

**A LANGUAGE FOR RULES, ANOTHER FOR SYMBOLS:  
LINGUISTIC PLURALISM AND INTERPRETATION OF  
STATUTES IN THE KINGDOM OF BHUTAN\***

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**From the Middle Ages to Modernity: the End of Isolation  
and the Development Policy of the Kingdom of Bhutan.**

From being almost completely unknown to the average Westerner, the Kingdom of Bhutan has recently become a fashionable destination for elite tourism. This small Himalayan state with a population of about 600 000, landlocked between India and China, has a lot to give to those willing to pay the tax imposed by the government on leisure trips to the country, which offers unparalleled natural landscape, magnificent Buddhist temples and a fascinating cultural heritage.

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\* The essay is primarily based on research conducted during a stay in Bhutan in connection with work at the Department of Legal Affairs between August and October 2000. I wish to express my warmest thanks for the kindness shown by His Excellency the Foreign Minister Lyonpo Jigmi Y. Thinley, by His Excellency the Chief Justice Lyonpo Sonam Tobgye and by Dasho Tashi Puntshog. Relevant information derives also from the patient explanations provided by my former colleagues at the Department, and especially by Lobzang Rinzin, former Government Prosecutor. Mention must also be made of Delphine Doltramare, an old friend of Bhutan, for making my visit to Bhutan possible. None among these persons had, however, the opportunity of reviewing the text, and I remain responsible for any possible error of fact or appreciation. A slightly different version of this essay has been previously published in R.Sacco ed., *L'interprétation des textes juridiques rédigés dans plus d'une langue*, Torino-Paris, 2002.

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Bhutan has – however – an interest going beyond its well merited tourist reputation. This country can be a case study without equal for both comparative lawyers and law-and-development scholars, for the same reasons that make it attractive for tourists.

The well preserved natural landscape and the cultural uniqueness are indeed due to the almost complete isolation in which the Kingdom has been until recently, due to complex geopolitical factors, which made it possible to avoid submission to the neighbouring British Raj<sup>1</sup>, as well as to any other colonial power. The “Kingdom of the Dragon” pursued until the early sixties a policy of almost total refusal of foreign cultural influence, lasting longer than that of the other Himalayan kingdom, Nepal.

Isolation was so complete that it can be said, quoting a local authority, that in Bhutan “the period which seems medieval in character extends right up to the end of the 1950s”. Until then, “Bhutan was the last physically isolated state in the modern world, the only political entity that was almost totally ignored by the world”<sup>2</sup>.

Modernization started with the realization of basic infrastructures (until then Bhutan had no motorable roads and was connected only by footpaths and mule tracks) upon the initiative of the third king Jigme Dorji Wangchuck, also

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<sup>1</sup> On the relation between the Kingdom of Bhutan and the British Raj, see P. COLLISTER, *Bhutan and the British*, New Delhi-Mumbai-Bangalore-Madras-Calcutta-Patna-Kanpur-London, 1987, rep. 1996 and MANORAMA KOHLI, *India and Bhutan. A Study in Interrelations 1772-1910*, New Delhi, 1981.

<sup>2</sup>The definition is from Holsti, quoted by PRIESNER, infra note 4. An informed description of the early history and political development of Bhutan is also NAGENDRA SINGH, *Bhutan. A Kingdom in the Himalayas*, New Delhi, 1978. The author was constitutional adviser to the third king of Bhutan.

on the basis of a national security concern following the suppression of the Tibetan revolt by the Chinese in 1959. In the absence of diplomatic relations with third countries, the first development plans were financed almost entirely by India.

The relatively free access for foreigners is instead a much more recent development, linked to the still very prudent tourism policy of the last 20 years. The limits to the access of tourists are the most superficial signs of an overall approach to development which is quite unique, and is usually presented by means of a catchphrase “Gross National Happiness is more important than Gross National Product”, which was introduced by the present king Jigme Singye Wangchuck in the late eighties.

The approach to development known as “Gross National Happiness”<sup>3</sup> has different components, deeply rooted in pre-existing Bhutanese values, including the special importance given to the absence of foreign (political as well as economic and cultural) domination and the role of Buddhism as a component of national identity (although not everybody in the country is a Buddhist, as we will mention later)<sup>4</sup>.

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<sup>3</sup> The best descriptions of the relation between development choices and national identity are probably in JIGMI Y. THINLEY, “Values and Development: Gross National Happiness”, and S.PRIESNER, “Gross National Happiness – Bhutan’s Vision of Development and its Challenges”, both in *Gross National Happiness. Discussion Papers*, Thimphu, 1999, pp. 12 ff., 24 ff. See also S.B.FRYE HARGENS, “Integral Development: Taking ‘The Middle Path’ Towards Gross National Happiness”, in *Journal of Bhutan Studies*, vol. 6, 2002, pp. 24 ff.

