, ‘O.K., here we are with G.N.H.,’ the developed world and the World Bank and the I.M.F. and so on asked, ‘How do you measure it?’” . . . So the Bhutanese produced an intricate model of well-being that features the four pillars, the nine domains and the 72 indicators of happiness.”)

that would ultimately result in the Millennium Development Goals (MDGs). Following that speech, Bhutan opened a research center in Thimphu devoted to the promotion and study of the concept of GNH. That same institution, known today as the Centre for Bhutan Studies and GNH Research, eventually came up with a complex methodology to quantify the concept of GNH, resulting in today's well-known GNH Index.<sup>104</sup> The Index was developed in partnership with scholars from Oxford University, and is now calculated every five years in a massive nationwide research effort, asking thousands of respondents 148 questions, which together inform a list of thirty-three separate indicators, all of which jointly result in a single, unitary score on how Bhutan is doing with regard to its pursuit of GNH.<sup>105</sup>

Such a massive effort to quantify and measure the concept of GNH—the same concept that K4 was able to summarize in a few short words—was perhaps necessary to convince international audiences that GNH is a concept worth being taken seriously. It has also proven remarkably useful for policymakers seeking an “objective” barometer of the impacts their development efforts are having. That said, the more introspective policy formulation process to which Lyonchhen referred above<sup>106</sup> has been gradually rendered obsolete. Gone is the subjective, replaced by the objective. Gone are the days where an inspirational speech would suffice to hold bureaucrats accountable to Bhutan's development philosophy. Today, Excel spreadsheets and quantifiable metrics supplement those speeches, and sometimes threaten to overshadow them.<sup>107</sup>

Bhutan's embrace of quantifiable metrics has turned into a national preoccupation for Bhutan's civil servants. Bhutan's government employees are used to a routine of periodic planning retreats, endless lists of performance indicators, and target setting. These rituals mesh seamlessly with the preferences of Bhutan's international development partners, who require objective and quantifiable documentation of the impact of their

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104. *Id.*

105. See URA ET AL., *supra* note 10. See also Emma Bryce, *The Flawed Era of GDP is Finally Coming to an End*, WIRED (Aug. 3, 2019), <https://www.wired.co.uk/article/countries-gdp-gross-national-happiness> [<https://perma.cc/QM7S-UZY9>].

106. *Supra* note 102 and accompanying text.

107. See Dorji Dradhul, *What Makes One NOT a Civil Servant?—A Personal Perspective*, KUENSEL (May 25, 2019), <https://web.archive.org/web/20190525115239/http://www.kuenselonline.com/what-makes-one-not-a-civil-servant1-a-personal-perspective/> [<https://perma.cc/L6D5-LBCF>].

contributions to Bhutan's development in order to justify their continued presence in the country. The preoccupation with metrics, however, also leaves behind those who are not trained in such measurement exercises. In particular, it cedes the conversation about progress to civil servants, and away from elders or less-formally educated citizens.

The merits of this quantification revolution aside, its impact on Bhutan's TDRPs has been staggering. As described below, Bhutan's informal dispute resolution sector was initially shielded from the purview of Bhutan's development planners. By the early 2000s, however, efforts to strengthen the rule of law settled on the need to reinforce alternative dispute resolution capacities at the local level. Once the gaze of the planners affixed to dispute resolution practitioners, the same bias towards quantifiable outcomes informed those efforts. The various subjective aspects of what makes DCM so appealing, and so appropriate, in Bhutanese villages is difficult to quantify. Instead, development planners focused on more measurable aspects such as the number of trainings conducted, the percentage of officials trained, and the percentage civil disputes resolved by mediators at the local level.<sup>108</sup> While these metrics may reflect notions of "progress" in a quantifiable sense, they certainly reflect nothing of the subjective values and norms described above. For example, one of the virtues associated with DCM was the focus on improving and reworking the relationships between the disputing parties. This focus is extremely difficult, if not impossible, to capture in terms of *any* quantifiable metric one could imagine.

### *B. Reforms to Bhutan's Formal Justice System Since 1959*

The relative stasis of Bhutan's dispute resolution landscape, which remained largely unchanged since the announcement of Zhabdrung's death in 1708, began to abruptly change in the late 1950s. At that time, Bhutan's Third King introduced significant legal reforms. Most notably, K3 oversaw the drafting of Bhutan's first modern code of laws, which—for the first time in centuries—harmonized a set of rules and laws to govern core elements of

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108. See AUSTRIAN DEV. COOPERATION, BHUTAN: COUNTRY STRATEGY 2015-2018, at 12 (2015), [https://www.entwicklung.at/fileadmin/user\\_upload/Dokumente/Publikationen/Landesstrategien/CS\\_Bhutan\\_2015-2018.pdf](https://www.entwicklung.at/fileadmin/user_upload/Dokumente/Publikationen/Landesstrategien/CS_Bhutan_2015-2018.pdf) [<https://perma.cc/QKV7-KDWU>].

the country.<sup>109</sup> To help interpret and enforce this new code, K3 also created an independent judiciary. From that point forward, the judges who adjudicated matters in these courthouses were designated as the official and learned “guardians” of justice in Bhutan.<sup>110</sup>

In the early years of the judiciary’s existence, Bhutan’s judges were drawn from the ranks of well-known TDRPs.<sup>111</sup> Initially, therefore, there was a good deal of continuity between DCM and the natural inclinations of Bhutan’s judges (with the key difference, of course, that judges were bound to enforce the newly established legal code, as opposed to unwritten community norms). Over time, however, Bhutan began to send promising students abroad for formal legal training, after which they returned to enter the judiciary (as well as other legal institutions in the executive branch).<sup>112</sup> With time, therefore, the education of judges shifted away from the informal tutelage-based model that defined the educational formation of TDRPs, and towards the formal education dispensed at modern law schools around the world. Moreover, most of those judges were educated in common law jurisdictions, primarily in India or the United States, where they would be trained in a model of adversarial legalism<sup>113</sup> that—as many readers will no doubt recognize—might be situated at the opposite end of a spectrum from the values and tactics implicit in DCM.

Since 1959, the formal institutions of the justice sector in Bhutan have seen an extraordinary period of growth. Bhutan’s judiciary is today composed of roughly sixty-three judges.<sup>114</sup> This equates to roughly 8.6 judges per 100,000 residents.<sup>115</sup> This ratio places Bhutan towards the higher end of the range of how many judges per capita hear cases in other nations, for example 10.4 in the United States, 6.6 in England & Wales, 6.5 in

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109. See Whitecross, *Thrimzhung Chenmo*, *supra* note 4, at 357.

110. *Id.* at 358.

111. See LNA FINAL REPORT, *supra* note 3 at 25.

112. *Id.*; see also Simoni, *supra* note 4, at 40.

113. See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001).

114. BHUTAN NAT’L LEGAL INST., *supra* note 13.

115. The 2017 Census, the most recent at the time of publication, found that Bhutan had a total population of 735,553, of which 681,720 were Bhutanese citizens (the difference consisting of migrant laborers, tourists who happened to be in Bhutan during the national census, and persons residing in Bhutan who lack legal paperwork) See NAT’L STATISTICS BUREAU, 2017 POPULATION & HOUSING CENSUS OF BHUTAN 10, 18 (2018), [http://www.nsb.gov.bt/publication/files/PHCB2017\\_national.pdf](http://www.nsb.gov.bt/publication/files/PHCB2017_national.pdf) [<https://perma.cc/4AFE-SCKT>].

Canada, 2.7 in South Korea, 2.3 in Japan, 1.6 in Malaysia and 1.0 in India.<sup>116</sup> Given Bhutan's challenging terrain and relatively poor infrastructure, such a comparatively high ratio of judges per capita can be justified in terms of access to justice, since even today many Bhutanese communities remain many hours removed from the nearest courthouse. Bhutan's judiciary is organized into a four- or five-tiered system (depending on location),<sup>117</sup> with a total of thirty-five courts of primary jurisdiction spread across Bhutan and two courts of appeal (the High Court and the Supreme Court) located in Thimphu.<sup>118</sup> Supreme Court decisions are subject to one final, and discretionary, review by His Majesty.<sup>119</sup> In 2018, Bhutan's court system handled a total of 1,232 criminal cases and 7,310 civil cases.<sup>120</sup> While many in Bhutan spoke to us about their worry that Bhutan's population was becoming increasingly litigious, this figure still compares quite favorably to other countries, where the ratios of civil cases per capita can be significantly higher.<sup>121</sup>

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116. ERIK G. JENSEN & THOMAS C. HELLER, BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW 99 (2003).

117. Administratively, Bhutan is split into twenty *dzongkhags* (districts). Some *dzongkhags*—especially those encompassing regions with population centers located far away from the *dzongkhag's* administrative center—also have sub-district administrative centers called *dungkhags*. *Dzongkhags* and *dungkhags* are further subdivided into a nationwide total of 205 *gewogs* (counties), which are themselves subdivided into a nationwide total of 1044 *chiwogs* (village clusters). See ELECTION COMM'N OF BHUTAN, NAMES OF VILLAGES UNDER 1044 CHIWOGS, <https://www.ecb.bt/namesofDemkhongs/NamesOfVillagesUnder1044Chiwogs.pdf> [<https://perma.cc/WZC9-FSHJ>]. Each *dungkhag* and each *dzongkhag* has a court of primary jurisdiction, but decisions by a *dungkhag* court are appealable first at the *dzongkhag* level. All *dzongkhag* decisions are appealable to the High Court in Thimphu, which used to be the court of appeal for the entire judiciary. Since 2008, a Supreme Court, which is also located in Thimphu, serves as an additional layer of appeal on top of the High Court (which itself contains a full-bench appeals process for initial High Court decisions). All sentencing decisions by the Supreme Court are ultimately subject to the discretionary review of His Majesty Himself if petitioned by one of the parties. See *Structure of the Royal Court of Justice*, ROYAL CT. JUST. BHUTAN, [http://www.judiciary.gov.bt/index.php/Welcome/get\\_pages?id=22%20&cat=5](http://www.judiciary.gov.bt/index.php/Welcome/get_pages?id=22%20&cat=5) [<https://perma.cc/GJ3Y-4MJH>]; Whitecross, *Thrimzhung Chenmo*, *supra* note 4, at 361 (describing the court structure and hierarchy before Bhutan's transition to democracy).

