

THE THRIMZHUNG CHENMO AND THE EMERGENCE OF THE CONTEMPORARY BHUTANESE LEGAL SYSTEM¹

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Karma Ura notes that “since the formal system of justice was instituted in the late 1960s, Bhutan has met with considerable success in building a society and state based on the rule of law” (1994:34). In this paper, I outline the development of the contemporary legal system and its major role in the transformation of Bhutan. Starting with the enactment of the Thrimzhung Chenmo in 1959, I argue that the Bhutanese legal system has rapidly emerged to act in a responsive manner to an ever increasing range of social changes and challenges. The legal system is therefore, a major aspect of contemporary Bhutan, and one that, unfortunately, tends to be overlooked or restricted to a few paragraphs². This paper does not examine particular laws or the formal procedures of the courts, rather it introduces those unfamiliar with either Bhutanese contemporary legal history or the general framework of the legal system to this subject.

Law, State and Power: the Legacy of the Zhabdrung

Under the Zhabdrung, Ngawang Namgyal the first law code that we are aware of for Bhutan was promulgated in 1651 (Planning Commission, RGOB 1999:81).³ In 1729, Tenzin Chogyel prepared the *bka' khrims* on the order of the 9th Desi, Mipham Wangpo who instructed, “You must at all costs prepare a record of the legal customs which were maintained intact by the Umze and others [and which were based on] legal codes transmitted from the royal lineages and the Chogyels until the

¹ Attendance at the CBS conference was made possible by an Overseas Conference Grant from the British Academy. This paper is an abbreviated version of a chapter from my thesis, “*The Zhabdrung’s Legacy: state transformation, law and social values in contemporary Bhutan*” (2002). My doctoral research was supported by the Economic and Social Research Committee, PhD Studentship R00429824743. I wish to thank Dasho Lungten Dubgyur for his comments and clarifications of obscure points, and the excellent staff of the Permanent Mission of Bhutan to the United Nations (Geneva). To Lyonpo Sonam Tobgye and Dasho Bap Kesang, my heartfelt thanks for their kindness and patience. Any mistakes in this paper are unintended and remain my own. This paper is dedicated to the late Margaret Whitecross, in recognition of her support and her deep affection for her Bhutanese friends.

² See for example : Rose (1977), Paramand (1992), Sinha (2001).

³ Bhutanese sources are inconsistent on the date of the promulgation of the Zhabdrung’s code of laws. In *Bhutan 2020* (Planning Commission RGOB 1999) the date provided is 1651, but in *Bhutan Civics* the date is given as 1652 (CAPPs 1999:50).

Zhabdrung Rinpoche" (Aris 1989:122 – 123)⁴. Further in the text, it refers to the situation in Bhutan prior to the arrival of the Zhabdrung, stating that the Zhabdrung "introduced laws where there had been no southern laws and fixed handles where there had been no handles on pots" (Aris 1986:129).⁵ This statement describes Bhutan as lacking law and uncivilised until the arrival of the Zhabdrung. Of course such statements have to be treated with caution because of the political role they played in confirming the supremacy of the Drukpa State administration established by the Zhabdrung.

The *bka' khriṃs* written by Tenzin Chogyal has been described succinctly as "[organising] along Buddhist lines the relationship between the Drukpa Kagyu monastic community, representing the state and lay patrons (*jinda*) and subjects in the judicial and economic fields" (Pommaret 1997:199). The relationship between the monastic and lay communities revolved around the material support of the monastic community in return for teachings, initiations and other rituals performed for the well-being of the lay community. This relationship was characterised by a variety of taxes payable by the lay community, including *ula* or compulsory labour for the government for a range of purposes – road and bridge building, the construction and repair of *dzong* and monasteries. Other taxes involved the provision of meat, butter, clothes and in western Bhutan, a monk tax instigated by the 4th Desi, Gyalse Tenzin Rabgye (see Kinga 2002).⁶ The complexity of the tax system as it existed in Bhutan in the 1930s and 1940s is revealed in a detailed discussion in the biography of Dasho Shingkarlam (Ura 1994)⁷. Beyond the tax provisions and rules for officials, the code covers all aspects of social life, notably inheritance, trade, crime and punishment and even the use of tobacco.

The administration of law and justice was the responsibility of the local *dzongpon* (governor) and appears to have relied on the character of those in power. Local variations in custom and practices created a patchwork of laws which probably remained oral. More work remains to be done to uncover a sense of what happened in the various regions and away from the administrative centres of power. Yet, it is highly probable

⁴ See also Dr Cuepper's paper and Dr Yonten Dargye (2001) pp164 – 165.

⁵ The expression "southern lands" refers to Bhutan.

⁶ The monk tax (*btsun khral*) refers to former requirement to send one male from each household to the Druk State monasteries instigated by the 4th Desi, Gyalse Tenzin Rabgye (reign 1680 – 1694).

⁷ I believe that a productive study of the National Assembly resolutions especially from its inception to the early 1980s is long overdue, for example, the transformation of the system of taxation is undoubtedly one of the major features of the development of the contemporary system of state administration.

given the breakdown in the Dual System in the mid-eighteenth century, that law codes were less important than the ability of local lords to exercise *de facto* control and authority. The emergence of the monarchy in the early twentieth century saw the creation of a powerful move towards centralisation under the authority of the monarch. It is against this background that I turn to consider the development of the Bhutanese legal system from the early 1950s.

The *Thrimzhung Chenmo*: the Transformation of Bhutan.