<sup>4</sup> The nation state is a late development in Bhutan. It can be traced back to the unification of the country in the XVII century by Nawang Namgyal, a member of the Tibetan Drukpa sect. Unification did not mean centralized administration, since Bhutan was governed locally through the “Dzongs”, fortresses acting as religious and political centres, and “the state’s primary function was to support the religious establishment, which in turn promoted humanistic morality and ethics among the lay

In this perspective, the four major goals of the government are economic self-reliance, protection of the environment, cultural advancement and “good governance”, with a strong skepticism about all development doctrines focusing merely on quantifiable economic indicators. In order to keep a balance between material and spiritual values, one of the absolute priorities of the government has been that of preserving as much as possible the cultural fabric of the Bhutanese society, cautiously evaluating the consequences of the transformations deriving from international exchanges.

“Gross National Happiness”: are we facing empty words? It is not possible here to give even a succinct description of the interesting Bhutanese path to development, as we will just go through one of the operational consequences of development policy, i.e. legal reform, in order to sketch the background of the linguistic problems of statutory interpretation. We will only say that the record of the Bhutanese experience, where enviable economic growth has been matched by dramatic advancements in the quality of life<sup>5</sup>, suggests its further study also from a legal perspective, until now rather neglected.

#### **“Gross National Happiness” and the Law: Legal Reform and Western Legal Models in the Bhutanese Context**

What is the role of law in the careful journey of Bhutan towards modernization? Until the early nineties it was a relatively minor one. At the beginning - as we have mentioned

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population” (S.PRIESNER, op.cit., p. 33). To a period of intense strife in the XIX century, followed the establishment of the monarchy in 1907, when a member of the still ruling Wangchuck family was able to concentrate in his hands all the power, previously divided between several political positions, while keeping the previously existing administrative structure. On the fragmentation of power in ancient Bhutan see specially KARMA URA, op. cit., pp. 25 ff.

<sup>5</sup> Some data can be found e.g. in *Bhutan. Society and Polity*, RAMAKANT and R.C.MISRA eds., New Delhi, 1997.

- material infrastructures were the absolute priority, followed by general access to training, primary education and health services.

In this context, the legal system kept an indigenous character. There are no studies on Bhutanese traditional law, and the country can be considered virgin ground for legal anthropological research<sup>6</sup>. However, the first identifiable layer of the Bhutanese legal system can be roughly said to correspond to the tradition described by Rebecca French in her pioneering book, *The Golden Yoke*. The traditional way of thinking about law in Bhutan uses the same categories as Tibetan law, referring to the same basic texts and the same teachings of Lamaist Buddhism, with a crucial role played by mediation and arbitration by persons of authority. A certain stigma is attached to formal litigation, although probably not as strong as in other Asian societies<sup>7</sup>. Traditionally, disputes are presented to independent and respected persons, or to the village headmen, with the aim of reaching a lasting settlement. Ideally, the settlement should be formalized in a signed agreement (*Genja*) establishing a pledge or stake (*'ba*) to be forfeited if a statement is proved false or if the terms of the agreement are violated.

In 1953 the National Assembly (*Tshogdu*) was created, including not only elected representatives but also representatives of the monk body and a number of high civil servants directly appointed by the king. The formal separation of powers was completed in the '60s with the creation of the court system, with its 20 district courts, and eventually the setting up of the High Court in Thimphu in 1968.

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<sup>6</sup> Concerning legal anthropology, an interesting work in progress seems to be that of Richard Whitecross, carried out at the University of Edinburgh.

<sup>7</sup> On dispute resolution in Bhutanese culture see M.A.RIS, "Conflict and Conciliation in Traditional Bhutan", in *Bhutan: Perspectives on Conflict and Dissent*, M.HUTT ed., Gartmore, Stirlingshire, 1994, pp. 21 ff.

In 1959 the National Assembly, in one of its first sessions, enacted a body of laws called *Thrimzhung Chhenmo* (“the Supreme Laws”). This is for foreign eyes a very peculiar legal text (with no relation to any Western code), certainly worth deeper study, which embodies traditional Buddhist values in the form of a collection of criminal law provisions accompanied by fundamental rules of procedure, as well as rules regulating religious rites or more generally protecting religious values (see the detailed rules on donations for religious purposes, cremation, and so on). Although the structure of most of the provisions is of a criminal character, sanctions are also established for wrongdoings related to sales and other commercial transactions, thus providing an embryo set of civil law rules. The *Thrimzhung Chhenmo* has been commonly perceived and described as a “general law of the land”, sometimes with a “quasi-constitutional” flavor, by stressing the principle of equality contained in its first part<sup>8</sup>.

The “Supreme Laws” of 1959 were followed by the enactment of a number of statutes regulating the most important fields of social life and some matters of increasing public interest. We have thus the Forest Act of 1969, the Land Act of 1979, the Inheritance Act of 1980, the Marriage Act of 1980, the Livestock Act and the Debt Act both of 1981, and some others.