118. *Structure of the Royal Court of Justice*, *supra* note 117.

119. Prior to the establishment of Bhutan's Supreme Court in 2008, the High Court's decisions were appealable directly to His Majesty.

120. JUDICIARY OF THE KINGDOM OF BHUTAN, ANNUAL REPORT 2018 8 (2018), [www.judiciary.gov.bt/publication/ar2018.pdf](http://www.judiciary.gov.bt/publication/ar2018.pdf) [<https://perma.cc/GVF2-DZ46>].

121. Bhutan's 2018 statistics suggest approximately 994 cases per 100,000 population. In Australia, this figure is approximately fifty percent higher at 1542 civil cases per 100,000, and in the United States it stands at almost six times the rate of Bhutan, at 5,806 civil cases per 100,000. See J. Mark Ramseyer & Eric B. Rasmusen, *Comparative Litigation Rates* 5 (Harvard John M. Olin Ctr. For

The court infrastructure also grew at a rapid clip during this time. In the 1980s, courthouses were still modest affairs, packed into one or two spare rooms of the dzongkhag administrative offices.<sup>122</sup> Court clerks had no desks, and all court communications were written by hand.<sup>123</sup> During the 1980s and 1990s, the government began to invest in the judiciary's physical infrastructure.<sup>124</sup> Much of this had to do with upgrading the iconography surrounding the courtrooms themselves.<sup>125</sup> The judge was given a throne to sit on, usually placed on an elevated podium at the front of the courtroom (to signify that the judge is acting in the name and image of His Majesty the King). Defendants and plaintiffs were given special seats and desks at the front of the room, and three traditional Buddhist masks, signifying the defense attorney, the prosecutor, and the truth-diviner were installed at the front of the room to give the hearings additional gravitas.<sup>126</sup> After Bhutan's transition to democracy, the judiciary embarked on a major capacity-building scheme to give each courthouse a separate physical building, visibly separating the judiciary from the executive branch of government.<sup>127</sup> This evolution of the judiciary today is visible to the naked eye. In most administrative capitals of Bhutan, today two prominent civic buildings dominate the municipal architecture: the first usually the ancient *dzong*—a citadel-style fortress housing Bhutan's executive apparatus and its central monastic authorities, and the second, usually facing towards the *dzong* from a hilltop of similar height and prominence—the district's new courthouse.

Since 1959, Bhutan's body of laws has also grown exponentially. Whereas in 1959 lawyers needed to be familiar only with the Thrimzhung Chenmo, by 2019 the number of separate laws had grown to an estimated 108.<sup>128</sup> Those various acts are supplemented by countless agency

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Law, Econ., & Bus Discussion Paper No. 681, 2010), [http://www.law.harvard.edu/programs/olin\\_center/papers/pdf/Ramseyer\\_681.pdf](http://www.law.harvard.edu/programs/olin_center/papers/pdf/Ramseyer_681.pdf) [<https://perma.cc/S9EX-VBSV>].

122. Interview with Sonam Gayal, in Nganglang, Pema Gatsel Dzongkhag (Dec. 12, 2019).

123. *Id.*

124. *Id.*; see also Whitecross, *Of Texts and Drama*, *supra* note 4, at 94 (writing in 2016 that “[i]t is not clear when these items appeared in the courtrooms, however based on interviews, they appear to be very recent additions”).

125. See also LUNGTEN DUBGYUR, PARASOL, *supra* note 4.

126. See also Whitecross, *Of Texts and Drama*, *supra* note 4, at 94.

127. See AUSTRIAN DEV. COOPERATION, *supra* note 108.

128. The Office of the Attorney General lists 104 separate acts, and the National Council website lists 108. Some of these acts are substantively redundant, and thus some of the older acts may no longer be valid law. See *Acts*, OFF. ATT'Y GEN., <https://www.oag.gov.bt/language/en/resources/acts-2/>

regulations and implementing directives, which usually go into much greater detail than the acts, and also constitute important sources of law, especially procedural and administrative law. The proliferation of new laws was especially remarkable during the 1990s and 2000s, when a staggering eighty acts were first adopted or amended (as compared to a total of fourteen new acts adopted during the previous three decades).<sup>129</sup>

### *1. The “Shadow of the Law” on Bhutan’s Traditional Dispute Resolution Practices*

The birth and rapid growth of Bhutan’s formal judiciary, and the explosive proliferation of new laws starting in the 1990s, have profoundly changed the way people access and relate to traditional dispute resolution in Bhutan.

#### *a. The Replacement of TDRPs With a New Class of Specially Anointed Justice Professionals*

The judiciary—and in particular its judges (*drongpoens*)—have slowly replaced the elders of the past as the ultimate authorities on distinguishing right from wrong.<sup>130</sup> Judges today are widely lauded as highly educated and authoritative individuals. In recent years, they have almost all been educated abroad, in foreign languages, and are sometimes more able to express legal concepts in English than they are in Dzongkha or other Bhutanese spoken languages.<sup>131</sup> His Majesty personally inducts the judges into the judiciary by means of an elaborate palace ceremony to grant them a green scarf—a Bhutanese symbol placing them at co-equal status with other high-level government officials such as parliamentarians or cabinet ministers.<sup>132</sup> They are addressed in the honorific. Their court judgments make the national

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[<https://perma.cc/SCT8-2FLX>]; *Acts*, NAT’L COUNCIL BHUTAN, <https://www.nationalcouncil.bt/en/business/acts> [<https://perma.cc/UGR5-DC7T>].

129. These figures are based on my personal research and are only as good as the various acts I was able to locate. This is almost certainly an underestimate of the true figure. Simoni and Whitecross describe this proliferation of laws as an “orgy of statute making.” Simoni & Whitecross, *supra* note 4, at 176.

130. LNA FINAL REPORT, *supra* note 3, at 25, 92-100.

131. *See also* Simoni, *supra* note 4.

132. Interview with Drangpon Tashi Yangzom, in Tashiyangtse (Nov. 8, 2019).

news, and constitute an important source of learning about the nature of right and wrong in the country. Furthermore, judges routinely see it as part of their mandate to travel to rural communities to educate people about the laws. This role is supplemented by the judicial training institute<sup>133</sup> which is located in Bhutan's capital and conducts numerous nationwide legal awareness initiatives that are then disseminated via television, radio, print and in-person presentations or workshops. The judiciary's elaborate symbolism, ritual and outreach power contrasts starkly with that of the TDRPs, whose only source of power is their gradually-accumulated reputations for honesty and integrity within their respective communities.

*b. The Introduction of a New "Justice Language"*

As in most countries of the world that subscribe to modern notions of the "rule of law," Bhutan's judicial decisions are articulated in terms of rights, based on the laws of the land. These justice narratives contrast starkly with the TDRPs' language of personal responsibilities towards others and Buddhist ethics. As a result, there has been a profound shift in terms of how disputes are commonly discussed in Bhutan: away from a narrative of mutual interdependence and responsibilities, and towards a narrative of entitlements and rights. At an intellectual level, this trend has proven to be profoundly disorienting for a great majority of the TDRPs we spoke to—so much so that many have simply given up trying to combat this new and overwhelming narrative with their older responsibilities-based notions of justice.

This rhetorical shift from responsibilities to rights is counterbalanced, to a limited extent, by Bhutan's 2008 Constitution. The fairly standard set of civil and political rights enumerated in Article 7 of Bhutan's Constitution are followed by a separate article enumerating fundamental duties that every Bhutanese citizen or person residing in Bhutan also has towards his or her neighbors and nation.<sup>134</sup> But while the Constitution arguably embraces both a narrative of individual rights and civic duties and responsibilities, the nature of the duties enumerated in Bhutan's Constitution is very different in nature from the responsibilities embraced by Bhutan's TDRPs. Some

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133. The Bhutan National Legal Institute (BNLI).

134. CONSTITUTION OF THE KINGDOM OF BHUTAN art. 7 ("Fundamental Rights"); *Id.* art. 8 ("Fundamental Duties").

contemporary constitutional duties are more reminiscent of the kind of state-law that the elders of the past were required to refer to the higher authorities.<sup>135</sup> Other constitutionally mandated fundamental duties are no more than logical extensions of municipal law. For example, a human right against violations of one's civil rights cannot be real unless there exists a corresponding duty on the part of every citizen—enforced by criminal law—to “not tolerate or participate in acts of injury, torture or killing of another person, terrorism, abuse of women, children or any other person.”<sup>136</sup> Such fundamental duties are little more than legal tautologies, and violations of them would inevitably be framed in terms of criminal law, not personal responsibilities or duties.<sup>137</sup>

Only three of the duties enumerated in Bhutan's constitution are arguably echoes of a Buddhist sense of personal responsibility: the “duty to preserve, protect and respect the environment, culture and heritage of the nation”<sup>138</sup>; the duty to “foster tolerance, mutual respect and spirit of brotherhood amongst all the people of Bhutan transcending religious, linguistic, regional or sectional diversities”<sup>139</sup>; and the “responsibility to provide help, to the greatest possible extent, to victims of accidents and in times of natural calamity.”<sup>140</sup> Nonetheless, it remains entirely unclear how the judiciary would act on any alleged violations of such a fundamental duty without resorting to some form of criminal-law-based language. The constitutional duty to provide help to a victim of an accident, for example,

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135. See, e.g., *id.* art. 8, § 1 (to “preserve, protect and defend the sovereignty, territorial integrity, security and unity of Bhutan”); *id.* art. 8, § 4 (to “respect the National Flag and the National Anthem”); *id.* art. 8, § 8 (to “pay taxes in accordance with the law”). Zhabdrung Ngawang Namgyel's eighteenth-century law code also included such citizen duties—primarily limited to paying one's taxes and contributing labor in furtherance of national development priorities—but listed those duties separately from the various individual responsibilities that applied to all individuals, regardless of their post in life. See WINDISCHGRAETZ & WANGDI, *supra* note 4.