The creation and adoption of the *Thrimzhung Chenmo* (Supreme Laws) was a conscious move initiated by the Third King, Jigme Dorji Wangchuk (1952 -1972) soon after ascending the throne. According to Dasho Shingkarlam, a retired official, one of his duties when he was appointed secretary to the King was to "[jot] down ideas concerning criminal and civil laws, which ... came through to His Majesty. There were already three such notebooks when I took over...It seemed His Majesty incubated the ideas... I was to draft the ideas found in these notebooks in some coherent structure and form" (Ura 1995:227). It is less clear to what extent this image of the King's role as law maker is accurate. Several informants suggested that the late King was most directly responsible for the sections on hunting and fishing, leaving the remaining sections to be drafted by other officials. The role of the King in the drafting process may be unclear, yet the majority of Bhutanese describe the law code as the work of the late King. By this association with a deeply venerated monarch, the *Thrimzhung Chenmo* gains an important foundation legitimating its authority over all Bhutanese. A second important thread of understanding is intertwined with the role of the King as law-maker, namely that the *Thrimzhung Chenmo* was in effect a codification of the traditional laws of Bhutan.

This apparent continuity with the past is significant for the legitimacy it provided the law code and its acceptance by the Bhutanese. Yet, when discussing the major reforms of the 1950s with several senior Bhutanese officials, this image was questioned. The laws contained in the draft code were not, they said, all based on traditional practices. Rather, the drafters prepared new laws drawing on a range of sources, notably beyond Bhutan in India. Kinga notes, "legislation streamlined and formalized many social institutions and practices such as marriage, inheritance, local resource management which were governed by customary laws and regulations" (2002:61).

The members of the newly formed National Assembly were responsible for scrutinising the draft *Thrimzhung Chenmo*. This delegation

of responsibility was a key feature of the changes underway in Bhutan. The process of consideration of the draft *Thrimzhung Chenmo* lasted from 1953, when the draft was first placed before the National Assembly, until 1959, when the text was finally ratified and brought into force. The National Assembly records note that between the second session in the spring of 1954 until the eleventh session (autumn 1958) that there "were no separate resolutions as the deliberations were mostly based on framing the General Law" (NA Resolutions). Throughout this period, the draft *Thrimzhung Chenmo* was subject to a significant number of revisions based on the discussions held in the National Assembly. The King, according to Dasho Shingkarlam (Ura 1995), left the matter to the National Assembly for the most part though he did give advice on difficult issues which arose during the process. The fact that the draft *Thrimzhung Chenmo* was subject to major revisions and provoked sufficient interest and comment from the members of the National Assembly does suggest a recognition of the importance of establishing a solid legal foundation "on which to base the integrity of the country ... and the mighty and the humble...both made equal before the law" (Ura 1995:322). There is a reciprocal process of legitimization in the process of ratification by the National Assembly. As a newly constituted body, the National Assembly as an institution was still establishing its position and legitimacy. Together with the *Thrimzhung Chenmo*, the National Assembly represent two key features of the process of transforming Bhutan.

We can gain some insight into the recognition of the importance of the *Thrimzhung Chenmo* in the Foreword. Acknowledging earlier texts and law codes, the Foreword comments that it was felt appropriate that the existing "religious and secular laws" be considered. Based on this review, it was decided what should be kept or discarded in the opinion of those consulted. Existing customary laws (*lugs srol*, *lugs lam*) were considered, and whilst aspects were to be maintained, where they did not match or accommodate the main laws being proposed then they were to be abandoned. It appears that little customary law was incorporated in the law code. Whilst it is difficult to comment on how extensive the consultation process was beyond the National Assembly, one can detect an awareness that the *Thrimzhung Chenmo* was a major document which would play an important part in the reforms and changes initiated by the Third King.

The new law code established equality before the law. From this flowed the need to establish the formal structures required to implement the new laws and the development of the modern Bhutanese nation-state to which these were inherently and implicitly linked. In 1960 the first

thrimpon (judges) were appointed over a few of the district courts located in the *dzongkhag*. Following the creation of the High Court in 1967, *thrimpon* were appointed in all the *dzongkhag*.⁸ Certainly, cases had been heard locally by officials (*drangpon*) previously, but for the first time a division in responsibilities and authority separated the legal decision-making process from administration. Once again, we can discern the importance of the emerging legal system as part of the general process of restructuring the administration of Bhutan. However, it took time for the institutional structures to be put into place; therefore the transformation and, more importantly, the dissemination of the new status of all Bhutanese as equal, and the separation of powers, is still happening⁹.

The language of the *Thrimzhung Chenmo* is worth noting. For the most part, it draws on Classical Tibetan, *choke*, and the link with pre-existing literary forms is important. Rather than creating a rupture with the past and earlier, extant law texts, the *Thrimzhung Chenmo* maintains the connection with the past, notably to the earlier laws introduced by the Zhabdrung who founded Bhutan as a unified country in the early seventeenth century (Aris 1986). As the national language has developed over the past forty years, subsequent legislation has been drafted and promulgated in Dzongkha, rather than the more classical language first used in the *Thrimzhung Chenmo*. At present, draft legislation is prepared and circulated in English and translated into Dzongkha. The ratified legislation is disseminated in both English and Dzongkha versions, and in the event of a conflict of interpretation between the two versions, the Dzongkha version is treated by the courts as the definitive version.

The role of Dzongkha as the official language, drawing as it does on its roots in classical Tibetan, and therefore religious, language reminds us of the intricate intertwining of the promotion of Dzongkha as the principal national language and the development of a more uniform Bhutanese national identity since the 1950s. The choice of language is significant for it allows for a sense of textual continuity, whilst at the same time mirroring wider shifts in state emphasis from religious to secular (cf Aris 1994, 1995; Pommaret 1997a, 1997b; Ura 1994, 1997). The language of the *Thrimzhung Chenmo* exerted, indeed continues to exert, an authority and authenticity which was central to its wider acceptance and its role as the legal, thereby legitimate, basis for the socio-political changes introduced.