The acts concerning family relations have also a rather indigenous character, and did not want to bring dramatic changes to the very stable Bhutanese society of their time, strictly sticking to traditional values. The same is true for the statutes concerning land use, which were aimed at regulating use of collective resources in a period of transition in Bhutanese agriculture, caused by the introduction of cash crops for export. Some of these acts were certainly important

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<sup>8</sup> The section OM states “Except for His Majesty the *Druk Gyalpo*, all other citizens of Bhutan, irrespective of their rank, social status or official position are equal under the *Thrimzhung Chhenmo*”.

steps in the modernization process, especially the Forest Act and Land Acts, establishing for instance that the government is the owner of all trees, including those growing on private land. One should not in any case overestimate the impact of legislation on individual relations in this first wave of lawmaking. Social control has continued for a long time to be firmly in the hands of traditional bodies, with formal court adjudication as second best compared to mediation<sup>9</sup>.

From this slow march forward, in the last few years Bhutan has instead moved to a real – to use the famous phrase by Grant Gilmore - “orgy of statute making” (by local standards). In 1992 we have the enactment of a Financial Institutions Act of Bhutan, followed by a Forest and Nature Conservation Act (repealing the 1969 Forest Act) in 1995, and in the same year 1999 of a Moveable and Immovable Property Act, a Telecommunications Act, a Legal Deposit Act, a Postal Corporation Act, a Bankruptcy Act, a Road Safety and Transport Act. This was just the beginning: in the following year we can see a new Companies Act, an Environmental Assessment Act, an Industrial Property Act, a Commercial Sale of Goods Act, a Copyright Act and many others.

Behind this “orgy”, there is the will of the Government to guarantee “good governance” during those, which are perceived as watershed years for Bhutan.

In 1998 Bhutan had a growth rate of about 6%, was about to launch its own television station, was soon to be connected to the Internet, and one year before shares of half a dozen public-sector undertakings were sold to the public to introduce privatisation<sup>10</sup>. “Good governance” in the context of swift economic growth was perceived as requiring adequate legislation, and in this case there was no doubt that

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<sup>9</sup> On the role of mediation see also A.SEIDMAN-R.B.SEIDMAN, *Bhutanese Legal System and Terminology. Report on the Outcomes of the Workshop, 22-26 February 1999*, Thimphu, 1999, p. 13.

<sup>10</sup> For a journalist’s overview see A.DAVID, “Shangri-La Wake Up Call”, *Asiaweek*, September 3, 1999, pp. 44-47.

legislation had to follow foreign – Western - models. All these acts have indeed seemingly been drafted by foreign consultants working for the concerned Bhutanese ministries, mostly through financial support from international institutions, as for instance UNDP.

The quality of this international legislative assistance would be worth a long discussion. The acts produced in these last years are on average of good technical quality, but are in general not at all “country specific”, showing no signs of any significant interaction between the foreign consultants and the local lawyers. They follow the legislative style of the common law (with a preamble giving detailed definitions of the terms used), and are clearly inspired by different American and South Asian statutes.

A detailed analysis of this last wave of legislative reforms is still to be carried out, and it could probably provide interesting results concerning the sources used by the drafters. Generally, the process has been rather chaotic, and its efficacy affected by the lack of Bhutanese lawyers with specialist competence. Important lessons about the limits of “country specific drafting” in particularly difficult environment, and with extremely scarce resources, have been drawn by Ann and Robert Seidman during a visit to Bhutan organized in collaboration with UNDP, but it is not yet clear whether their analysis had any impact on the Bhutanese drafting practice<sup>11</sup>.

There is, however, an important exception to the use of international experts for the drafting of new statutes, i.e. the Civil and Criminal Procedure Code enacted in 2001. The drafting of this code is mostly due to the personal commitment of the Chief Justice, a man of vision who had his legal education in Australia. Although with significant adaptations to the local reality, also this piece of legislation clearly borrows from common law procedural models

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<sup>11</sup>A.SEIDMAN-R.B.SEIDMAN, op. cit.



(including American solutions like discovery and class action), in some cases in forms already adopted in India.

The importance of traditional mediation followed by the *Genja* can still be perceived in this code, which contains a chapter concerning “Adjudication without proceedings” where in civil cases an official role as mediators is assigned to different local authorities (including members of the National Assembly) and the legal value of related out-of-court agreements is recognized<sup>12</sup>.

### **Language Pluralism and Legislative Drafting**

Since statutes are the most important legal source in the process of modernisation, the problem of their language is a crucial one.