136. CONSTITUTION OF THE KINGDOM OF BHUTAN art. 8, § 5; see also TOBGYE, *supra* note 4, at 91.

137. For more on this topic, see Liora Lazarus, Benjamin Goold, Rajendra Desai & Qudsi Rashee, *The Relationship Between Rights and Responsibilities*, MINISTRY JUST. RES. SER. 18/09 (2009) (U.K.); Hans Küng, *Global Ethic and Human Responsibilities*, Address at Markkula Center for Applied Ethics, Santa Clara Univ. Submitted High-level Expert Group Meeting: Human Rights and Human Responsibilities in the Age of Terrorism (Apr. 1-2, 2005); Fernando Berdion Del Valle & Kathryn Sikkink, *(Re)discovering Duties: Individual Responsibilities in the Age of Rights*, 26 MINN. J. INT'L L. 189 (2017).

138. CONSTITUTION OF THE KINGDOM OF BHUTAN art. 8, § 2.

139. *Id.* art. 8, § 3.

140. *Id.* art. 8, § 6.

would presumably also be adjudicated in a court of law based on whether the alleged defendant's actions satisfied the elements of an enumerated crime in the Penal Code, not in terms of whether that person owed a constitutional duty towards the victim of the accident. Thus, even the Bhutanese Constitution's balanced embrace of both rights and responsibilities has not yet translated into a similarly balanced embrace of both concepts by Bhutan's modern-day judiciary.

Compounding this trend has been the gradual, if perhaps popularly misunderstood, embrace of human rights language by policymakers in Bhutan. The upper echelons of Bhutan's justice sector certainly understand that human rights protections pertain primarily to the relationship between the individual and the state, as a legal framework to prevent individuals and communities from arbitrary or unjust incursions by the state on their natural rights.<sup>141</sup> But the idea of an individual or community directly contesting the legitimate exercise of state power still sits uncomfortably with other powerful Bhutanese narratives describing the proper relationship between an individual and the state. Those alternative conceptualizations emphasize the need for citizens to demonstrate unwavering humility and respect towards the government and its representatives.<sup>142</sup> As a result, the narrative of human rights has only rarely been invoked by domestic activists to contest the exercise of state authority.<sup>143</sup> On those extremely rare occasions when it has, it typically provoked counter-accusations of poor form, lack of patriotism, or worse.

In my personal experience, the language of human rights has instead been deployed more frequently to describe instances when a supposedly uncompromising—and culturally novel—attitude towards certain social issues is imposed at the expense of traditional attitudes. Common examples are changing attitudes about domestic violence, child abuse, and corporal punishment. Rather than being understood as a framework to describe the

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141. Burns H. Weston, *Human Rights*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/topic/human-rights> [<https://perma.cc/9FBA-XYGF>].

142. See Whitecross, *Virtuous Beings*, *supra* note 4, at 71-82; see also Karma Phuntsho, *Echoes of Ancient Ethos: Reflections on Some Popular Bhutanese Social Themes*, in *THE SPIDER AND THE PIGLET: PROCEEDINGS OF THE FIRST INTERNATIONAL SEMINAR ON BHUTAN STUDIES* 564 (Karma Ura & Sonam Kinga eds., 2004).

143. The most noteworthy example here is the rebellion in the 1980s by Lhotshampa residents in Bhutan's southern regions protesting against national dress requirements. See PHUNTSHO, *supra* note 34, at 578-82.

nature of the relationship between the individual and the state, or even the responsibility of the state to ensure that certain rights are upheld, popular perceptions are that human rights apply primarily in the context of relationships between private individuals, such as the relationships between a husband and a wife, a parent and a child, or a school teacher and a pupil. Moreover, the perception is that human rights are absolute and uncompromising, in contrast to more flexible Bhutanese traditions. This perception feeds the notion that human rights are a mandatory pre-condition for Bhutan's continued development and modernity. Many of the TDRPs we spoke to expressed some reservations about the incursion of human-rights style thinking in their communities, but dismissed their concerns as simply not being aligned with their communities' changing expectations of justice.

Their concern is sad but well-founded: alongside the lofty rhetoric extolling the virtues of Bhutan's informal dispute resolution traditions, many Bhutanese policymakers and their international development partners demonstrate significant disdain for Bhutan's TDRPs. In casual conversation, one frequently hears apologetic references to the "backwards," "antiquated," and "superstitious" practices of "uneducated" elders resolving disputes in Bhutanese communities. Many in Bhutan's judicial elite are quick to dismiss the continued role of the elders as an echo of the country's past, soon to be phased out with the passing of the elders' generation. Such commentators apply contemporary human rights standards to dismiss historical descriptions of dispute resolution stories, complain of lacking checks and balances in the dispute resolution systems of old, and of lacking accountability mechanisms to censure elders if they are biased. Judging from our numerous conversations with both the consumers and suppliers of traditional dispute resolution services, many of these assertions rely on unfounded generalizations, stereotypes, or outlier examples about traditional dispute resolution practices in rural communities.

For example, one frequently hears among gender-rights activists that while traditional dispute resolution may be appropriate for some types of disputes, TDRPs cannot be trusted to adjudicate family disputes where traditional gender norms may be at issue.<sup>144</sup> In fact, as our research has

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144. Of frequent concern in such ruminations are situations involving domestic violence, or situations involving a woman asserting herself against patriarchal norms.

demonstrated, practitioners of DCM in Bhutan go to great lengths to honor the dignity of the individual disputants, including those who belong to sexual, religious, or ethnic minorities.

*c. Increasingly Accessible Appeals Processes*

From its beginnings, Bhutan's formal justice system was always considered as a supplement of last resort to the primary dispute resolution processes in Bhutan. As described below, over time certain types of disputes were removed from the scope of what TDRPs were allowed to handle. But even for those cases that remained legitimately within the mandate of Bhutan's elders, the courts increasingly came to serve as a viable appeals process to those informal dispute resolution processes. In effect, Bhutan's entire informal dispute resolution infrastructure—the TDRPs as well as the LG officials<sup>145</sup>—essentially became a prerequisite point of entry into Bhutan's formal justice system. Individuals dissatisfied with the outcome of a dispute resolution process at the village level could easily appeal that decision in court. Furthermore, as a result of the significant improvement of Bhutan's infrastructure, as well as the persistent efforts to make the courts more customer-friendly,<sup>146</sup> the physical and psychological barriers associated with going to court have also dramatically reduced.

Parties who today choose to appeal the outcome of an informal dispute resolution process essentially enjoy a proverbial “second bite at the apple” to resolve their dispute. For reasons having to do with differing evidentiary standards, different normative traditions, and a *de facto* respect for mediator privilege, judges in Bhutan usually entertain such appeals *de novo*, evaluating all the evidence anew. Other than asking parties in a binary sense whether they have already attempted to resolve the case informally (and, if they haven't, encouraging them to consider doing so), judges typically refrain from inquiring into the details of previous dispute resolution efforts. Over time, this has gradually undermined the seriousness with which parties engage in informal dispute resolution processes. It is as though parties come to an elder even while simultaneously trying to guess at their likelihood of

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145. See *infra* Section III.C.

146. See Lungten Dubgyur, *Review of Judicial Reforms in Bhutan*, in THE SPIDER AND THE PIGLET: PROCEEDINGS OF THE FIRST INTERNATIONAL SEMINAR ON BHUTAN STUDIES 379 (Karma Ura & Sonam Kinga eds., 2004).

success in court. Many elders we spoke to complained of how the promotion of a guaranteed and easily accessible judicial “BATNA”<sup>147</sup> distracted the parties from genuinely applying themselves to the challenge of finding an informal resolution to the dispute. Furthermore, and perhaps more fundamentally, the judicial alternative is one that tempts parties with the chimera of complete and glorious vindication—a formal verdict in one’s favor, as opposed to the more nuanced outcomes of an informal dispute resolution processes. As many elders shared with us, their efforts to sell disputants on the promise of relationship-preserving DCM are gradually losing ground to the more seductive promise of full and cost-free vindication by a court of law.

*d. The Shrinking Legal Mandate for Bhutan’s Traditional  
Dispute Resolution Practitioners to Act*

The *Trimzhung Chenmo* designated only the most serious of crimes as ineligible for informal dispute resolution processes.<sup>148</sup> This situation changed in 2001 with the passage of Bhutan’s Civil and Criminal Procedure Code, which stipulates that “[a]t any stage of the proceedings, it shall be open to the parties to take the help of a . . . mediator[] for mutual settlement of a *civil* case . . .”<sup>149</sup> According to all accounts gathered by our research, Bhutan’s law enforcement and judicial authorities consider the prohibition on mediators handling criminal cases to apply only to serious criminal cases. As we heard repeatedly, elders are still free to handle less serious types of crimes, for example “if no one is bleeding,” or if the theft included only “small items.”<sup>150</sup> But these standards are clearly highly subjective, and rarely delineated in the formal law.<sup>151</sup> This situation creates a grey zone of legal uncertainty for defendants accused of a large number of so-called

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147. One’s best alternative to a negotiated agreement. See ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES* 102 (Penguin Books 3d ed. 2011) (1981). At the risk of being too cute with acronyms, one might call it a BATMA (best alternative to a *mediated* agreement).

148. Whitecross, *Thrimzhung Chenmo*, *supra* note 4, at 364 (citing sections Da 3-1 and 3-2 of the *Thrimzhung Chenmo*).

149. Civil and Criminal Procedure Code of Bhutan, 2001, art. 150 (emphasis added).

150. These words, or words very similar to them, were told to us countless times during interviews with authorities across Bhutan.