⁸ Kuensel vol 5 (15 - 31 October 1967) p5 "Establishment of a High Court".

⁹ Here I refer to the intention to create a Supreme Court and more recently the establishment of the Department of Legal Affairs. In September 2003, the creation of a National Law Commission was announced.

However, although Dzongkha has been promoted as the official language, and there has been a recent requirement for all inter-office and ministry communications to be written in Dzongkha, English is the most prevalent working language¹⁰. Furthermore, in an attempt to develop legal terminology, the Royal Court of Justice has drawn on senior monastic Buddhist scholars. Drawing from their knowledge of Buddhist texts and Buddhist concepts and principles, the Royal Court of Justice has sought to develop the appropriate language for new ideas and procedures based on Buddhist terminology and which accommodates contemporary ideas and requirements. This has sought to ensure that values centrally to Bhutanese society, for example *thadamtshi* and *lejumdrey*, are reflected fully in the language of the law¹¹. This dimension is not widely recognised in Bhutan. Yet, the process of translation between the English draft version and the Dzongkha version acts as a reminder of the problem of translating not only new legal terminology, but also the changing needs and issues facing contemporary Bhutanese society and government. A report in Kuensel comments that “translation, especially of technical and legal terminology, will remain a major hurdle. Assembly members then face the task of interpreting them and conveying their important messages to the people”.¹² This is a task which faces all societies and remains a constant feature of all legal systems.

Legal structures: a modern tradition?

The structure of the Bhutanese judiciary has undergone significant changes over the last decade, notably in 2000 and 2001. The creation of the Department of Legal Affairs is arguably the most significant structural development since the creation of the High Court in 1967. There are plans to establish a Supreme Court, which may now occur sooner than originally thought with the current preparation of a written Constitution in Bhutan¹³. Although the legal texts prepared and disseminated are central to the judiciary and legal thought in Bhutan, the institutions of the judiciary play a crucial role in the development of legal consciousness and understanding among ordinary Bhutanese.

¹⁰ This is not a new concern, for example several National Assembly Resolutions emphasised the use of Dzongkha as demonstrated by NA Resolution 33 of the 35th Session (Autumn 1971).

¹¹ See Whitecross (2002).

¹² Kuensel “Editorial – Need for Legislation” 06/05//2000:2. The task of translating it must be stressed includes preparing Nepali versions of all texts.

¹³ At present, a second draft of the constitution has been placed before HM the King.

The formal structure of the modern Bhutanese judiciary is essentially two-tiered¹⁴. At the local level each *dzongkhag* has its own District Court. There have been created two Sub-District courts, *dungthrim*, in two of the larger *dzongkhag* and each Sub-District Court possesses the same jurisdiction as a District Court. The District Courts exercise general jurisdiction over the *dzongkhag*. Certain categories of crimes, notably treason, are reserved to the High Court in Thimphu and the High Court must confirm the decision of the District Court in murder cases. Beyond these limitations, the district courts hear all cases, civil and criminal, arising in their area. If there are disputes over the most appropriate court in which an action should be heard, the matter of jurisdiction will be decided by the High Court. At present, the district courts are typically located within the *dzong*. In Punakha and Wangduephodrang *dzong*, for example, the court rooms are located in the outer courtyards near the entrance and are clearly signed posted. Small groups of people, men and women can be seen waiting on the veranda or peering at the court notices pinned to a board outside the court. In Thimphu, the District Court has outgrown the original rooms allocated to it in the District offices located near the Sunday Market, and plans to build a new, separate District Court have been drawn up. It is a long term objective to remove the District Courts from their current locations so that they are "independently located"¹⁵.

Above the District Courts is the High Court. Located in Thimphu and created in 1967, there are now eight High Court judges, including the Chief Justice¹⁶. The High Court hears both criminal and civil matters, but has specific jurisdiction in matters of treason, and international treaties. In the event of a dispute between *dzongkhag*, the High Court has power to decide and it acts as a court of first instance for all cases of criminal charges against government officials. The current High Court is located close to Tashichho Dzong in Thimphu, but land has been acquired for a new High Court to be built above the present location.

The High Court represents a recent development in the Bhutanese judicial system. The District Courts located in the *dzong* reflect older practices of discipline and authority whereas the High Court represents a

¹⁴ One could describe it as three tiered with the *dungkhag* courts at the bottom. However, this I feel is a distortion since there are only three *dungkhag* courts. However, there are certain discrepancies in existing legislation which does not provide the *dungkhag* courts with the same jurisdictional powers as the district courts (see Dubgyur in this volume).

¹⁵ Kuensel 10/08/2002:20.

¹⁶ An example of the general lack of accuracy over the Bhutanese legal system is Sinha (2001:96) who writes that "A High Court with six judges - four nominated by the King, a Lhotshampa and a representative of the Tshogdu was established in 1975".

new tier of legal authority. Yet, it is worth noting that Michel Piessel comments on meeting the Trongsar Thrimpon (judge) in 1968 that he “was not merely the representative of justice, order and the law; he was order, justice and the law” (1988:159).¹⁷ The personalised aspect of authority and the role this has played until recently has made the transition from the older forms of authority and influence, as well as the understanding and images these held for ordinary people, to a legal system seeking to establish and maintain a sense of “equality for all” difficult. The position of Chief Justice was created in 1985.