The overall context in which the legislator operates is rather difficult. The languages spoken in Bhutan are currently considered to be 24, 8 if one takes into account only those which have at least 10 000 speakers. Among these, all but one (Nepali) are Tibeto-Burman languages. Those having the largest number of speakers are *Dzongkha* (estimated 160 000), which is the native language of Western Bhutan, *Tshangla* (estimated 138 000) also known as *Shâchobi Kha* or *Sharchop*, predominant in the eastern part of the country, *Khengka* (estimated 40 000), *Bumthangkha* (estimated 30 000) spoken in the Bumthang district and in the whole of central Bhutan. Nepali, a Hindu-Aryan language, is spoken (in a form in some respects different from standard Nepali) mainly in Southern Bhutan, following the immigration of labourers at the beginning of the 20th century. The figure of Nepali speakers, currently estimated around 156 000, is a politically sensitive point, since there is still open conflict on

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<sup>12</sup> See chapter 22. About the machinery of justice in Bhutan see my forthcoming essay “Happiness, Development and Procedure. The Changing Faces of Justice in the Kingdom of Bhutan”, in *Festschrift till Per Henrik Lindblom*, Uppsala, 2004.

the status of an important number of persons (part of them now in refugee camps in Nepal) who claim to be members of the Bhutanese Nepali minority and to which the Bhutanese government refuses citizenship affirming that they are recent immigrants<sup>13</sup>. The position of the Nepali minority, which with its Hindu religion constitutes what is often perceived as a challenge to national identity, is probably the most serious problem of contemporary Bhutan.

Until the sixties, there was no official language policy, and no spoken language was a national language. This also because none among the spoken Tibeto-Burman languages had developed into a written language. Before modernization, illiteracy was rampant and contacts between the different linguistic areas were limited by the difficult communications. The written language used in drafting official documents was Classical Tibetan, also known as *Chöke* (or *Chökey*), which was also the language of the traditional education of the monastic body in the lamaseries. The approach to language use was rather pragmatic, as is shown by the fact that when the first few secular schools were opened in Bhutan at the beginning of the 20th century, the medium of instruction chosen was Hindi, because of easy access to textbooks in this language<sup>14</sup>.

In 1961 a royal decree by King Jigme Dorji Wangchuck established that “Dzongkha” was the national language of Bhutan<sup>15</sup>. This did not mean that the language of Western Bhutan was promoted as such to national language. Instead, “the term ‘Dzongkha’ was still primarily used to denote not the spoken language of Western Bhutan, but the literary exponent thereof, *Chöke*. Because *Chöke* was considered the literary form of *Dzongkha*, the liturgical language and the spoken tongue were not popularly perceived as being two

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<sup>13</sup> For different voices on this problem see “*Bhutan: Perspectives on Conflict and Dissent*”, cit.

<sup>14</sup> See G.VAN DRIEM, *Dzongkha*, Leiden, 1998, p. 7.

<sup>15</sup> On the development of the present language policy see G. VAN DRIEM, *Dzongkha*, cit., pp. 8 ff.

distinct languages”<sup>16</sup>. The adoption of textbooks in “Dzongkha” (actually *Chöke*) instead of Hindi and the teaching of *Dzongkha* as a written language in schools implied thus the usage as a medium of written communication of a language that was in the same relation to the spoken languages as Latin is to Italian or French.

Since the seventies, the language policy has aimed at the vernacularization of the written language, to bring it closer to the living language. In this perspective, a Dzongkha Division of the Department of Education was created in 1971, followed by a Dzongkha Advisory Committee 1986. The two merged in 1989 with the establishment of the still existing Dzongkha Development Commission, which develops textbooks, works on the compilation of dictionaries and, has the power to introduce neologisms and new spellings. In the standardization of modern *Dzongkha*, which is based on the cultivated form of the native language of Western Bhutan, a prominent role has been played from the early nineties by a Dutch linguist, George van Driem, who is the author of the first extensive grammar as well as the person behind the official system for romanization to be used for presenting names and words to the international public, since *Dzongkha* otherwise uses the alphabet of Classical Tibetan, known as *’Ucen* script.

With standardization, *Dzongkha* has acquired an increasingly central role in the defence of the cultural identity of Bhutan, and the government constantly promotes its use. In spite of this, the advancement of *Dzongkha* suffered from the competition with English since the beginning of modernization. It must indeed be remembered that in schools, because of the unavailability of *Dzongkha* textbooks in many fields and the lack of adequate terminology for scientific and technical subjects, most of the education still takes place in English. With modern education, “English supplanted *Chökey*, inasmuch as most educated Bhutanese

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<sup>16</sup>G. VAN DRIEM, *Dzongkha*, cit., p. 8.

could read and write fluently in English but not in *Chökey* or *Dzongkha*. To a large number of educated persons “literacy came to be equated with knowing English, and education and scholarship came to be judged by Western standards”. Even because of the increasing number of young Bhutanese who receive their education abroad, English is absolutely preponderant among the educated elite, for which a “recent survey shows that around 80% ... can read, write and speak good English but, in the case of most of them, their knowledge of *Chökey* or *Dzongkha* can only be ranked as semi-literacy”<sup>17</sup>. The only newspaper published in Bhutan, the weekly *Kuensel* is published in three identical editions, in *Dzongkha*, English and Nepali.