151. The only exception I was able to identify is Domestic Violence Prevention Act of Bhutan, art. 22, which states that certain types of non-felonious domestic violence, allegedly perpetrated by non-recidivists, can qualify for referral by the Royal Bhutan Police to informal “negotiated settlement.”

minor criminal offenses, opening the door for serious potential abuse of power and legal confusion.

Bhutan's proliferation of new laws also led to a multiplication of different types of crimes. Each new act, it seems, delineates new types of crimes, usually flowing from the willful disregard by an offending party of the provisions in the act. This gradual expansion of potentially criminal acts is compounded by a lack of any tangible tort law doctrine in Bhutan delineating competing civil law delicts that may arise from the same potentially criminal act. To the extent that there exists overlapping criminal and tort liability, the courts understand the tort law remedy to serve merely as a supplemental form of punishment, compensating the victim of that act over and above any criminal sanctions that the state may impose on the alleged perpetrator.<sup>152</sup> Thus, the legitimate space for elders to mediate keeps shrinking over time.

Furthermore, changing societal standards, or changing official priorities, can today quickly alter the unwritten standards governing the division of labor between Bhutan's formal and informal dispute resolution systems. Such changes can have serious consequences for any TDRPs slow to learn of these changed standards. A poignant example concerns underage marriage in Bhutan. Traditionally, Bhutanese villagers married young, often before attaining the modern age of majority, eighteen years of age. As a result of international scrutiny and legislation passed subsequent to Bhutan's ratification of the Convention on the Rights of the Child in 1990,<sup>153</sup> the authorities suddenly took a keen interest on preventing any underage marriages from taking place. Just months before, authorities might have turned a blind eye towards "close" cases—for example a nineteen-year-old man marrying a seventeen-year-old girl from the same village.

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152. Based on personal conversations with judges in Thimphu and elsewhere. In one such example, a judge described to us the extraordinary lengths he had to go to in order to compel the compensation of the victim of an accident (a dart that ricocheted off a target and instead hit a child in the eye, thus blinding that child), since the police were not willing to charge the person who had thrown the dart with a crime, citing no intent to harm the child. Without a police charge sheet and a subsequent criminal case to rule on, the judge had no clear basis for ordering remedies of any sort, criminal or civil. By contrast, a TDRP in the same community found no difficulty justifying an order to compensate the child, citing a principle of traditional justice that "the law is in favor of the person who loses something," and that the issue of whether the person who threw the dart did so intentionally or on accident was immaterial, since the child obviously lost something and deserved the protection of the law.

153. See Child Care and Protection Act of Bhutan 2011; Marriage Amendment Act of Bhutan 2009.

What used to be considered a “minor” criminal incident—informally still eligible for quiet resolution by an elder—suddenly had become a “serious” criminal case, absolutely inappropriate for informal dispute resolution of any kind. But while there may have been universal knowledge of this official shift in relevant legal standards at the elite level, the TDRPs in the villages were the last ones to receive this information. More troublingly, when they finally did learn about the change in priorities, it usually came in the form of a harsh official rebuke by a government official, or worse yet a criminal prosecution for illegally mediating a case.<sup>154</sup> Rumors of severe sanctions against TDRPs spread like wildfire across Bhutan, and reinforced the impression of TDRPs as outdated, uneducated, and potentially human-rights-violating dinosaurs. Predictably, this had a serious chilling effect on TDRPs. Many told us they are thoroughly confused by what constitutes a civil case—and thus safe for them to handle—and that as a result they have simply stopped accepting *any* cases for potential mediation.

### *C. Reforms to Bhutan’s Informal Dispute Resolution System Since 2002*

In 2002, an amendment to the law delineating local government mandates and procedures, which had originally been passed in 1991, introduced language conferring on Bhutan’s LG leaders a mandate to “mediate and conciliate disputes of minor civil nature referred by the people in the *ge[w]og* by involving, if required, conciliators of good standing in the community.”<sup>155</sup> This amendment coincided with an administrative reform expanding the authority to mediate local disputes from the *chimis*<sup>156</sup> to include also the *gups* (elected sub-district LG officials).<sup>157</sup> By 2009, the initial language encouraging LG officials to consider involving TDRPs (or the *chimis*) had disappeared,<sup>158</sup> thereby enabling them to resolve disputes on their own initiative. That said, the 2009 reforms did not go so far as to confer

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154. For example, a mediator can be fined and imprisoned for “execut[ing] a written agreement or mak[ing] an oral settlement in contravention of the provisions laid down in [the Act].” Marriage Act of Bhutan, 1980, Kha 8-16.

155. Geog Yargay Tshogchhung Chathrim Act 2002, art. 11, § 15.

156. *Chimis* in the past were tasked with representing the *gewog* at the national level.

157. Interview with Kinley Wangchuk, in Buli village, Zhemgang Dzongkhag, Bhutan (Dec. 18, 2019).

158. The text of Local Government Act of Bhutan, 2009, which replaced the Geog Yargay Tshogchhung Chathrim Act, reads in Section 84(i) that the “Gup as the Chairperson and head of the Gewog shall . . . [m]ediate and conciliate disputes of civil nature referred by the people in the Gewog.”

upon LG officials the exclusive mandate to provide dispute resolution services in their communities; their mandate was still intended to run in parallel to the continued role of the TDRPs.

Initially, these reforms would have had little impact on informal dispute resolution in most Bhutanese villages. The selection of local government representatives was the first manifestation of democracy in Bhutan.<sup>159</sup> During K3's reign, the idea that decisionmakers should be selected by virtue of a bottom-up election first took hold. This selection process typically involved one representative from each household in a constituency, who jointly decided—usually by consensus—who should represent the community. Individuals usually did not campaign to be selected; instead, they were nominated based on their reputation in the community for objectivity and fairness. Unsurprisingly, those nominated to serve in local government were usually also the same who were already entrusted by their communities to act as TDRPs. Conferring upon those same individuals an explicit mandate to resolve disputes therefore had little if any practical impact on what they were already doing, in most cases.

That changed due to another key clause in the laws regulating local governments. The same 2002 amendment to the law regulating LGs in Bhutan also stated that a candidate running for an LG position “shall be functionally literate.”<sup>160</sup> The 2008 Election Act further defined this “functionally literate” standard as being “capable of reading and writing in Dzongkha.”<sup>161</sup> Especially in those areas of Bhutan where Dzongkha is not the primary spoken language, this requirement significantly limited who could stand for an LG election.<sup>162</sup> Even in areas of Bhutan where Dzongkha was the principal language of communication, many traditional elders did not meet the standard because they did not know fluently how to read or write. With time, these requirements changed the demographics of those who served in LG positions; away from the traditional village elders and towards younger, more upwardly mobile, and more formally educated political aspirants.

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159. PHUNTSO, *supra* note 34, at 566-72.

160. Geog Yargay Tshogchung Chathrim Act, art. 4, § 7.

161. Election Act of the Kingdom of Bhutan, 2008, Annexure § (u).

162. Further limiting who could stand for an LG election, a 2007 amendment to the LG Act stipulated that candidates must be between twenty-five and sixty-five years old. *See* Local Government Act of Bhutan 2007, § 35(c).

These new leaders brought with them different norms about how to resolve disputes. In pursuit of their mandate to resolve disputes in the community, they relied heavily on the same attributes that qualified them to run for local office in the first place. Being formally educated, they relied on their ability to read and apply Bhutan's formal laws, prioritizing that skillset over their more limited fluency with the spiritual or religious ethics that had guided their predecessors. Although not without exception, many modern LG officials interpret their dispute resolution function as similar to that of a judge: namely to investigate disputes, distinguish fact from fiction, and render a verdict. When asked to explain the value of their role, almost all emphasize their superior ability to decide cases efficiently and in line with the law. It is for this reason that their style of mediation is most accurately described as "administrative adjudication"<sup>163</sup>—a far cry from the DCM practiced by the TDRPs of the past.

In 2012, the Bhutan National Legal Institute (BNLI)—Bhutan's judicial training institute—began a major initiative to train all LG officials<sup>164</sup> in a standardized model of dispute resolution that it dubbed the *Thuenlam* (translated literally as "unity of the people, neighborliness and harmonious living"<sup>165</sup>) model of mediation. The initiative enjoys the high-level support and financial backing of the Royal Government of Bhutan,<sup>166</sup> as well as the generous financial backing of Bhutan's international development partners.<sup>167</sup> It also attracted the technical support of foreign mediation

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163. Serge Loode likens the practice of LG-administered mediation in Bhutan to the Australian process of "conciliation," which he defines as a process that "allows the conciliator to provide information on relevant legislation, and to make suggestions for appropriate solutions to the conflict." Just like in Bhutan, conciliators in Australia are often government officials, and "often have special legal or other training, and are operating under specific laws, which outline the kinds of matters that fall under their jurisdiction." Serge Loode, *Development of Mediation in Australia and Bhutan: The Future Perspective*, 4 BHUTAN L. REV. 25, 28 (2015). I go further than Loode in describing it as a form of adjudication, since many of the LG leaders we interviewed went well beyond merely "making suggestions" on how best to resolve a conflict, and in fact rendered their judgments, just as would be the case in a formal court of law.

164. LG officials trained included *gups* (*gewog* headman), *mangmis* (deputy *gewog* headmen) and *tshogpas* (*chiwog* headmen).