The creation of the High Court in Thimphu in 1967 marked another major shift. The separation of the judiciary from the executive was a major political move, and the importance of judicial independence was emphasised by the National Assembly in various resolutions passed during the Twelfth, Sixteenth and the Seventy Third Sessions. However, the process of gaining full judicial independence was less straightforward. It appears from the records that the Home Ministry did interfere with the High Court on a regular basis. Over the past decade, the High Court has asserted its independence, notably in the acquittal of five Nepalese suspected of being “anti-nationals” (terrorists) which was opposed by the Home Ministry but the High Court emphasised the “correctness” of the acquittals¹⁸. The separation of powers was re-emphasised at the beginning of the 80th Session of the National Assembly in 2002.

In April 2000, a new Office of Legal Affairs was created. Outlined in a report issued in late 1999 to coincide with the Silver Jubilee of the Fourth King, the report comments:

As with any institution it [the legal system] has to evolve with the times and yet continue to reflect our rich tradition and culture....

With changing times, Bhutan had to deal with increasingly complex legal issues within the country. An appropriate legal body or an agency with strong documentation and a proper legal perspective within the socio-cultural milieu of our country, can strengthen the government’s position. Therefore, an Office of Legal Affairs will be created (RGB 1999:16)

The new office effectively acts on behalf of the state in civil and criminal matters. It assumed the role, which can be found in other jurisdictions, of acting as prosecutor on the one hand, and representing the state in matters in which the state is a party. In addition, there is a

¹⁷ “ Le Thrimpon n'est pas seulement un representant de la justice, de l'ordre et de la loi; il est l'ordre, la justice et la loi”. My translation.

¹⁸ Shaw 1994: 149.

Legal Services Division, part of which will advise on human rights issues, and a separate unit drafting law, "rules, bye-laws ...and reviewing acts/laws" (*ibid.* 1999:18). It is worth noting that the Office of Prosecution is described as being the forerunner of "the Attorney General's office" and that in time the Office of Legal Affairs will be "upgraded in the future into the Ministry of Law" (1999:18). There is also a planned Supreme Court, which will be located in the current High Court buildings near Tashichho Dzong. The High Court is to move to a new building (still under construction – a ground breaking ceremony was held in July 1999) and continue its function as the main appeal court. The Supreme Court will deal with matters of policy and give advice on legal issues that arise to the government and by implication to the High Court.

The King remains, despite the recent transfer of power to the Cabinet of Ministers, the ultimate court of appeal, and all Bhutanese, as in the past, have the right to petition the King directly. However, it is the Royal Advisory Council which examines the cases on behalf of the monarch. Discussing their understanding of the right of appeal to the King, a group of young male Bhutanese stressed that, if the person making the appeal had not pursued the matter through all the appropriate channels before making the appeal, then that person would be in serious trouble. Although like many young Bhutanese, they were vague and based their comments on what they had overheard, they appear to have been correct. In the Civil and Criminal Court Procedure 2001 it states that an appeal to the King can only be done once the judicial process was fully exhausted (RCJHC 2001:32).

Closely linked to these recent developments and planned creations has been the development of civil and criminal court procedures. A recent document produced by the Royal High Court states that "changes in the judiciary take place continuously" (n.d : 9). In the summer of 2001, during the 79th National Assembly, the draft Civil and Criminal Court Procedure was ratified after two days of debate, and the Chief Justice answering the concerns raised by the delegates. The new Civil and Criminal Procedure Code 2001 is based on detailed research undertaken by the High Court. Key elements of the traditional customs are incorporated, notably the importance of private resolution by mediation and the role of the *jabmi*. Contrary to what some writers suggest there have been rules and court procedures in place since the inception of the contemporary legal system and the Civil and Criminal Court Procedure

Code 2001 represents a recognition of the importance to constantly monitor and amend procedural rules as required.¹⁹

The procedural changes in part are linked to the computerisation of the judiciary. The main court forms and styles have been harmonised and are available for court clerks and judges alike to access. Each case appearing on the computerised records indicates not only the parties to the action, and their location, but the place where the case initially was raised, and the decisions and court orders made throughout the process. During a meeting with the Chief Justice, it was fascinating, and indeed revealing, to see the information which is now available to court officials. In addition to providing details of the court hearing calendars, there are breakdowns of figures for cases settled, the nature of cases and the number pending at any given time. This data will be important in identifying areas, which may need to be considered for legislative action to be taken. The computerisation of court cases is described as providing “a uniform sentencing policy” and “information for analysis and develop[ment] strategies” (CAPSS 1999:61). Similar changes have been made to police procedures with the provision of computerised charge sheets sponsored by DANIDA.²⁰

Local Level Practices: “nang kha nang du lab pa”

Under sections Da 3 – 1 and 3 – 2 of the *Thrimzhung Chenmo*, direct provision was made for the private settlement of disputes (*nang kha nang du lab pa*). Following the ratification by the National Assembly of the Civil and Criminal Court Procedure Act 2001, section 145 states that:

145. At any stage of the proceedings, it shall be open to the parties to take the help of a *Chimi*, *Gup*, *Chipon*, *Mang-mi* or *Barmi* as mediators for mutual settlement of a civil case in accordance with the requirements of this Code (RCJ 2000:43).

The importance of negotiated settlements has been continually recognised by the judicial system. This is one feature of the *Thrimzhung Chenmo* which draws on pre-existing practices and customs (Aris 1994; Hainzl 1998; Kinga 2002). Based on local-level mediation between the parties concerned by local men of influence (e.g. a village headman), the practice of arbitration and mediation has been strongly promoted by the judiciary in Bhutan (e.g. Dubgyur 2000; Wangchuk, T 2000). The fourteenth century Buddhist scholar, Longchen Rabjam describes acting as a mediator in reconciling differences as a “virtuous deed” (Longchen

¹⁹ See for example Sinha (2001:96): “These courts are run on a fairly informal level as formal procedural aspects are yet to be evolved.”