The linguistic skills of lawyers well reflect the linguistic pluralism, which dominates Bhutan. Persons with formal legal education are still few in Bhutan, and are almost uniquely represented by young law graduates who, after selection by the government, spend the years needed to obtain a law degree in an Indian University. They are thus fluent in English (medium of education in Indian law schools), with a good command of the legal terminology of the common law. Besides that, their mother tongue is one of the different regional languages, which can well not be *Dzongkha* (it is for instance often *Tshangla*, which is very different) or one of its closest relatives. *Dzongkha* is certainly known and spoken, but advanced writing skills cannot be taken for granted. Very often, lawyers also have a good knowledge of spoken Nepali (but seldom of the written language, which uses the same script as Sanskrit).

Because of the difficulties in mastering written *Dzongkha*, English has an important role as *lingua franca* in the administration. Internal communications, reports and other documents are very often written in English, also because of the easier availability of word processing facilities.

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<sup>17</sup> KARMA PHUNTSO, op.cit., p. 115.

The difficulties related to the use of *Dzongkha* permeate the whole legislative drafting process as well. The first versions of new statutes are constantly drafted in English. This is – of course – a matter of necessity when the legislative activity takes place with international technical assistance, but is also a natural consequence of the fact that the legal training of Bhutanese lawyers is in English. Translation takes place before transmission to the National Assembly. The bill is ordinarily first approved by the cabinet in the English version, and the full cabinet (Ministers plus Royal Advisory Council) normally reviews also the *Dzongkha* version before submission to the Assembly<sup>18</sup>.

The translation process is difficult and a cause of significant delays in the legislative process. The number of official translators is very small, and legal competencies are practically absent among them. Those selected as translator “simply exhibit unusual skills in interpreting English into acceptable *Dzongkha*”<sup>19</sup>. Because of their small number, the solutions have been traditionally found case by case, relying on the help of officials from different ministries, from the High Court and from the Dzongkha Development Commission. The specific problems related to the finding of adequate English translations for complex English legal terms are normally tackled by the Dzongkha Development Commission and the High Court. At least in 2000, a certain role in the review of translations was left to the then recently created Department of Legal Affairs.

In the West, the debate about the risks of legal translation is an endless one, but seldom the difficulties experienced are comparable to those of Bhutan. Most of the recently enacted statutes are very complex texts, containing numerous terms with very specific technical meaning. The language, in which the acts are translated, as well as Classical Tibetan, has never been used in the framework of a modern legal system.

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<sup>18</sup> A. SEIDMAN-R.B.SEIDMAN, op. cit., pp. 19-20.

<sup>19</sup> A. SEIDMAN-R.B.SEIDMAN, op. cit., p. 28.

An extensive Dzongkha dictionary is still to be published, and thus translators currently use Tibetan dictionaries in order to find suitable terms.

It is of course difficult for an external observer to assess the quality of translation. During the debates in the National Assembly, remarks on seemingly inadequate *Dzongkha* terms are rather common, and it is also possible to find situations where some members of the assembly asked to postpone the enactment of a bill because of the impossibility to understand it, as was the case during the 1999 debate on the Bankruptcy Act<sup>20</sup>. During that debate, a Royal Advisory Councillor, in answering to the members worried about their limited comprehension, stated that the “main reason for not being able to understand the *Chathrim* [the act]”, “was [that] the national language, *Dzongkha* is at present in a process of developing. Difficulty of understanding arises when equivalent words in *Dzongkha* have to be coined in accordance with the *Chathrim*”.

It is however quite difficult to distinguish between problems of comprehension related to the translation process and the difficulties inherent in the review of technical legal texts by persons with a very limited grasp of Western legal concepts. This aspect also emerged during the debate about the Bankruptcy Act (which was eventually approved in the same session). The above-mentioned Royal Advisory Councillor concluded “the members will be able to understand it gradually as they put them into practice and become more familiar. Besides, it is the practice in many countries of the

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<sup>20</sup> See *Translation of the proceedings and resolutions of the 77<sup>th</sup> session of the National Assembly of Bhutan (29<sup>th</sup> June-4<sup>th</sup> August, 1999)*, Thimphu, s.d., p. 318-327. The statement of the Royal Advisory Councillor mentioned in the following is on p. 325 (the emphasis is ours). In the same proceedings, see also the remarks on linguistic points about other acts approved in the same session (see under Bhutan Municipal Act, Bhutan Telecommunication Act, Moveable and Immoveable Property Act).

world to *deliberately* draft legal documents in such a way that it is difficult for the general public to understand them”.

### **Interpretation of Statutes**

Statutes are approved by the National Assembly in both the English and *Dzongkha* versions. There is no general rule about which language version should prevail. Some of the acts approved in the last years contain, however, a provision according to which “in case of any differences in the interpretation the *Dzongkha* text should prevail”, or other similar wording. In at least one case, this choice was made during the debate in the National Assembly by amending a bill, which established instead that the English version was to prevail<sup>21</sup>.

Such provisions are certainly consistent with the language policy aimed at strengthening the position of *Dzongkha*, but their real weight in the peculiar Bhutanese context is rather unclear.