165. See Lungten Dubgyur, *A Contextual Legal Application of a Jabmi*, 8 BHUTAN L. REV. 53, 54 (2018).

166. JUDICIARY OF THE KINGDOM OF BHUTAN, ANNUAL REPORT 2017, at 45 (2017).

167. AUSTRIAN DEV. COOPERATION, *supra* note 108 (allocating a total of €3 million to the justice sector for a range of activities, including BNLI's efforts to revive ADR systems in Bhutan); *see also* GROSS NAT'L HAPPINESS COMM'N, ELEVENTH FIVE YEAR PLAN 2013-2018, at 427-28 (2013),

experts with a particular interest in comparative mediation systems<sup>168</sup> and prominent scholars from among Bhutan's judicial community. Although I am in no position to comment on the rigor of the preliminary research that informed the justification for BNLI's LG training initiative,<sup>169</sup> in 2013 the GNHC concluded in its request for funding that "only few people use [alternative] dispute resolution" in Bhutan, and that "it is [sic] therefore become very important to revitalize ADR system in our society."<sup>170</sup>

BNLI describes its work promoting administrative adjudication at the LG level as a continuation and revival of Bhutan's centuries-old dispute resolution traditions. In practice, however, the style of dispute resolution is quite different from DCM. During their training workshops, LG officials listen to a variety of lectures describing the basics of mediation, with an emphasis on the financial and efficiency advantages of mediation over the formal judicial process.<sup>171</sup> They are given a simple mediation process template<sup>172</sup> to use, which essentially holds that the mediator should speak to the parties separately before holding any joint mediation sessions.<sup>173</sup> They are also given limited opportunities to practice their mediation skills in the context of simulated mediation skits.<sup>174</sup> Crucially, they are given a briefing on the limits of their mediation mandate, complete with a rapid-fire primer on some of the laws they will likely encounter as mediators.

Thanks to the persistent messaging efforts of BNLI, judicial authorities, and the LG officials themselves, administrative adjudication is now what most people think of when they hear the terms "*Nangkha Nangdrik*," "mediation," "dispute resolution," or "conciliation" in Bhutanese villages. Armed with their certificates of attendance at BNLI's mediation training, which lasts anywhere from three days to a full week, many LG officials we

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[http://www.mohca.gov.bt/download/11th\\_FYP.pdf](http://www.mohca.gov.bt/download/11th_FYP.pdf) [https://perma.cc/2WS4-AQXL]; MINISTRY OF FOREIGN AFFAIRS OF DEN., 30 YEARS OF BHUTANESE-DANISH PARTNERSHIP 4 (2014).

168. See Loode, *supra* note 163; Melinda Edwards, Promoting and Strengthening the Practice of Mediation in Bhutan (Bhutan Nat'l Legal Inst. Research Paper, 2013) (unpublished manuscript) (on file with author).

169. See Yargay, *supra* note 4.

170. See GROSS NAT'L HAPPINESS COMM'N, *supra* note 167, at 427.

171. Bhutan Nat'l Legal Inst., Mediation Curricula (on file with author).

172. See Edwards, *supra* note 168, at 43; Yargay & Chedup, *supra* note 4, at 99-100.

173. See Yargay & Chedup, *supra* note 4.

174. See generally *id.*

interviewed claimed that only those certified<sup>175</sup> by BNLI were authorized to practice as mediators in local communities.<sup>176</sup> Whether intentional or unintentional, BNLI's efforts to train LG officials have effectively cemented the role of LG officials as Bhutan's newest—and increasingly also its exclusive—providers of dispute resolution services in rural communities.<sup>177</sup> As the current director of BNLI wrote in 2015, BNLI's initiative is indeed responsible for a “significant judicial reform”<sup>178</sup> in Bhutan in terms of how disputes are handled in rural Bhutanese communities, all without any legislative intent to effectuate such a dramatic overhaul of Bhutan's dispute resolution landscape.

LG mediators are typically very efficient, often settling a case within hours. They provide their dispute resolution services for free, as part of their regular duties as LG officials. In all dzongkhags, disputes are first handled at the *chiwog* by a *tshogpha* (village headman). If they are unable to resolve the case, it is next brought to the *mangmi*, and, failing resolution there, to the *gup*. In some dzongkhags we visited—especially those in the west—*gewogs* had further appeals procedures in place, for example bringing the case to a panel of *gewog* officials to resolve. In Paro, for example, a case could be elevated first to the *gewog*, and subsequently to a panel of *gups* from across the dzongkhag for review.<sup>179</sup> All of these processes, taken together, are still all appealable to the formal justice system.<sup>180</sup>

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175. BNLI's training does not “certify” anyone as a “licensed” mediator—it merely issues any attendees with certificates of attendance.

176. In fact, the LG officials are intended to provide their services not *instead of*, but *alongside* to the TDRPs. See Yargay & Chedup, *supra* note 4, at 110-11.

177. Merry describes this trend as a predictable tendency by government officials when faced with “competitor(s) in the marketplace of disputes.” Merry, *supra* note 97, at 2069.

178. Yargay, *supra* note 4, at 17.

179. Interviews with Gewog and Dzongkhag Officials (Mar. 2019).

180. In recent years, three other initiatives have been introduced into the informal dispute resolution landscape. The impact—if there is any—of these new programs on Bhutanese TDRPs cannot yet be documented as they are all still very new. In 2016, RENEW, a civil society organization dedicated to the elimination of domestic violence in Bhutan, began an innovative program to train its community-based volunteers on consensus building, drawing explicitly on victim-offender mediation models for certain types of less-serious incidents of domestic violence. See Passang Dorji, *RENEW & Police Meet for “Consensus Building Training”*, BHUTAN BROADCASTING SERV. (May 22, 2018), <http://www.bbs.bt/news/?p=96202> [<https://perma.cc/JLW6-EZP5>]; see also PHUMZILE NGUKA-MLAMBO ET AL., UNITED NATIONS HIGH-LEVEL GROUP ON JUSTICE FOR WOMEN, JUSTICE FOR WOMEN: HIGH-LEVEL GROUP REPORT 59 (2019), [https://www.idlo.int/sites/default/files/pdfs/publications/Justice-for-Women\\_Full-Report-English.pdf](https://www.idlo.int/sites/default/files/pdfs/publications/Justice-for-Women_Full-Report-English.pdf) [<https://perma.cc/HV7G-BSRK>]; Stephan Sonnenberg, *What Relevance for ADR in Situations of Domestic Violence? Part 2: The Design and Challenges of Bhutan's Consensus Building Initiative for*

#### *D. Out with the Old, In with the New*

These various reform initiatives, all of which took place in the name of capacity building and an improvement of judicial services, effectively drove to extinction the dispute resolution practices that had been practiced for centuries in Bhutanese villages and communities. Bhutan's elders have been told, both explicitly and implicitly, that their methods are no longer relevant in today's Bhutan. In some cases, they have even been told that they are no longer legally allowed to practice as mediators at all. In most communities we visited, this has effectively shut down the traditional practice of dispute resolution. The LG officials who took their place, in turn, have served as catalysts for the further spread of rights-based understandings of right and wrong, at the expense of the TDRPs' old responsibilities-centric approach.

##### *1. Benefits of Bhutan's Modernizing Informal Dispute Resolution Processes*

The evolution of informal dispute resolution practices in Bhutan has led to a number of concrete benefits for communities in Bhutan. BNLI commonly mentions that its interventions have made dispute resolution services more accessible, especially from a financial perspective; more efficient; and less prone to influence by the wealthier or more literate individuals in a community.

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*Certain Types of Domestic Violence*, HARV. NEGOT. & MEDIATION CLINICAL PROGRAM (Nov. 21, 2018), <http://hnmcp.law.harvard.edu/hnmcp/blog/what-relevance-for-adr-in-situations-of-domestic-violence-part-2-the-design-and-challenges-of-bhutans-consensus-building-initiative-for-certain-types-of-domestic-violence/> [https://perma.cc/SLC5-PNSX]. In full disclosure, I worked extensively on this effort while working as a clinician at JSW Law. In 2019, the judiciary also launched a new initiative to train senior judicial clerks as court-annexed mediators, who would thenceforth provide mediation services directly in courthouses across the country. Yargay & Chedup, *supra* note 4; *see also* Rinzin Wangchuk, *All Courts to Have Mediation Unit—KuenselOnline* South Asians News Portal (Oct. 30, 2019), <https://southasiansnews.com/2019/10/30/all-courts-to-have-mediation-unit-kuenselonline/> [https://perma.cc/DM76-93AP]. That same year, efforts also began in earnest to design the mandate for Bhutan's new Alternative Dispute Resolution Centre (ADRC), the creation of which is called for by Bhutan's 2013 ADR Act. *See* Alternative Dispute Resolution Act of Bhutan, 2013. The ADRC's mandate is likely to focus primarily on commercial arbitration, although it was also exploring other ways to provide ADR services. While none of these new initiatives are necessarily a bad thing, and each are responding to a clear need for ADR innovation, it is also true that Bhutan's informal dispute resolution landscape is getting increasingly congested.

In the past, TDRPs<sup>181</sup> were sometimes compensated for their services with small gifts of appreciation such as rice, vegetables, local alcohol (*ara*), or butter. In addition, it was expected that the parties requesting the services of the TDRPs might provide them with lunch or refreshments. Usually, these gifts or remunerations were thought of as a customary thank-you for the elder's services. None of the elders we interviewed ever suggested that these "payments" were required for them to provide their services, but many told us that they were considered customary. Many also told us that if ever they suspected that one of the parties was financially weak, they would reject any such payments. With time, however, such non-mandatory customs may easily have begun to resemble *de facto* requirements, especially in the eyes of disputants who might consider their fates to be dependent on the good will of the mediator. Furthermore, as the economies of villages became more cash-based, some elders might also genuinely have begun to think of their services not in terms of earned karmic merit, but rather in terms of opportunity costs and lost salaries. Many we spoke to suggested that such informal payments may even have become a source of potential bias for some mediators, in that wealthier disputants could have afforded to "out-gift" the other side and thereby ensure more favorable treatment by the elders mediating their case. Because of the passage of time, it is impossible to verify whether such allegations are based on actual historical fact or merely the more modern lore justifying the need to reform the system, or perhaps a bit of both. According to many whom we interviewed, these various payments, however modest they may have been, did constitute a hurdle to some parties accessing the services of TDRPs, especially the most socioeconomically vulnerable in society.

