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## **LEGAL AID IN BHUTAN**

**Background Paper for Legal Aid Symposium  
27-28 October  
Terma Linca, Thimphu, Bhutan**

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## **Acronyms**

ACC	Anti-Corruption Commission
CCPC	Civil and Criminal Procedure Code
NGO	Non-Governmental Organization
NJC	National Judicial Commission
OAG	Office of the Attorney General
RBP	Royal Bhutan Police
RENEW	Respect, Educate, Nurture and Empower Women

## LEGAL AID IN BHUTAN

### **Background**

As the issue of legal aid is emerging in Bhutan, the Office of the Attorney General, Bhutan National Legal Institute and UNDP Bhutan are jointly organizing the first international symposium on legal aid in Bhutan. The symposium will take place at Terma Linca Resort, Thimphu, Bhutan on 27<sup>th</sup> and 28<sup>th</sup> October 2014.

The objective of the symposium is to discuss and help develop a legal aid system in Bhutan which is based on the international best practices and in harmony with the Bhutanese legal system.

The symposium will provide an opportunity to share international experiences, but also it is necessary to base the discussions on the Bhutanese legal system, cultural practices and traditional values including the socio-economic conditions of the Bhutanese people.

This background paper is intended to inform the participants of the symposium on the issues pertaining to legal aid in Bhutan. It endeavours to give a brief overview of the legislative framework pertaining to legal aid, issues relating to legal aid and institutions closely associated with legal aid in Bhutan. Accordingly, the paper seeks to define the concept of legal aid and provide information on the legislative aspects on legal aid in Bhutan and identify some key challenges in dispensing legal aid in Bhutan.

Given the limited literature and resource on legal aid in Bhutan, this paper relies on information obtained through interaction with officials of relevant organizations, unpublished academic manuscripts and sharing of experiences.

This background paper has been prepared in collaboration with UNDP, Bhutan National Legal Institute and the Office of the Attorney General to serve as a background document for the legal aid symposium. The drafting has been led by Jamyang Sherab of Garuda Legal Services, with some reference to a 2014 assessment conducted by Nick Booth, Policy Advisor – Governance, Access to Justice and Human Rights, UNDP Asia-Pacific Regional Centre. It may not necessarily reflect the official views of UNDP, Office of the Attorney General or BNLI.



## **I. A brief introduction to the Bhutanese Legal System**

The Bhutanese legal system is a unique system and on a close examination it reveals features of various legal systems but it neither falls within the category of common law system (adversarial system) nor the continental civil law system (inquisitorial system).

In 1953, His Majesty the third Druk Gyalpo Jigme Dorji Wangchuck established the legislative branch called the *Tshogdu*. The *Tshogdu* comprised 150 members of which 106 members were elected representatives of the people of 20 Dzongkhags (districts); 10 from the Zhung Dratshang (clergy); and 24 nominated representatives of the government.

The *Tshogdu* as the legislative arm of the Government adopted the *Thrimzhung Chhenmo*, the Supreme Law of Bhutan in 1959. The *Thrimzhung Chhenmo* had comprehensive provisions dealing with legal principles and procedure both for the civil and criminal cases. The enactment of *Thrimzhung Chhenmo* marked the beginning of the modern law making process in Bhutan.

The appointment of judges (Drangpons) in the districts started in the 1960s and the High Court as a court of appeal was established in 1968. Since then the judiciary has evolved over the years.

The formal justice system is safeguarded, upheld and administered fairly and independently without fear or favour by the Judiciary<sup>1</sup>. The judicial authority is vested with the Royal Courts of Justice comprising of the Supreme Court, High Court, Dzongkhag Court and Dungkhag Court (Divisional Court)<sup>2</sup>.

The Supreme Court (with 5 Justices including the Chief Justice) is the highest appellate court in the country. Next in line is the High Court (with 9 Justices including the Chief Justice<sup>3</sup>),

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<sup>1</sup> Constitution of the Kingdom of Bhutan, art. 21, § 1.

<sup>2</sup> Constitution of the Kingdom of Bhutan, art. 21, § 2.