²⁰ Kuensel “New charge sheet system expected to curb crime” 27/05/2000.

Rabjam n.d: verse 6). The *chimi* (National Assembly representative) and *gup* (village headman) each have some “judicial functions” at the local level (UN Core Doc. 1999:4). The role of local officials such as the *gup*, who acts as the head of the local village block (*gewog*), is seen as encouraging social harmony and allowing communities to maintain control over local matters. During one encounter in Punakha with a *gup*, he explained his role in terms of being a facilitator. To assist the *gup* are the *chipon* (village co-ordinator) and *mangi-ap* (village elders). Historically, the position of *gup* was hereditary until the abolition of its hereditary dimension in 1963 by the National Assembly. The post of *chimi* is more recent in origin, and are both now based on local elections by the villagers and members of the *gewog*.

Following the process of decentralisation of government initiated with the creation of the District Development Committees at *dzongkhag* level, the early 1990s saw the development of Gewog Development Committees at village level. Both of these institutions have been given legal status by Acts (*chathrim*) passed by the National Assembly and, importantly, these Acts gave formal legal recognition to the role of the *mangi ap* and the *dzomdu* (village meeting). The roles of the local level GYT and the DYT have been further emphasised in the Ninth Five Year Plan and the recently SNV sponsored programme on decentralisation in Zhemgang district.²¹ Therefore, the continuing emphasis on the resolution of civil matters at the local level mirrors broader governmental polices aimed at decentralisation.

The role of the *gup*, *mangi ap*, and *chipon* as mediator reinforce the emphasis on maintaining social harmony. As I discuss elsewhere (Whitecross 2002), underlying the notions of *thadamtshi* and *bey zha* (the everyday aspect of *driglam namzha*), is an emphasis on the reciprocal nature of duties and obligations both within the family and household, and in the wider community. However, as Bhutanese society is transformed, especially with the growth of the urban centres this emphasis on social harmony is being altered.

In addition to the local level officials, are *barmi*. These are local individuals who “are well versed in the law” (c.f. UN Core Doc.1999:4; Hainzl 1998). The term *barmi* literally means “middle person” and his role is to act as an impartial negotiator between disputing parties. During previous trips, I met a number of individuals who acted as *barmi* in a

²¹ SNV – a Dutch Development NGO. At the 80th Session of the National Assembly held June – July 2002, several new Acts dealing with the functions of the *gup* and the *Gewog* Development Committees were passed. The Acts strengthen the role of the *gup* and these will undoubtedly re-emphasis in the rural areas at least the role of *gup* and their assistants in settling local, civil disputes. Kuensel “GYT Chathrim 2002: the launch of a new era” 26/07/2002.

range of situations ranging from family disputes to negotiating land transactions. In part, this reflects a broader desire for order and stability, as well as, the association of human discord with disturbing the balance with local spirits and deities (Pommaret 1997, Schicklegruber 1997, Dujardin 1997). Subtle social pressure appears to exist to encourage settlement of disagreements for the well-being of the wider community, and failure or apparent obstinacy can be interpreted as a lack of *thadamtshi* for the community²².

Once a settlement is reached, an agreement in the correct legal format is drawn up and signed by the parties before witnesses. Two particular forms of document were mentioned – *Genja* which is a simply contract or agreement, and a '*Bah*'. The '*Bah*' is an interesting document for it specifies the penalties which the one party to the agreement will pay to the other in the event of failing to abide by the terms of the agreement. Here, the state intervenes and specific requirements are set out for the agreement and its' registration with the local District Court. The emphasis on written documentation of the agreement is not especially new. The importance of writing is reflected in the written land titles (*sa thram*), and decrees emanating from the monarch and other high officials. However, the process of registering the agreement, which is especially important for '*Bah*', with the court establishes and re-emphasises the authority and legitimacy of the courts – without registration with the court then, in the event of a breach of the agreement the other party cannot seek legal redress without first establishing his/her claim. State control and supervisory authority is therefore maintained, indeed extended even over those areas, which appear to be out with the formal control of the judicial system.

The judicial functions of the *gup*, *chimi*, *mangi ap* and the *barmi* are restricted to civil cases – all criminal matters are handled by the police and passed to the District Court. At present, a legal profession is emerging in Bhutan as described later in this chapter, and legal representation is currently primarily done either by the individual, him/herself, or by a *jabmi*. *Jabmi* are similar to *barmi* in that they possess knowledge of the law, but their role is to appear on behalf of the individual during court cases. Until the early 1990s, the *jabmi* received no formal legal education. However, following criticisms from various Human Rights organisations (Hainzl 1997) over the perceived weakness of the *jabmi* system, formal training and licensing of *jabmi* were

²² *Thadamtshi* can be glossed as respect, loyalty, devotion and is a key Bhutanese social value. See in particular, Whitecross 2000 and 2002 (chapter 2). See also K Puntsho for a critical reassessment of *thadamtshi* in this volume..

introduced. According to the most recent available figures, there are 166 licensed *jabmi* working in Bhutan (UN Core Doc. 1999:4). During my first visit to Thimphu, I came across a sign for the “City Legal Unit” which I understand was one of the first private law office opened in Bhutan, and established by a former *thrimrab*. A few other private law offices have opened in Thimphu and Phuntsholing. Provision for the use of *jabmi* during court cases is made in under Section 32 of the Civil and Criminal Procedure Code 2001.²³ At present, *jabmi* provides representation in civil and criminal cases. The recent Jabmi Act 2003 passed by the National Assembly during the 81st Session requires *jabmi* to hold legal qualifications and to have completed the National Legal Course. Two new bodies, the *Jabmi Tshogsdey* and *Jabmi Tuesdays*, will supervise the licensing and conduct of *jabmi* and we see the transformation of *jabmi* into a professional body for the first time in Bhutan (Whitecross forthcoming).