The new system, which relies not on elders but rather on elected LG leaders, is often described as being equally accessible to all segments of Bhutanese society, regardless of their socioeconomic means. LG leaders receive a government salary for their services and accepting payments of any sort from villagers seeking their services is illegal.<sup>182</sup> Of course, LG

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181. As well as other types of third-party dispute intervenors not covered in this paper. *See supra* note 86.

182. Local Government of Bhutan Act 2009, § 181(h) ("A member of the Local Government shall not ... [a]ccept [a] bribe, including any fee, gift, and compensation or reward in the discharge of his/her duty." (emphasis added)).

officials can (and sometimes do<sup>183</sup>) still knowingly flaunt the anti-corruption provisions in their mandate. However, in such cases a powerful system of administrative anti-corruption mechanisms exists to curb abuse.<sup>184</sup> Consequently, the less well-off in society have arguably benefitted the most from the expansion of the LG's dispute resolution mandate.

The second argument commonly heard in favor of the LGs' administrative adjudication processes is that they are quite a bit more efficient than their alternatives. This is certainly true with respect to the formal court processes, but also, presumably, with regard to Bhutan's traditional model of dispute resolution (DCM). As described above, the TDRPs were usually not particularly concerned with time-efficient resolution of the conflicts brought before them; instead, they sought sustainable outcomes that promised a qualitative improvement in the disputants' relationships towards one another. LG officials, on the other hand, often boasted how they might sometimes resolve mediations within hours. Many of the parties, especially those who might be more conflict-averse, are drawn to this promise of greater efficiency.

Finally, LG officials often state that their mediation efforts are less prone to the distorting bias of powerful or wealthy individuals in the community bending the process in their favor. While potentially true, our research did not uncover any evidence for this assertion. Quite the contrary, many consumers of the LGs' dispute resolution services complained to us of *precisely* such bias among LG officials, usually in favor of those who are more well-off, more powerful, or perhaps more similar to the LG officials in terms of their upbringing or educational background. Indeed, many individuals who insisted on taking their cases to court did so precisely because they felt the judicial authorities would be less biased against them than their local LG leaders.

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183. See e.g., Staff Reporter, *Panbang Court Sentences Goshing Gup and Three Others in Corruption Case*, KUENSEL (Dec. 5, 2019), <https://kuenselonline.com/panbang-court-sentences-goshing-gup-and-three-others-in-corruption-case/> [<https://perma.cc/6CS9-VHVB>]; Kinley Wangchuk & Samdrup Jongkhar, *Gups in SJ Accused of Misusing Fund*, BHUTAN BROADCASTING SERV. (May 1, 2019), <http://www.bbs.bt/news/?p=113687> [<https://perma.cc/RC9G-L3PA>]; Rinzin Wangchuk, *ACC Implicates 11 for Fraud, Encroachment of Govt. Land*, KUENSEL (June 19, 2016), <https://kuenselonline.com/acc-implicates-11-for-fraud-encroachment-of-govt-land/> [<https://perma.cc/QPY8-VNJK>].

184. See Andy Spalding, *Andy Spalding on Bhutan: An Anti-Corruption Movement Like No Other*, FCPA BLOG (July 21, 2017), <https://fcpablog.com/2017/07/21/andy-spalding-on-bhutan-an-anti-corruption-movement-like-no/> [<https://perma.cc/7C7X-ADJY>].

Depending on one's perspective, the administrative adjudication model also promises two additional benefits. First, since BNLI's LG training emphasizes key aspects of Bhutanese law, the modern system promises greater substantive consistency between what an LG official and what a judge might decide. Without significant additional investment in the legal capacity of the LG officials, however, this promise is still highly aspirational. A few hours of training is hardly enough to give LG leaders, most of whom have never had any other formal legal training, the background they would need to competently adjudicate cases. Thus, while the *Nankha Nangdrik* training may give LG officials the confidence to believe they can competently adjudicate cases in line with the law, this confidence is premature. Certainly, our research team has uncovered numerous instances where LG officials had roundly misinterpreted relevant legal standards.

The LG officials themselves were often the first to acknowledge this problem. Many of them asked us to convey to the judiciary the need for more trainings, focusing in greater depth on the details of the laws. The problem, of course, is that these LG officials were essentially asking for a formal legal education, so that they could begin to adjudicate cases with the same level of substantive sophistication as a judge. This persistent request also reveals the degree to which LG officials fail to differentiate their administrative adjudication process from a formal legal adjudication. If the end goal is merely to decide cases consistently with the laws, any benefits associated with the qualitative aspects of a mediation process consequently fall by the wayside.

Finally, a standardized national model of LG-administered dispute resolution holds the promise of greater transparency and accountability. By 2018, each of the 205 *gewogs* administrations had been trained on the *Thuenlam* model of dispute resolution, and subsequently encouraged to share annual data about the number of cases mediated in each location. After gathering a first round of data, BNLI found that a total of 4,492 cases had been mediated.<sup>185</sup> In all likelihood, this figure still significantly undercounted the true number of disputes being mediated by LG officials across Bhutan, since the *tshogpas* at the village cluster level—who usually handle the greatest number of disputes—do not uniformly keep track of the

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185. BHUTAN NAT'L LEGAL INST., NATIONAL MEDIATION REPORT 2018, at 87 (2018).

number and type of cases they resolve.<sup>186</sup> Nonetheless, it shows the magnitude of the LGs' dispute resolution capacity, and gives a more rounded picture of the overall number of disputes arising in Bhutanese communities.

## *2. Drawbacks of Bhutan's Modernizing Informal Dispute Resolution Processes*

In many of the villages we visited, the gradual expansion of the LG officials' mediation mandate at the expense of all other types of informal dispute resolution has led to a growing societal dependency on LG officials for their dispute resolution services. Whereas in the past, individuals could seek out the services of a range of TDRPs, today, individuals in many communities are encouraged to bring virtually all of their disputes—regardless of their magnitude—to LG officials for resolution. Not only does this centralization of the dispute resolution mandate pose a tremendous burden for the LG officials themselves—who, in addition to resolving disputes must also handle all administrative and local development-related affairs in the locality—but it also shrinks the choice for disputants of where to mediate their disputes to only one institution.

First, in today's Bhutanese villages, the role of an LG official formally combines legislative, executive, and now quasi-judicial functions into one. With growing efforts to decentralize government decisionmaking to the local level,<sup>187</sup> LG officials set important development priorities at the local level. At the same time, Bhutan's Constitution also requires that gups remain "apolitical."<sup>188</sup> Any enemies they may have made in those capacities are unlikely to view them as potentially impartial dispute resolvers in the context of a dispute. And yet if, for whatever reason, a disputant lacks confidence in their LG official, or finds them to be biased or politically

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186. *See id.* at 4. This is also consistent with the findings of the LNA.

187. GROSS NAT'L HAPPINESS COMM'N, *supra* note 14, at 81-82.

188. CONSTITUTION OF THE KINGDOM OF BHUTAN, art. 22, § 17; *see also* Nima Dorji, *The Politics of Apoliticity: In the Conflict between Political Rights and Political Neutrality, Facelessness Wins* (Bhutan Law Network at JSW Law Research Paper Series No. 18-4 (2018)), <https://ssrn.com/abstract=3266270>. *But see* UNITED NATIONS DEV. PROGRAM BHUTAN & PARLIAMENT OF THE KINGDOM OF BHUTAN, BHUTAN NATIONAL HUMAN DEVELOPMENT REPORT: TEN YEARS OF DEMOCRACY IN BHUTAN (2019) (concluding as one of its findings that "[p]eople are reluctant to discuss politics openly or share their views to avoid being accused of belonging to a particular party," and recommending that the ECB clarify what is meant by "apolitical," also with regard to LG officials).

compromised in some way, they are often left with only the prospect of addressing themselves to the formal justice system, where they are likely to face renewed pressure to first exhaust all LG mediation options before proceeding with a formal complaint.

Second, the mediated outcomes of LG administrative adjudications tend to be a lot less creative than their TDRP precursors. As described above, LG officials seek to adhere closely to the provisions of the law, and thus rarely come up with truly “out of the box” thinking that often characterized DCM. At best, LG officials encourage parties to agree to compromise and agree to what they describe as “win-win” outcomes. In reality, this is typically just another way of saying that those who are owed something should agree to accept a lesser amount than what they are entitled to under the law, so that the outcome might be described as a win for both sides. In my personal opinion, this has led to a lamentable loss of the beautiful Solomonic wisdom that was on display in many of the stories told by the elders we interviewed handling those same types of cases in the past.

Finally, the cumulative societal role of the dispute resolution process overall has become more transactional. Whereas, in the past, disputes were seen as an opportunity to improve community relationships, disputes today are seen only as prompts for quick and effective action within the constraints of that single dispute only. While the modern dispute resolution process may be efficient, it is also much less effective in keeping villages harmonious than the DCM.

### *3. Balancing the Ledger*

The reforms to Bhutan’s traditional justice mechanisms have had a profound impact on how rural Bhutanese villages resolve their disputes. The final verdict as to whether these various changes have been for the better or for the worse rests firmly in the eyes of the beholder. My assessment, which stems from our field research, is that the perspectives of the civil servants, their counterparts working in international organizations, and the small cadre of outside technical advisors who are hired as consultants to support Bhutan’s development process have won out over the views of the rural communities. Many of the purported benefits of the reforms pertain largely to the interests of the modern-day civil servants of Bhutan, whereas most of

the drawbacks described above come at the expense of the rural consumers of Bhutan's dispute resolution processes.

Historically speaking, no one at the local level had concerns about the accessibility of dispute resolution processes. The elders in the past were always accessible, and barriers to access those services, while real, were quite modest. This was reinforced by the strong karmic—not financial—incentive that many elders we interviewed told us motivated their efforts. Similarly, the argument that LG administrative adjudications are more efficient does not correspond with reality. While villagers in the past generally avoided formal court proceedings whenever possible, complaining not just of excessive time spent going to court but also of harsh methods and procedures that they did not understand, the LG administrative adjudication processes did not, as it is commonly claimed, replace those formal court proceedings. If anything, the tightening standards of what constitutes a case eligible for mediation is increasing the caseload in Bhutan's courts, while the courts themselves have undertaken a number of reforms to make them more efficient and customer-friendly. Rather, as described above, the LG dispute resolution processes are merely supplanting the TDRP-administered processes (especially DCM), which were never premised on a need for efficiency.