The Bhutanese judiciary is increasingly staffed with lawyers trained in the Western legal tradition, usually - as we have said - through a law degree acquired in Indian law schools<sup>22</sup>. Previously, the main access to the judicial career was through “on the job” training in the High Court of Justice or in another court, together with an oral and written exam<sup>23</sup>.

The few years spent in India (in what is normally the first visit abroad) do not of course deprive the “new lawyers” of their

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<sup>21</sup> See Translation of the proceedings and resolutions of the 77<sup>th</sup> session of the National Assembly of Bhutan (29<sup>th</sup> June-4<sup>th</sup> August, 1999), Thimphu, s.d., p. 314, concerning the Bhutan Telecommunication Act 1999.

<sup>22</sup> This is sometimes followed (but it is a recent development) by a master degree in a major European, American or Canadian university, financed by some foreign donor.

<sup>23</sup> See on this point C.HAINZL, *The Legal System of Bhutan. A Descriptive Analysis*, Vienna, 1998, p. 35.

cultural roots. The foreign education of the future judges is completed by a one year long “national legal course” under the direction of the High Court, which stresses the importance of the local tradition. The papers written by the participants to the course for the closing ceremony provide a very interesting picture of the Bhutanese legal style. In the collection I had the opportunity to read <sup>24</sup>, almost all the papers deal with Buddhist precepts, values and literature. These papers were written before leaving for legal studies in India, but a strong link with the traditional learning seems to survive after the immersion in the Western legal tradition.

Some evidence of this can be drawn from the description of the Bhutanese legal system written by Lobzang Rinzin, a brilliant young lawyer serving at the Department of Legal Affairs during my stay in Bhutan. In his exposition, the bases of the present legal system are still represented by the fundamental teachings of Mahayana Buddhism as contained in the laws compiled in 1652 by Zhabdrung Ngawang Namgyal, which included the definition of the “ten nonvirtuous acts” (divided into immoral actions of the body, of speech, and of the mind) and of the “sixteen virtuous acts of social piety”<sup>25</sup>.

Following the Lamaist tradition, these spiritual laws “were said to resemble a silken knot (*dargye duephe*) that is easy and light at first but gradually becomes tight, while worldly laws were compared to a golden yoke (*sergyi nyashing*) that grows heavier and heavier with the degree of the crime”. Most important, this is not presented as the description of a remote past: “these laws evolved over the centuries as a reflection of the culture and lifestyle of the people, keeping the stream of justice clear and pure”. Notwithstanding the modifications realised by the following temporal rulers “the principles of

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<sup>24</sup> See the “papers written for the closing ceremony for the second batch of the national legal course”, 6 November 1996.

<sup>25</sup> *Ibidem*, p. 1. On these concepts see R.REDWOOD FRENCH, *op. cit.*, pp. 80-82.



Buddhism and natural justice themselves, as originally set forth, have not changed and have always been upheld<sup>26</sup>. Modern legislation is considered nothing more than the most recent development of such tradition, due to the enlightened initiative of the present king, with no conflict with the Bhutanese perception of justice.

Certainly, the symbols, the style, are those of Mahayana Buddhism, and it is difficult to isolate statutory interpretation from the general cultural environment of the legal process. However, the development process unavoidably leads to the increased importance of legislation, and many recent statutes are considered milestones on the path to “Gross National Happiness”. These statutes are, as we have mentioned, sometimes transplants sometimes more or less *ad hoc* products, but are in any case legal instruments of a Western character, with a prevailing influx of the legislative technique used in the common law jurisdictions.

When they are called to interpret these statutes, it seems that the Bhutanese judges – at least those trained abroad – follow a Western pattern. In a “data free land”<sup>27</sup> such as Bhutan it is very difficult to provide much more than anecdotal evidence. Decisions, including those of the High Court, are not published and it seems that their diffusion is considered as a risk of infringement on the privacy of the parties. Nor can scholarly studies provide any help. There are no law reviews in Bhutan and until now just one law book has in my knowledge been published by a Bhutanese author, based on his LLM dissertation at the University of Leiden<sup>28</sup>.

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<sup>26</sup> *Ibidem*, p. 2.

<sup>27</sup> “Bhutan has been termed as a ‘data-free’ country in the sense that social research is entirely a new phenomenon for the Bhutanese”, A.C.SINHA, *Bhutan. Ethnic Identity and National Dilemma*, New Delhi, 2<sup>nd</sup> rev. ed., 1998, p. xxii. The original definition is by Leo Rose.

<sup>28</sup>It is the book written by KUENLAY TSHERING, *Integrating Environment ad Development in Bhutan. A Legal Perspective*, Delhi, 1999.

The only written sources can be found among the few unpublished documents written by local lawyers when called to interact with international experts. One such document is the paper prepared by the registrar of the District Court of Thimphu where, after the standard reference to the “deep influence by the doctrine of Buddhism”, he gives an overview of the interpretation of laws.