<sup>3</sup> It may be mentioned here that at the time of writing of this paper, the High Court comprised only 4 Justices including the Acting Chief Justice due to the shortage of legal professionals fulfilling the requisite criteria.

which exercises appellate jurisdiction over Dzongkhag Courts. There are 20 Dzongkhag Courts (one in each district) which act as the appellate court for the Dungkhag Courts and is the court of first instance where there is no Dungkhag Courts. Dungkhag Courts were established essentially to enhance access to justice for the rural masses. Currently, there are 15 Dungkhag Courts of first instance. Both the Dzongkhag Courts and the Dungkhag Courts act as trial court, depending on the hierarchical set up. While all the courts exercise general jurisdiction, the High Court is the court of first instance on constitutional matters. Additionally, the Constitution also provides for the establishment of ‘such other Courts and Tribunals’<sup>4</sup> as may be necessary.

Currently, Bhutan does not have a law school to provide law degree and all aspiring lawyers pursue their law degree in India and other countries. However, a one-year course (Post Graduate Diploma in National Law) on the national legal system and national laws is a must for every lawyer who wishes to practice law in Bhutan. As of now, there are approximately 112 lawyers<sup>5</sup> in the country which is inclusive of judges, prosecutors, government attorneys and a few private practitioners. It may be noted that at the moment there is no standard rules and regulations regarding to the issuing of license to practice law. However, a person with a law degree and who has successfully completed the diploma in national law can practice law.

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<sup>4</sup> Constitution of the Kingdom of Bhutan, art. 21 § 2.

<sup>5</sup> As per the list maintained with the Office of the Attorney General of Bhutan.

## II. Concept of Legal Aid

Generally, legal aid refers to any legal services rendered (usually by the state or with state funding) to a person without charge. The legal basis for the entitlement to legal aid varies considerably from country to country. Accordingly, different practices have been adopted and different approaches have evolved in different parts of the world.

In respect of criminal legal aid, Paragraph 6 of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems states that:

*“legal aid” includes legal advice, assistance and representation for persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence and for victims and witnesses in the criminal justice process that is provided at no cost for those without sufficient means or when the interests of justice so require. Furthermore, “legal aid” is intended to include the concepts of legal education, access to legal information and other services provided for persons through alternative dispute resolution mechanisms and restorative justice processes.”*

In Bhutan, the right to legal aid is categorically provided in numerous legislations<sup>6</sup> but there is no specific law dealing with the concept of legal aid. Furthermore, the High Court of Bhutan in the case of *Opposition Leader vs. Government* (referred to as the “First Constitutional Case”) underscored the importance and the need to provide legal aid for those who cannot afford legal aid, wherein the court stated that:

*“The basic principle for the requirement of legal aid arises from the fact that it is considered necessary to provide certain level of legal aid to persons who is otherwise unable to afford legal representation. Failing to provide legal aid would deprive such persons from equal access to the justice system. Alternatively, they would also be at disadvantaged situations where the State or a wealthy*

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<sup>6</sup> Provisions relating to legal aid are provided in the Constitution, the Civil and Criminal Procedure Code, the Evidence Act, the Child Care and Protection Act, and the Domestic Violence Protection Act.

*individual takes them to court. Legal aid is a means to justify its ends of ensuring fair representation and to uphold the principle of equality before the law and effective protection of law, ensure due process, access to justice and the rule of law...’’<sup>7</sup>*

However, despite recognizing the importance of legal aid, the judgment falls short of defining legal aid.

### **III. Need for legal aid**

The need for legal aid is felt all over the world and Bhutan is no exception. A person with an adequate means is capable of hiring the best of the lawyers, whereas the poor is disadvantaged especially in the wake of complicated laws where legal expertise has become a necessity.

To ensure that an indigent person’s right to a counsel is safeguarded, the State is bound to provide legal aid. This is based on the presumption that the State is always in a better position to afford resources, both financial and human resources.

This is particularly true in the case of Bhutan since the development of human resource in the legal field is young and heavily dependent on Government support and scholarships. The legal practice as a profession is relatively recent as compared to other professions. The Royal Government began to send officials and students to pursue the LL.B. degree in India in the early 90s. Both the Government and privately sponsored law students upon completion of their studies generally attempt to seek employment in the Government service in the first instance. Therefore, initiative to provide legal aid to the indigent through an institutionalized system must stem from the Government as the pool of lawyers is with the government.

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<sup>7</sup> Paragraph 18 of the Judgement.