Similarly, the concern with transparency and accountability—i.e., the promise of being able to better keep track of how many and what kinds of cases are mediated—is only a concern for those who are tasked with assembling nationwide statistics or administering a standardized national accountability process. The preoccupation with data and accountability was never a problem at the local level. There, the reputations of the individual dispute resolvers served brilliantly as the ultimate accountability metric. The problem, therefore, was not that there were no accountability safeguards in place, but rather that the civil servants in Thimphu did not understand or control those safeguards. Today's centralized system of dispute resolution is arguably equally or more prone to corruption, apathy or politicization than was its decentralized precursor, with the only difference that today the civil servants have taken over from the villagers the means for curbing those vices.

Finally, the promise that today's modern dispute resolution system might generate outcomes more strictly in line with the law is also a concern that was never held at the local level. Villagers expected their TDRPs to

help them reestablish harmony at the village level. Adherence to the laws was only ever seen as a means to that ultimate end, insofar as those laws are also formulated in light of a societal vision of communal harmony. Thus, whether through DCM, or LG-administrative adjudication, or a formal judicial proceeding, the ultimate litmus test for most Bhutanese communities of the success or failure of a dispute resolution process was always its ability to re-establish community harmony.

In contrast, some of the drawbacks of Bhutan's modern dispute resolution weigh disproportionately on the concerns that villagers might have. The loss of creativity described above may be a loss to the villagers, even while it may come as a relief to the civil servants who no longer have to field complaints about a lack of consistency and the occasional quirky mediated outcome.<sup>189</sup> Such creativity, which was the hallmark of traditional village-based dispute resolution, is lost in modern dispute resolution processes.

Furthermore, the changed demographics of who can serve as a local leader have also inured to the overall benefit of Bhutan's civil servant class, at the expense of the local communities. Bhutan's modern-day LG officials typically completed some level of formal education and are more familiar with the administrative language used by the civil service. As a result, it might be easier today for civil servants in Thimphu to find common professional ground with their modern LG counterparts than it was in the past. But those same LG officials may also have a harder time connecting with their village constituents, most of whom do not have that same type of educational background.

Finally, the modernization of Bhutan's dispute resolution landscape has stripped the country's elder generations of an important traditional role in their communities. In the past, elders might pride themselves on their

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189. As an illustration of this point I refer to the case of a nonviolent but psychologically abusive husband in the Haa valley, who had fallen out of love with his wife but was still the family's sole breadwinner. The woman was unwilling to seek a divorce, since doing so would leave her and her children destitute. Moreover, she claimed, the abuse was only sporadic, because the husband spent the majority of the year herding the family's yaks in the highland pastures, leaving her and her children in peace. The TDRP who mediated the case ultimately agreed that a shack should be built on the family's property where the husband could live alone during the few winter months when he was back from the highlands. Finances continued to be shared, and everyone, including the neighbors, felt this to be a wonderful outcome. Nonetheless, those same elders were also visibly embarrassed to share this example for fear that it might not be in line with modern laws, or with the dictates of human rights as they understood them. Focus Group with Katsho Village elders, Haa Dzongkhag (Mar. 14, 2019).

important role helping to resolve community disputes. Today, in contrast, many complain of feeling redundant and useless. This has also led to an erosion of respect for elder generations in the communities.

#### IV. A FINAL NOTE ON THE ROLE OF THE DEVELOPMENT COMMUNITY

In response to above analysis, some might argue that the processes of modernization are impossible to reverse. According to this logic, while perhaps lamentable at a sentimental level—especially by outsiders who tend to accept romantic notions of how life was simpler in the past without having to themselves live those lives stripped of modern conveniences—modernity is not something that communities should resist, but rather something they should learn to embrace and benefit from. In Bhutan, this argument is less common than in many developing countries.<sup>190</sup> Instead, most still seem to genuinely embrace the importance of preserving culture, even if that sometimes comes at the expense of breakneck modernization. From that perspective, if the way individuals and communities handle their disputes can be deemed an integral part of their culture, it is important to pinpoint exactly the locus of the push to modernize. If the reforms are the result of a bottom-up process demanding such reforms, one might argue that change might be necessary, even at the expense of cultural preservation. But if instead, as I argue above, they are the result of a top-down process of modernization driven largely by the interests of civil servants and their partners in the international development community, an ethical dimension arises that I address in the final part of this paper. In particular, I would like to raise the issue of needing to think carefully not just about the interests of the civil servants and international development partners, but also the needs and concerns of the communities that stand to be directly impacted by rule-of-law development reforms.

Over my several years in Bhutan, I have been an astonished observer of an incessant push to reform and restructure Bhutan's justice sector. This instinct is especially noteworthy in light of Bhutan's remarkable track record managing its own affairs without outside intervention or support. Most of the seminal reform efforts that have been so influential in reshaping

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190. See e.g., LWAZI SIYABONGA LUSHABA, DEVELOPMENT AS MODERNITY, MODERNITY AS DEVELOPMENT (2006) (discussing the application of the idea of "development as modernity" on the African continent).

how justice is done in Bhutan were initiated prior to the presence in Bhutan of any outside development partners. Bhutan has inspired the world with its home-grown model of development. And Bhutan can—and should again—inspire the world all over again with its successful establishment of the rule of law in the twentieth century. As described above, before the Wangchuck dynasty was established in 1907, Bhutan was arguably a nasty and brutish place. Today, it is known internationally as the world’s last “Shangri-La.”<sup>191</sup> This transition did not come about by accident, but notably was the result of carefully thought-through reforms initiated by Bhutan’s early Monarchs.

If one listens to some of Bhutan’s international development partners—a euphemism for its donors—however, one might easily miss that important observation. The Austrian Development Agency (ADA), for example, is well known for insisting that its capacity-building efforts in Bhutan should be known as “reform” projects, not capacity-strengthening initiatives.<sup>192</sup> In other words, out with the old, in with the new. More to the point, out with the Bhutanese models of justice that have evolved over the centuries, and in with the Western models more familiar to the donor class and those who were educated abroad. This push for change, even if such changes are not being called for at the local level, is all the more troubling because they fuel a constantly churning cycle of resource-intensive reform proposals that define the relationship between Bhutan’s civil servants and their international cooperation partners.

So, what is more appropriate in Bhutan today: wholesale reform and replacement of existing justice sector institutions, or capacity-building efforts designed to strengthen Bhutan’s home-grown institutions? At a theoretical level, of course, the most intellectually sound way to determine whether Bhutan’s efforts to improve the quality of its justice sector would be to first carefully study the issue from all sides, taking into consideration a range of different stakeholder perspectives. Again, from this theoretical perspective, the most important of those stakeholder perspectives might arguably be those of the individuals and communities who need to access

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191. See e.g. *Why is Bhutan Called the Last Shangri La?*, RS TRAVELS BLOG (Apr. 19, 2018), <https://www.rstravels.co.in/blog/why-is-bhutan-called-the-last-shangri-la-2/> [<https://perma.cc/F8X3-FK3X>]; Daniel Scheffler, *Bhutan, the Last Shangri La*, WONDERLUST, <https://wonderlusttravel.com/bhutan-last-shangri-la/> [<https://perma.cc/64XT-6USX>] (two representative examples among countless others describing Bhutan as a modern-day Shangri La, a narrative primarily oriented towards tourists).

192. Author’s personal observations.

the various justice institutions. That theoretically logical process, however, is unfortunately not how Bhutan's contemporary justice sector development planning process currently unfolds. Instead, the planning process typically happens among the policy-planning elites, and often amplifies only those voices calling for resource-intensive reform, not those voices comfortable with the status quo.

Bhutan's planning cycle typically begins with a nationwide planning process whereby the GNHC consults a range of stakeholders at all layers of governance about potential development projects they might have that would require government resources. Every five years, this process culminates in a massive five-year development plan (FYP). In preparation for the Twelfth Five Year Plan, for example, once finalized, vetted, and approved, the many stakeholders who were originally consulted in the process were again asked to realign their actual development programming in light of that finalized and approved FYP.<sup>193</sup> If a development priority is not reflected in the FYP, it will not receive funding. If a given sector is deemed to be working well, it will typically not be flagged for a budget increase. And most importantly for purposes of this discussion, if the members of an institution are not included in the government's consultation process in the first place—for example the hundreds of Bhutanese elders providing their services informally as community dispute resolvers—that institution's development priorities will simply not be reflected in the centralized planning process.

Once the development plan is in place, the next challenge is to fund the various elements in the plan. Some elements of the plan are funded from a national budget, or from untied donor funding, which is of course a fairly straightforward process. Other aspects of the plan, however, are offered up to the international development partners with a particular interest in certain substantive areas. The ADA, for example, has expressed a particular interest in funding development initiatives focusing on Bhutan's justice sector.<sup>194</sup>

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193. See GROSS NAT'L HAPPINESS COMM'N, 12TH FIVE YEAR PLAN GUIDELINES (2017), <https://www.gnhc.gov.bt/en/wp-content/uploads/2017/05/Finalized-Guideline.pdf> [<https://perma.cc/UJ7E-TG49>].

194. In addition to the ADA, the Swiss Development Cooperation and Danish International Development Agency also funded justice sector initiatives in the past. The United Nations Development Program, which coordinates international development efforts in Bhutan, also provides technical and logistical support, but is itself funded in large part by ADA. See *Justice for All: Austria and UNDP Join*

Technically, those international development partners agree to contribute to certain parts of the FYP without amending the overall integrity and coherence of that plan. In reality, though, a second—and much more subtle—negotiation often takes place to gently reframe and massage certain programming choices to correspond with the development partners’ programming priorities.