The picture is one where the judge must issue decisions in strict conformity with the provisions of the statute, without any explicit lawmaking role: “The function of the Court is *Jus dicere* (to interpret laws) and not *Jus dare* (to make laws)”<sup>29</sup>. As a legal basis for this statement, the author mentions a provision of the *Thrimzung Chhenmo*, where it is established that “the judge shall decide cases and award punishment strictly in accordance with the provisions of law. He shall not allow himself to be swayed by any personnel opinions while interpreting the provisions of law”<sup>30</sup>.

The other guidelines for interpretation are seemingly borrowed from the common law tradition, although the description is somewhat chaotic: “Literal interpretation is the rule”, but “when the *sententia legis* cannot be determined by the language of the statute”, help is provided by the “mischief rule”, and by “logical interpretation”, defined as the “supplying by the judge of an intelligent interpretation to furnish what is lacking in the law”, reading “the statute as a whole and not in isolation”. Some maxims are mentioned, as *noscitur a socio* (“Rule of *ejusdem generis*”) and *expressio unius est exclusio alterius* (defined as “a valuable servant but a dangerous master”)<sup>31</sup>.

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<sup>29</sup> *Ibidem*, p. 7.

<sup>30</sup> *Thrimzung Chhenmo*, DA 1-5.

<sup>31</sup> An early recognition of the possibility of recourse to analogy is contained in a statement to the National Assembly of the Representative of the High Court, according to which “when the law of the land lacked explicit guidance for the Court, inferences

The scarce information provided by this document, which is in practice the only available material about interpretation of modern statutes in Bhutan, leaves many open questions about how the judges actually operate, and absolutely nothing is said about the problem of the conflict between the meaning of a word or phrase in the English and in the *Dzongkha* versions.

Should a problem of this kind arise, it would be solved as any other case in which a provision “is ambiguous or capable of deferring [sic] interpretations” i.e. by decision of the High Court, on a majority vote<sup>32</sup>.

In the special Bhutanese context, where the number of judges is very limited, a linguistic problem that should acquire major practical importance or general interest, could also be discussed during the Annual National Judicial Conferences, where the judges gather to discuss common problems and even points of interpretation<sup>33</sup>.

In Bhutan it would be however rather meaningless to try to identify a detailed doctrine on the solution of problems of interpretation of recent statutes, including those of a linguistic kind. Because of the very limited size of the legal system, the concentration of legal competence in an extremely small number of persons, and the personal prestige of the

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must be drawn from other provisions of the same law to arrive at a just decision”. See National Assembly, 59 (1983), p. 24.

<sup>32</sup> See RITU RAJ CHHETRI, op. cit. Such a provision is now included in the new Civil and Criminal Procedure Code, which under 27.1 (“Power to fill lacuna”) establishes that “Every judge shall decide a case strictly in accordance with the provisions of Law. Where any section is ambiguous or there exists lacuna, the decision of the majority Judges of the Supreme/High Court shall prevail”.

<sup>33</sup> See *Agenda for the 13<sup>th</sup> National Thrimpons Conference* (no date). Resolutions are normally distributed to judges, although with some delay, see pp. 15-16.

Chief Justice, many problems are certainly solved through informal means.

What is instead more relevant to stress is that the bilingual character of modern Bhutanese legislation is in some sense flawed. On the one hand, the government's language policy consistently affirms the priority of the *Dzongkha* version, but on the other hand the common language of lawyers is still more English than *Dzongkha*.

This is especially true when dealing with the recent statutes drafted with international assistance. Their translation in *Dzongkha* is an impressive accomplishment for which the Bhutanese deserve praise and admiration. It is however a fact that *Dzongkha* is not the mother tongue of many lawyers, and most of them do not have advanced skills in the written language. They are instead well versed in the English language and in the English legal terminology after their studies abroad.

In particular, when it comes to the recent statutes dealing with very technical matters, as for instance the Bankruptcy Act and the Commercial Sale of Goods Act, it is unavoidable that the text used is mostly the English version. Starting from the *Dzongkha* versions, the judges and the other lawyers employed in the ministries (until now there are no lawyers in private practice) would have more difficulties in resorting to other materials to solve interpretation problems.

So far we have been concerned only with interpretation by the judges, and we have mentioned the absence of law graduates in private practice. Although the few persons with a law degree can only be found in the ranks of the judiciary or of the public administration, there is however a group of persons providing assistance to parties of disputes. These "practitioners", who are either village elders or headmen or retired officials, known for their wisdom and eloquence in *Dzongkha*, are called *jabmis*, and they are acquiring an increasingly important role in Bhutanese society. They can

represent litigants in court, or perform activities of an advisory nature. Since 1996, the High Court organizes training courses for them, where they are given information on the judicial system and clarifications on the new laws, and eventually granted licenses. In 1998, there were about 200 *jabmis* in Bhutan<sup>34</sup>.