In the light of this argument in 2009 the Government directed the Office of the Attorney General (OAG) to provide legal service to the indigent litigants, who could not afford a lawyer.<sup>8</sup> However, the directive was not implemented because it is apparent that the OAG cannot shoulder such responsibility, as the central prosecuting agency of the Government. The conflict of interest is evident – cannot prosecute as well as defend.

#### **IV. Legislative framework for legal aid in Bhutan**

Under any legal system, it is pertinent to observe two elements of legal aid - *firstly*, whether the legal aid is to be enforced as a matter of right and guaranteed by the laws; and *secondly*, if it is a matter of right, the extent and scope of the aid which has to be provided. Likewise for Bhutan, it is important to review the laws in this light.

##### ***Legislative framework for Legal Aid prior to the 1990's***

Since 1959, *Thrimzhung Chhenmo* was used both as the substantive and procedural law to render justice. The laws being easy to comprehend and its simple procedures facilitated litigants to represent themselves (or with support of their kith and kin or elderly) before the courts and the requirement of professional lawyers were not felt.

In those days most disputes and issues were resolved internally or at the local level with the assistance of the kith, kin, relatives, elderly people or local leader through the age-old tradition of mediation (*Nangkha Nangdrik*). In addition, there were fewer complicated laws and lesser acrimonious litigations before the formal adjudicating bodies like the courts. However, it may be noted that in Bhutan mediation can be conducted only in civil cases and criminal cases are necessarily tried before the courts.

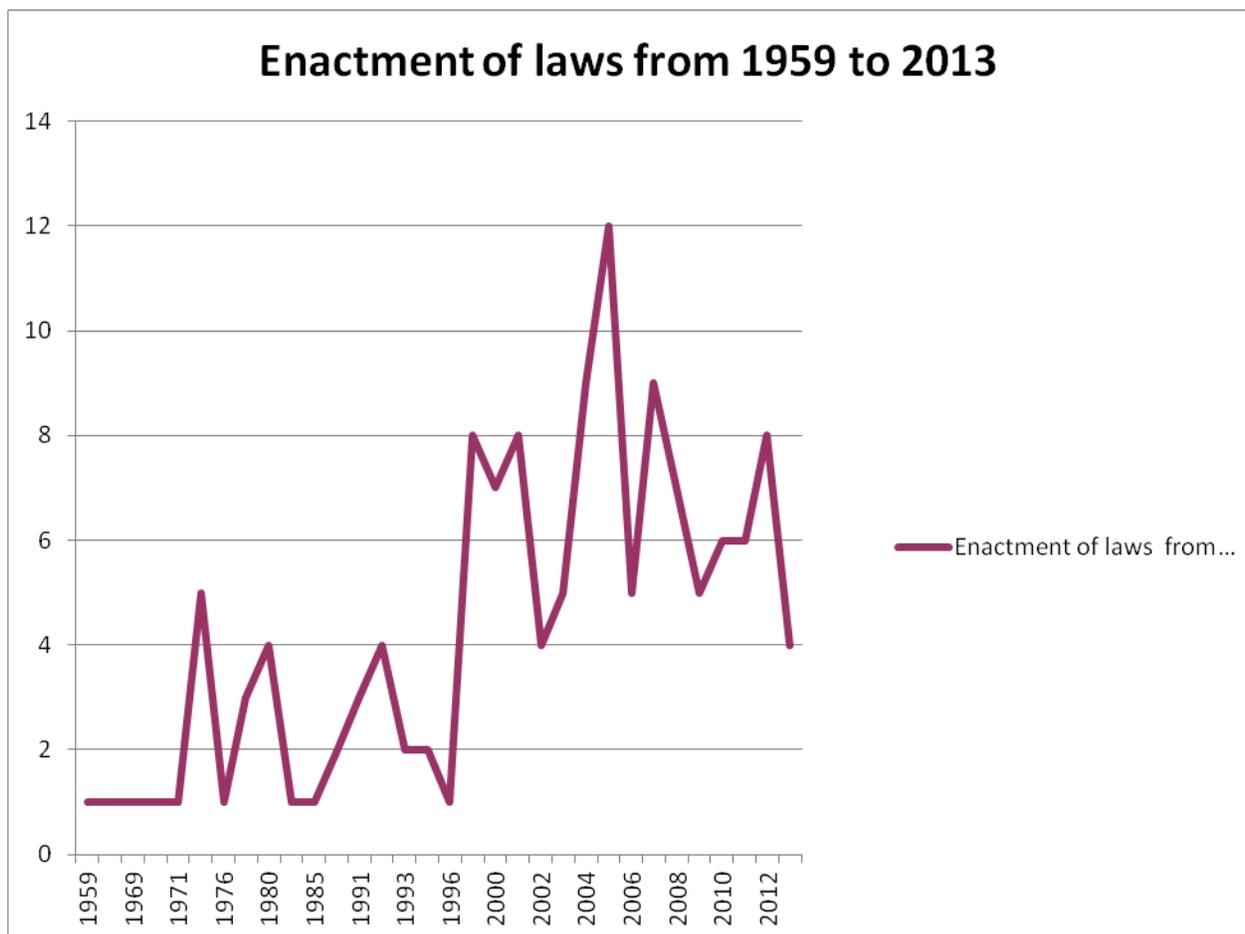
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<sup>8</sup>According to the information gathered from the Office of the Attorney General.