Before leaving the subject of mediation, I want to return to the theme of the tension between the concerns of “this world” and Buddhist doctrine. I mention above Longchen Rabjam, a renowned Tibetan Buddhist saint-scholar who spent several years in Bhutan. The full verse reads:

By acting as a witness and mediator between disputing parties

Although you consider reconciliation a virtuous deed that benefits others,

It will only lead to worldly pride.

Instead, abandon worldly hopes and fears is my heart advice

(Longchen Rabjam n.d: verse 6).²⁴

Transplanting Practices: the Processes of Legal *Bricolage*

The everyday operation of law cannot be separated from the practices embedded in the local and national courts, police units, the processes of legal education and interactions with other officials who are involved in the implementation and interpretation of policy decisions and requirements. Beyond these official and semi-official actors are the general populace to whom the laws are applied. From the laws and rules

²³ Section 32 states that an individual can plead or defend him/herself, or be represented by a *jabmi*. This right of legal representation can be waived if the individual is deemed mental competent, and finally that legal representation will be provided in such cases as deemed necessary in the interests of justice at no cost to the individual (Civil and Criminal Procedure Code 2001:10).

²⁴ My translation. I should thank Lopon Gendun Rinchen for the reference and copy of the full text. The Tibetan text is entitled “Advice from the Heart in Thirty Verses” (*snying gtam sum cu pa*). The Tibetan verse reads: *gnya' dang dpang po zhal lce sogs kyis/ gzhan rtsod bsdum pa 'gro don yin snyam yang/ de la brten pa'i zhe 'dod 'byung ba'i rgyu/ re dwogs med pa kho bos snying gtam yin*.

applied to household property and private land, to the mundane regulations of weights and measures used in public markets and shops, the regulation of businesses and the duties and responsibilities owed by individuals to each other and the state are all conditioned by the background presence of the law and underlying social values embedded within it. Cultural meanings and understandings, in which the routine ways of doing things are not articulated, inform these practices (Huxley 1996; Merry 2000; Watson 1977, Whitecross 2002).

During the processes of legal transformation in Bhutan, (as can be found in elsewhere, for example, Vietnam, Cambodia, Laos and Mongolia as well as Japan), foreign laws and pieces of legislation can be introduced without adopting the practices with which they are interpreted, administered and enforced in their original jurisdiction and legal system.²⁵ Following the establishment of the *Thrimzhung Chenmo* as the basis for the Bhutanese legal system, and as the primary source of laws governing everyday life in Bhutan, we can note from the late 1970s a significant increase in subsequent legislation. In part, the legislation sought to clarify and develop sections of the *Thrimzhung Chenmo*; this is most notable with reference to the Land Act 1979, the Inheritance Act 1980 and the Marriage Act 1980.

However, recently a number of acts passed by the National Assembly have sought to address issues either not provided for, or inadequately, set out in the *Thrimzhung Chenmo*. The Moveable and Immoveable Property Act 1999 came into force following discussion of the terms of the Act in the 77th Session of the National Assembly. Discussing the reports of the Act with ordinary Bhutanese highlighted the problem of legal reception. The majority although they could read through the reports were unclear as to the purpose of the Act and what it would mean for them as individuals. For a western lawyer, the purposes, and indeed practical implications, were known quantities; it is not only legal knowledge but also background social knowledge. Later, whilst in Thimphu, I was advised that the model was from the United States and that US legal advisers had drafted the Act. As a result of popular demand, there is currently a move to introduce for the first time a Landlord and Tenant Act to deal with perceived abuses by landlords (notably rent increases annually with little or no recognition of improvements carried out by tenants). This problem reflects the pressures of urbanisation in certain areas, especially in Thimphu where

²⁵ Based on discussions with legal consultants working in Vietnam, Mongolia, Laos, as well as Bhutan and contemporary writings on the development of the legal systems in Japan (e.g. Haley 1998). I should add that all legal systems are by their nature continually developing and evolving – there is no legal system that is finished and perfect.

housing is in short supply and people are in a vulnerable position. A drafting committee has sought similar legislation from various jurisdictions for consideration during the preparation of a similar act for Bhutan.

Draft legislation has to date been drafted by individual Government Departments, the High Court and depending on the area being legislated for, foreign drafters may be called upon to assist in the drafting process. All drafts are circulated among the National Assembly members prior to each Session of the Assembly which recently has met once a year, though it can be called more often if required. The draft legislation is presented in both English and Dzongkha and debated in the Assembly with officials from the relevant Department present to answer questions raised by the Assembly. Based on the outcome of the debates, the draft legislation may be approved, approved subject to amendment, or passed back unapproved to the Department.

Legal Scholarship: a Key Development

French (1995) in her work on reconstructing the former Tibetan legal system, comments on extant law codes and manuals from Tibet. With the exception of the Neudong Code, which contains a sophisticated discussion of subtle points of law, there are no major works which parallel western legal debate and scholarship. In Bhutan, the earlier law codes set out the barest rules for officials, with little advice beyond exhorting the officials to do their duties and maintain the social order. Yet, it is worth pointing out the amount of available literature on the *vinaya*, the rules of monastic conduct. The *vinaya* was almost certainly the main source for the rules of *driglam namzha* and the organisation of the Bhutanese State introduced by the Zhabdrung in the early seventeenth century. Commenting on the development of the legal philosophy underpinning the modern Bhutanese legal system, several officials noted the importance of religious writers as sources of important legal concepts which combine Buddhist principles with the practicalities of dealing with everyday situations. However, the *vinaya* lacks certain elements which we tend to associate with modern legal systems – notably a final court of appeal to provide a definitive interpretation of a disputed point of law, and no law enforcement provision to enforce sanctions.