Until a few years ago, the lack of formal legal training was not a great problem for the *jabmis*, since the written legal materials were represented by the *Thrimzhung Chhenmo* and a few other acts. Proficiency and eloquence in *Dzongkha* was enough for the practice, and knowledge of English legal terminology was rather limited. This embryo legal profession cannot be expected to use more than very simplified patterns of interpretation. There are indeed some cases where the *jabmis* have started an activity of a more entrepreneurial character dealing with business matters in the capital Thimphu and in the commercial town Phuntsholing in the south<sup>35</sup>. Also for the *jabmis*, those more likely to deal with the more elaborate statutes will be certainly inclined to use the English version. This is specially true for those (particularly in the south) who are native Nepali speakers.

#### **The Language of Statutes in the Balance Between Tradition and Modernity: A First Assessment**

In the application of modern legislation, the English version thus has certainly many advantages compared to the *Dzongkha* one. The prescriptions contained in some statutes according to which “the *Dzongkha* version shall prevail” can have but limited weight.

Those inclined to read reality through the glasses of “globalization”, will see this as another sign of the

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<sup>34</sup> About the *jabmis* see C.HAINZL, op.cit., pp. 36 ff.

<sup>35</sup> The problem of the training of *jabmis* has been discussed at the National Assembly in 1997. See Proceedings of the National Assembly 75 (1997), pp. 111 ff.

unavoidable predominance of the “global” (English) on the “local” (in this case, a little known Tibeto-Burman language), the latter doomed to marginality in a near future.

In Bhutan, it is not certain whether this is actually the case, since the problem of the language of statutes is just one element of a complex dialogue between tradition and modernity.

The modernization of the legal system goes on. The ideal of “Gross National Happiness” presupposes the growth of market economy, and increased international exchanges. To sustain this growth, the government has introduced the necessary legislative framework by having the acts just mentioned passed by the National Assembly. Some of them have certainly not been drafted according to the law-making methodology proposed by the best “law-and-development” scholars<sup>36</sup>, but in the Bhutanese context this would have implied important delays in the reform process, as well as an overload for the country’s few trained lawyers. The limited human resources have instead been concentrated on a few acts, as for instance the Code of Procedure enacted in 2001, after several years of work<sup>37</sup>.

It is interesting to note that the length of time for the drafting work for this code was also due to the process of translation into *Dzongkha*. In this case – as it is unanimously recognized – the language is of the highest class, although many terms are not easily understandable for the average person, as it

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<sup>36</sup> About the methodological guidelines to follow in developing countries see A.SEIDMAN and R.B.SEIDMAN, “Using Reason and Experience to Draft Country-Specific Laws”, in *Making Development Work. Legislative Reform for Institutional Transformation and Good Governance*, A.SEIDMAN-R.B.SEIDMAN-T.W.WÄLDE eds., The Hague-London-Boston, 1999, pp. 249 ff.

<sup>37</sup> See Assembly enacts historic legal code, *Kuensel*, July 28, 2001.

was admitted by the Chief Justice himself in his speech to the National Assembly<sup>38</sup>.

The efforts to ensure the best possible linguistic quality of the *Dzongkha* version of the code of procedure are the latest moves in a complex enterprise, where “black letter law” on statutory interpretation has only a minor role. The Bhutanese policymakers want to strike some sort of balance between local and global, between tradition and modernity. The international dimension of modernization implied the accession of Bhutan to the common law family, as a direct consequence of the choices concerning the education of future lawyers and the legislative drafting. From the linguistic point of view, such transition could not have been realized without further strengthening the position of English in Bhutanese society. With a pragmatic approach, the government did not want to hamper the effectiveness of legal reform by introducing too narrow restrictions to the use of English, probably realizing that it will unavoidably become the medium of legal-technical discourse in an increasingly open country.

On this background, the function of the translation of all statutes into *Dzongkha*, and the theoretical predominance of the *Dzongkha* version, is not likely to be that of substituting English, or of competing with it for the position of general medium of legal discourse, once the process of standardization is completed.

The overall impression is instead that a sort of “division of labour” between the two languages has been established, one where English is the tool required for operating the legal machinery borrowed from the West to govern economic development. English is the code in which the new rules are written, and it clearly tends to dominate all discourse concerning their interpretation, i.e. the professional discourse of lawyers.

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<sup>38</sup> *Ibidem*.

While English becomes the code of *rules*, *Dzongkha* keeps the role of “social glue”<sup>39</sup>, of defense against cultural alienation, of brick stone of national identity (with all the problems related to its being foreign to Bhutanese Nepali speakers). Above all, through its roots in Classical Tibetan, *Dzongkha* is able to evoke the *symbols* of the indigenous legal culture surviving in the interstices of “imported” law. “Rules” and “symbols”: in Bhutan, it is not clear which of the two carries more power.

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<sup>39</sup> About the idea of language as “social glue” see for instance the remarks in P.G.MONATERI, “ ‘Cunning Passages’. Comparison and Ideology in the Law and Language Story”, in *Les multiples langues du droit européen uniforme*, R.SACCO-L.CASTELLANI eds., Torino, 1999, pp. 123 ff.



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