### *Legislative framework for Legal Aid after the 1990's*

By the 1990s, with the changing socio-economic conditions and emerging legal issues, Bhutan initiated changes to its legal framework to keep pace with modernization and technological innovation. Under such circumstances, the increase in the number of laws was inevitable, and the need for lawyers became more apparent.

The graph below depicts the trend in the increase of the number of enactments from 1959 to 2013. As evident in the graph, with the enactment of *Thrimzhung Chhenmo* in 1959, there has been a gradual increase in the enactment of laws over the years.



By 2000, Bhutan began to conceptualize the idea of a Constitution. Before the adoption of the Constitution many laws (both substantive and procedural) incorporating international best

practices were enacted including – Civil and Criminal Procedure Code (2001), Penal Code of Bhutan (2004), *Jabmi* Act of the Kingdom of Bhutan, 2003 (governing practice of lawyers), Evidence Act 2005, Judicial Service Act, 2007, etc. The Constitution was adopted after the first Democratic Parliamentary Elections in 2008.

The laws in Bhutan which have direct relevance to legal aid include:

- a) Constitution of the Kingdom of Bhutan, 2008;
- b) Civil and Criminal Procedure Code of Bhutan, 2001;
- c) Child Care and Protection Act of Bhutan, 2011;
- d) Domestic Violence Prevention Act of Bhutan, 2011;
- e) Evidence Act of Bhutan, 2005;
- f) *Jabmi* Act of Bhutan, 2003.

### ***Civil and Criminal Procedure Code (2001)***

The uncomplicated legal procedures prevalent in the earlier times facilitated an individual to initiate formal legal proceedings before the court, with or without the assistance of a professional lawyer. Section 31.1 of the Civil and Criminal Procedure Code enshrines the right to self-representation, and states that:

*“The registration may be effected by:*

- (a) a representative of the State;*
- (b) a prosecutor or a Jabmi hired by the state to prosecute;*
- (c) the police officer;*
- (d) a victim or a victim’s next-of-kin; or*
- (e) an aggrieved person or his/her Jabmi/next-of-kin.”*

This provision accords flexibility to a litigant to register a case himself or herself or with the assistance of a lawyer called *Jabmi*. A *Jabmi* means a Bhutanese legal counsel who has been

licensed to practice.<sup>9</sup> However, the licensing process has not been formalized as mentioned earlier.

Further, section 34 of the Civil and Criminal Procedure Code states that:

*“Only an indigent Accused shall have Legal Aid provided for one's defence where the interest of justice so requires.”*

This section imposes two conditions to avail legal aid from the State. The reference to ‘defence’ implies that to be entitled to legal aid, a person must be charged with a criminal offence. This interpretation effectively rules out any possibility of providing legal aid to a person on civil matters. Second condition is that a person must be indigent with no financial means to seek justice or defend himself before the courts. However, the term “indigent” is not defined and at this point it would be difficult to specify who would fall under this category.

#### ***Constitution of the Kingdom of Bhutan, 2008***

The provision of legal aid under the Constitution of the Kingdom of Bhutan is clearly mentioned under Article 9 dealing with the ‘Principles of State Policy’.

Article 9 (6) of the Constitution states that:

*“The State shall endeavor to provide legal aid to secure justice, which shall not be denied to any person by reason of economic and other disabilities.”*

Based on the above provision, it may be understood that the provision of legal aid is not a mandatory requirement from the state as the word ‘endeavour’ read together with the context of the reference to the ‘principles of state policy’ suggest that these are merely guiding principles.