The *Thrimzhung Chenmo* in part represents a major departure in the style and format of earlier law codes (*khrims yig*)²⁶. In comparison to one

²⁶ I strongly disagree with Sinha (2001:96) when he writes that "The core of the legal code in substance continues to be the one provided by the first *Zhab- drung*". I think Sinha may be referring to the 1729 *bka' khrims*, yet although that can be viewed as an ancestor of the

of the few surviving law codes extant in Bhutan, the *bka' khriims* written in 1727, the *Thrimzhung Chenmo* is set out in seventeen explicitly titled sections which are broken into numbered paragraphs setting out separate points of law. In addition, there is a contents section setting out the individual chapter headings which permits ease of reference. This format has been reproduced in subsequent legislation. An interesting feature of the subsequent legislation is the Foreword which explains the background to each new Act and the process of consultation and debate in the National Assembly. These sections mirror the Foreword of the *Thrimzhung Chenmo*, drawing as they do on the former, more literary names of Bhutan (e.g. Medicinal Valleys arrayed with Sandalwood²⁷ (Marriage Act 1980)) and containing religious references to the teachings of Buddhas and invocations of the dharma protectors.²⁸ These references ground the legislation as part of the “Dual System” introduced by the Zhabdrung – the balancing of spiritual and secular law. For the most part, the laws of Bhutan are secular but draw on and present themselves as encompassing and putting into practice (in general terms) Buddhist principles.

Arguably, the *Thrimzhung Chenmo* has become in many ways the ur-text for the subsequent legislation that has emerged over the last thirty to forty years. References to it are not uncommon, yet as the source of law the majority of its chapters have been effectively replaced by later legislation; a recent example is the Civil and Criminal Court Procedure Act 2001 which specifically repeals Chapters 11 and 12 of the *Thrimzhung Chenmo* 1959 (CCCP 2001:1). However, the term *Thrimzhung Chenmo* has recently been used to refer not only to the original text ratified in 1959, but also to the “codified and enacted laws of the National Assembly” (CAPSS 1999:57), which reflects, at least, an appreciation of the importance of the original law code and its central role as the legal basis for the transformation of Bhutanese society and government. In interviews with ordinary Bhutanese a similar view was frequently expressed, though few had ever seen a copy of the text or had read it.

There has been, at least since the late 1980s, a policy of carrying out research in the High Court, part of which focused on preparing advice for new draft legislation being proposed by various Ministries. Additional Research was carried out on the Buddhist canon (Kangyur) and commentaries (Tengyur) to assist with the development of legal

Thrimzhung Chenmo, I feel that to characterise contemporary legal texts in this way suggests an archaic legal system.

²⁷ *sman ljongs tsan dan bkod pa'i rgyal khab* (*gyen 'brel gyi khriims yig* 1980:3)

²⁸ The language of the Forewords merits further consideration and I intend to do further work on the development of legal language and terminology in Bhutan.

vocabulary and with the express intention of drawing on Buddhist terminology and concepts. Part of this work influenced Dasho Khandro to research and publish through the Royal High Court of Justice his work on *driglam namzha* (Dasho Khandro 1997)²⁹. Furthermore, this research was important for the preparation of the text of the recent Civil and Criminal Procedure Code 2001³⁰.

The research materials of the Research Unit of the High Court are now being made available. There is an increasing desire by younger, western-educated lawyers to start publishing more widely on legal matters to disseminate knowledge about law and to encourage wider debate on the issues now arising in Bhutan. This recognises the importance of disseminating information about both the formal structures and general laws. Whilst Ura commented that "to some extent, law in Bhutan ...tends to be the common man's guide" (1994:35), as the amount of legislation increases there is a need for suitable dissemination of new laws, often introducing new legal concepts³¹. Accordingly, in the autumn of 2001, a training course entitled "Training and Dissemination on Rule of Law and Judicial Process" was launched by the Royal Court of Justice in the *dzongkhag*.³² Over three days, young trained lawyers under the supervision of members of the judiciary, including the Chief Justice, explained civil and court procedure to members of the District Development Committee (DYT). The first day focussed on detailing the "principles of judiciary, the independence of the Judiciary, Equal Justice

²⁹ This is an excellent work, though very difficult to find, on *driglam namzha*.

³⁰ Dasho Lungten Dubgyur (personal communication June 2003).

³¹ It is worth noting that a number of National Resolutions deal with the need to make available copies of legal texts. For example, the following resolution was passed during the 45th Session: 24/9th/ Fire Dragon Year (17/10/1976).

National Assembly Resolution 2: Supplying copies of National Law Books.

In the past the National Law Book was kept only in the courts of law for reference. The Assembly decided to supply copies of the same to the Gups so as to enable them to explain its contents to the public, at the latter's convenience.