This process is not typically driven by bad faith. It is necessitated by the fact that the international donors must themselves also justify their continued presence in Bhutan.<sup>195</sup> While many international aid agencies and foundations may be funding important work in Bhutan on its own merits, most of them are also global in scope, and must therefore also justify their Bhutan programming vis-à-vis competing development opportunities in other parts of the world. Especially in light of a world and a region which is sadly replete with natural and man-made disasters screaming for attention, justifying a development programming presence in Bhutan can sometimes make for a tough sell. By almost any development indicator, Bhutan is a glowing success story. Its environment is pristine, its economy growing, its people at peace with one another, and its institutions stable. Moreover, these achievements are largely due to Bhutan’s home-grown policymaking efforts, thereby invalidating even the argument that a continued international development presence could serve as a bulwark to prevent chaos from setting in.

As a result, many international aid agencies have gently wound down or completely terminated their field presence in Bhutan. Those that remain must go to greater and greater lengths to justify their continued presence in Bhutan. To do so, they need to demonstrate that their funding portfolio includes robust projects designed to address certain global hot-button issues of the day, including gender empowerment, structural reform, protection of vulnerable populations, etc.<sup>196</sup> These hot-button issues are almost never

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*Hands to Ensure Equal Justice for the Vulnerable*, AUSTRIAN DEV. AGENCY, <https://www.entwicklung.at/en/ada/news/detail-en/justice-for-all> [<https://perma.cc/72C2-BFG5>].

195. See e.g., Tancrede Voituriez, Julie Vaillé & Noura Bakkour, *What Rationales for International Development Aid? Main Donors’ Objectives and Implications for France* (Institut du Développement Durable et des Relations Internationales, Working Paper No. 01/17, 2017), [https://www.iddri.org/sites/default/files/import/publications/wp0117\\_apd-narratives\\_en.pdf](https://www.iddri.org/sites/default/files/import/publications/wp0117_apd-narratives_en.pdf) [<https://perma.cc/6HQH-V7SQ>] (identifying five different narratives used by different development agencies to justify their aid).

196. These assertions are strictly my personal opinion, based on my observations and interactions with numerous international development practitioners living and working in Bhutan over the past years.

generated with regard to any analysis of the actual needs of Bhutanese communities. Rather, in the case of bilateral donors, they are the result of a process driven by policymakers in the donor country over what kind of development projects it wishes to support as part of its global development aid mix, or (in the case of multilateral donors or international organizations) the result of a global development prioritization process, currently the SDGs.<sup>197</sup> To receive support, problems must be identified in Bhutan that can be deemed to fit within those global funding priorities.

According to the logic of international development, Bhutan's partnership with the international community requires a constant sequence of problem identification, followed by donor-funded problem-resolution efforts. The end result must be a conclusive declaration of victory over the problem. And, in order to then justify the continued presence of the development donors in the country even after that initial problem is "solved"—new problems must then again be identified to justify a renewed cycle of aid programming. And so on.

In such a situation, there exists a symbiotic relationship between Bhutan's civil servants, who want to keep their operations well-funded and growing, and the international development aid community, which also wants to see its offices thrive, and which hopes to claim success for various impactful "reform" initiatives that unfolded under its tutelage. From this perspective, any act of too generously praising the appropriateness and existing capability of Bhutan's justice institutions, especially those that operate without any such outside support, would invite the question of whether a continued slate of resource-intensive rule of law "reform" initiatives is really necessary, and whether resources might not better be spent on other priorities.

Instead of entertaining such irksome questions, local civil servants and their international development partners chose instead to make the case for a constant cycle of necessary reform efforts that allows their symbiotic relationship to continue unimpeded. All it requires is an unspoken agreement to allow existing institutions to be depicted as somehow lacking, inadequate, or in need of serious reform, since only such depictions can justify the continued flow of resources to support those institutions. Despite

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197. Without wishing to critique the SDGs at all, it is striking how, ever since their promulgation, seemingly not a single development activity can go forward without articulating its linkage in a direct way to one of the SDGs.

the open contempt that many civil servants have of the international development partners' self-serving need to subtly overlook Bhutan's existing institutional capacity, they also recognize the obvious need to maintain the façade of open and harmonious development collaboration. With an ever-shrinking list of donors willing to support Bhutan's ongoing development priorities, Bhutanese policymakers know that they need to play the game. All of this is carefully massaged to still fit within the overall framework of Bhutan's FYPs, so that no one can fault the international community for not supporting Bhutan's national development planning priorities.

If, for whatever reason, no one within Bhutan's civil service or civil society is yet willing to acknowledge that a certain "problem" exists that might call for a corresponding development reform initiative, the donor can always propose that a neutral study be commissioned to establish whether such a problem might exist.<sup>198</sup> Such studies are then usually also funded by that same international donor, who would usually retain control over selecting the consultants to lead it. Tight deadlines are imposed to ensure quick progress. Technical experts—who are almost always foreign technical experts with a prior track record working on the same substantive issue in other countries—are then hired. Next, a "local champion" is selected, which is usually some Bhutanese civil service institution with substantive jurisdiction over the issue being studied. That local champion is given financial support to host, and ultimately co-sponsor, the resulting research. The actual research process usually consists of a few days' consultations in the capital, primarily with civil servants, supplemented perhaps by a token field visit to generate supposedly grassroots input, or a well-financed workshop where the consultants can verify their hypotheses about a particular problem with a select crowd of invited stakeholders. Such visits are usually formal affairs, tightly choreographed by the sponsoring agency to prioritize the perspective of the civil servants who might ultimately be responsible for claiming ownership over the final recommendations.

The outcome of such consultancies is almost always a decisive conclusion that the originally posited problem is indeed a significant one,

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198. The assertions in this paragraph draw on my personal experience interacting with development planning experts over my years in Bhutan.

and further that only a major reform effort—ideally spearheaded by the Bhutanese agency that co-hosted the consultancy—is likely to solve the problem. If, based on that recommendation, a funding request is then granted, it will be replete with generous funding to support the TA/DA (Travel and Daily allowances) of the various civil servants involved in the project, prestigious capacity-building initiatives, as well as ample budget lines for more international technical advisors to “guide and support” that process in light of international best practices.

The above description is a composite of the development aid cycle that I have witnessed time and time again during my time in Bhutan. Of course, it is also an oversimplification and a stereotype. But by and large it can serve as a useful description of how the international aid community and their civil service counterparts generally agree on development collaborations. The cycle is buttressed by noble-sounding language that frames the role of the international community as that of a mere “facilitator,” not as the substantive driver of new reform initiatives. And yet, in my experience at least, the reality is often far more complicated, with international donors working hand in hand with their chosen civil service counterparts to drive and initiate certain reform initiatives.

The key point is that this cycle of reform initiatives tends to ignore any institutions that are currently working well, and tends to severely marginalize any non-elite viewpoints. Furthermore, it tends to disincentivize careful consideration of any potential second-order impacts—positive or negative—that reform efforts may have on the communities they impact. Such perspectives are simply not part of the process. The result, unfortunately, is a willful blindness towards well-functioning local systems, local success efforts, local nuance, or the actual frustrations with existing institutions, and a focus instead on grandiose projects promising “reform,” “development,” and “progress” in line with global hot-button development priorities.

Unfortunately, the efforts by Bhutan’s civil servant elite and their international donor partners to reform how informal dispute resolution is done at the village level is one example of how such an approach to development planning can cause unfortunate collateral damage in Bhutanese communities. This conclusion is sure to cause howls of outrage. When confronted with such an argument—which is absolutely not new, I

might add<sup>199</sup>—many development experts take incredulous offense. Go-to responses include that “human rights” or “rule of law” standards are universal; the product of universal consultation and best practices, and thus beyond the purview of legitimate discussion. This is perhaps the preferred response, because—by implication—it paints anyone daring to protest (in this case me) as an enemy of progress, justice, virtue, and global cooperation. Another common retort is that these various reform initiatives are driven by Bhutanese stakeholders, with the international community merely providing technical and financial expertise. According to this logic, it is not the international community that is acting as the violator of national sovereignty, but rather the critic (again, me). Still another style of rebuttal tends to focus on objective output indicators supposedly demonstrating the success of the reform initiatives. Finally, one might respond by accusing critiques such as this one of being overly academic, or by suggesting there are surely others with greater experience who might disagree with the analysis.

Each of these rebuttals deserves thoughtful discussion, all of which would exceed the scope of this article. That said, I would suggest that the strongest response may be a proposal not to replace, but rather to strengthen, the existing development planning process. Rather than engaging in polemics, my suggestion would be to include a robust and honest consultation process that includes the perspective of *all* stakeholders impacted by a proposed reform initiative. My hope is that the results of our field research can serve as an example of the kind of analysis that might help better inform the development planning process.

None of the above should be interpreted as an allegation of bad faith by any of the actors described who currently participate in the development planning process. From the elders to the LG officials, to the civil servants, policy makers and international donors, each actor in this system is responding as best they can to the incentives they face. What this paper

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199. See, e.g., Makau wa Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201 (2001); Marie-Bénédicte Dembour, *Following the Movement of a Pendulum: Between Universalism and Relativism*, in CULTURE AND RIGHTS: ANTHROPOLOGICAL PERSPECTIVES 56 (Jane K. Cowan et al eds. 2001); David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101 (2002); David Rieff, *The Precarious Triumph of Human Rights*, N.Y. TIMES MAG. (Aug. 8, 1999), at 37; Binyavanga Wainaina, *How to Write About Africa*, 92 GRANTA (2005); Ivan Illich, Address to the Conference on InterAmerican Student Project (April 20, 1968) (transcript available from National Society for Experiential Education).

should instead make clear is the crucial need for all actors in this development enterprise to leave space for sophisticated—and I would argue *qualitative*—research to assess the potential impacts of any proposed reform initiatives on potentially impacted communities.