Da tshun 'brug gi khrims gzhung chen po de nyid sa gnas so so'i khrims khang du ma gtongs bzhag srol med rung da nas rgyal khab gong 'phel gyi 'gur ba dang bstun te mi mang rnams nas kyang khrims lugs legs por ha go pa'i ched du rdzong khag so so'i rged po rnams kyi lag par yang khrims yig re gzhung nas gnang rgyu'i gros thag chod/

³² The twenty *dzongkhags* were divided into three zones and a different High Court Judge attended the courses in each zone. The Chief Justice, personally supervised the courses in the eastern *dzongkhags*. The final presentation of this course in was held in Wangdiphodrang 5th - 7th August 2002 under the supervision of the Chief Justice, Lyonpo Sonam Tobgye. (Personal communication, Dasho Lungten Dubgyur, August 2002). This was the final *dzongkhag* in which it was conducted.

under Law" (RCJ,HC 2001:1). It illustrates the importance of education and training within the judicial system stressing consistency. The recent course was described by senior lawyers, and other non-official informants, as necessary to develop a better understanding of the legal system. Yet, it was equally a conscious attempt enhance popular confidence in the formal legal process. There is the intention in time to make available on a court website details of court decisions and to use modern technologies to increase not only the speed by which the courts (District and High) process cases, but also the transparency of the legal process.

Conclusion: "As the Earth is to living and non-living entities, law is to a human being"³³

Flowing from the *Thrimzhung Chenmo* and subsequent legislation, it is possible to discern how the law transforms through its texts, and its performances (Ewing and Silbey 1998; Merry 2000). The law texts set out, (re)define and embody cultural conceptions of personhood, rights and specify relationships and actions as either legitimate or illegal. Law has been central and remains central to the creation, articulation and legitimisation of the relationship between the state, community and the individual. The transformation, and indeed effective replacement, of the *Thrimzhung Chenmo* highlights the nature of the social changes which have occurred in Bhutan, as well as the new challenges and requirements which now exist in Bhutanese society. We should not let discussions of balancing tradition with change distract us from the fact that contemporary Bhutan is quite different in terms of social aspirations and opportunities from that of the late 1950s. Fifty years of even "cautious" exposure to outside ideas and influences, and controlled development inevitably has had an impact, however subtle, on Bhutanese society³⁴.

The introduction of the bulk of legislation governing Bhutanese life reflects a mainly, though not exclusively, retroactive process of introducing new laws in order to deal with situations and issues which have arisen as the result of wider social and economic changes in Bhutanese society. In turn, this has lead to the transplanting or reception of law texts drawn from other legal systems and traditions. Although there has been a strong degree of consultation, and a clear appreciation by the Bhutanese officials concerned to tailor the new regulations and laws to conform to Bhutanese requirements, it is inevitable that subtle

³³ Quotation by Pelgoen Phagpa Lhuedrup, cited Royal High Court of Justice n.d. p2.

³⁴ A recent report in the *Guardian* (a UK newspaper) commented on the perceived negative impact of television in Bhutan.

and not so subtle differences in cultural meaning and logic are bound to have arisen. For although it is possible for legal texts to be rewritten and amended in the process of reception, it is less certain that the practices of interpreting and administering them will undergo such an ease of transplantation. It is worth stressing that any laws will over time be adapted to local circumstances and local political agendas (Moore 1979; Merry 2000; Watson 1977). This may help reassure those who fear the importation of alien ideas, but there is always the problem of disseminating new ideas and requirements to the society at large.

Public reactions and comments on recent legislation are worth noting. Confidence in the authority and legitimacy of law in part relies equally on the state institutions that have the task of preparing it, as much as, on the formal institutions which implement it (Durkheim 1957, 1984). The recent appointment of young lawyers with formal legal education to the District Courts was positively welcomed by many Bhutanese. However, it is acknowledged that building institutional confidence and to transform popular mistrust of the legal system takes time. Yet, it is clear that the Bhutanese legal system has undergone significant changes during the last fifty years. Now the judges and legal officials are charged with the task of furthering the promotion of the rule of law and to ensure that the legal process is transparent and fair.

Behind the *Thrimzhung Chenmo*, its institutions, and its principles of legal ordering lies a set of foundational norms and values related to the role of the law and the Bhutanese state in social ordering. It is worth emphasising that the move towards creating a unified legal system in Bhutan grew out of ideas discussed and developed in Bhutan. The emphasis given to property in the first third of the *Thrimzhung Chenmo* suggests that these norms and values include the primacy of private law, exemplified by the new code and judicial process. With the later legislation and reception of (modified) western models, which themselves incorporate values and un-stated premises defining law, the role of the state and the relationship between individual and community, the adaptation of new rules, procedures, and institutions to their social environment remains an on-going process. The emphasis on mediation at the ground level remains an important feature of the contemporary Bhutanese legal system linking it with the traditional practices on which it seeks to build³⁵.

³⁵ Mediation is much discussed in the USA and Europe, but is limited in practice. Recent initiatives, for example by the Chief Justice of Maryland, and by senior judges in Scotland seek to extend the mediation as a practical option for all disputants. In my recent involvement I have pointed specifically to the Bhutanese practice.

In this paper, I have sought to briefly outline the processes of agency and consciousness directly in relation to the legal transformations which have, and are indeed, still taking place in Bhutan. Implicitly embedded in these processes of legal transformation was and is the desire to create a modern nation-state and secure a place for Bhutan in the wider geopolitical arena. The *Thrimzhung Chhenmo* and the legal transformation it introduced form part of this conscious process of transforming Bhutanese society. The abolition of the various categories of serf and slaves which existed in Bhutan until 1959 is in direct correlation to the equalisation of legal standing before the law for all living in Bhutan, with commoners and nobles transformed in to modern, self-disciplining subjects of the nation state.³⁶

³⁶ Although T Wangchuk estimates the percentage of population of serfs at the time of manumission was only 10%, I do not think one can underestimate the implications of the readjustment this caused throughout Bhutanese society, especially when combined with the emphasis on equalising social status for all (Wangchuk 1999:59).

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