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<sup>9</sup> Civil and Criminal Procedure Code of Bhutan § 215.17 (2001).

On the other hand, in the absence of interpretation by the courts, it can be argued that right to legal aid is both a fundamental right constitutionally and statutorily.<sup>10</sup>

Article 7(15) of the Constitution of the Kingdom of Bhutan states that:

*“All persons are equal before the law and are entitled to equal and effective protection of the law and shall not be discriminated against on the grounds of race, sex, language, religion, politics or other status.”*

Article 7(21) of the Constitution of the Kingdom of Bhutan states that:

*“A person shall have the right to consult and be represented by a Bhutanese Jabmi of his or her choice.”*

Although the provisions of the Constitution do not directly state that the right to legal aid is a fundamental right, a holistic reading of Article 7 (15) and (21) of the Constitution and Article 9 (6) of the Constitution along with section 34 of the Civil and Criminal Procedure Code imply that right to legal aid is a fundamental right.

In this regard, it may be noted that Article 7 (21) of the Constitution provides that right to consult a *Jabmi* is a fundamental right and Article 7 (15) of the Constitution, provides for “equal and effective protection of the law” as a fundamental right and it further states that there should be no discrimination on effective protection of the law on the grounds of race, sex, language, religion, politics or “other status”. Hence, to ensure equal and effective protection of the law, a person must be permitted to consult and be represented by a *Jabmi*. Therefore, it may be concluded that the State must follow the guiding principle enshrined under Article 9 (6) of the Constitution, wherein for securing justice, the State is duty bound to provide legal aid to any person who lacks economic capability. If such aid is not provided by the State, it may tantamount

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<sup>10</sup> Tashi Gyalpo, Need for an Institutionalized and Accountable Legal Aid to Secure Justice for the Broke in Bhutan, (May, 13, 2013) (unpublished seminar paper, American University) (on file with author). Mr. Tashi Gyalpo is currently working as Chief Attorney at the Office of the Attorney General. He wrote the article, as a Humphrey Fellow in the American University, Washington College of Law, Washington, D.C., U.S.A in 2012-2013.

to not according “equal and effective protection of the law” to the person with financial inadequacy.

It must be underlined that the Bhutanese laws value the right to be represented by a lawyer of his or her choice as one of the greatest ideals of human rights. This is clearly understood from the fact that this right cannot be suspended even during the proclamation of emergency.<sup>11</sup>

### ***The Child Care and Protection Act of Bhutan, 2011***

Under Bhutanese laws, legal aid from the State is not necessarily confined to person with financial inadequacies. This is mainly because Article 9 (6) of the Constitution mandates the State to provide legal aid to persons with ‘economic’ and ‘other disabilities’. It is the prerogative of the State to determine the categories of person that would fall under the term ‘other disabilities’. Accordingly, the Child Care and Protection Act of Bhutan, 2011 provides for legal assistance to children who are charged with criminal offence.

Section 107 of the Child Care and Protection Act of Bhutan, 2011 provides that:

*“A child arrested on a criminal charge shall:*

- (a) Be informed promptly and directly of the charge through the child’s parents, member of family, legal guardian or legal representative;*
- (b) Have the opportunity to be represented by a Jabmi; and*
- (c) Have legal or other appropriate assistance in the preparation and presentation of the child’s defense.”*

The right of the child who is in conflict with the law is reiterated under section 151 of the Child Care and Protection Act of Bhutan, 2011 and states that:

*“A child who is in conflict with the law shall have the right to a legal*

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<sup>11</sup> Constitution of the Kingdom of Bhutan, art. 33, § 6 [provides for the suspension of the fundamental rights during the emergency; right to consult a lawyer is not mentioned in the lists of rights that may be suspended].

*representative.”*

The Child Care and Protection Act of Bhutan, 2011, provides for the statutory requirement for a child who is conflict with law to be represented by a lawyer. Section 180 of the Act, however, only mandates the State to provide legal assistance if the child does not have financial capability to engage a lawyer. The relevant section provides that:

*“If a child or the parents or guardian of the child is an indigent person, the State shall provide legal assistance to the child in all the proceedings of the case for one’s defense where the interest of justice so requires.”*

The Act also explicitly imposes a duty on the State to provide legal aid, if the child or the parents or guardian of the child is an indigent person.

### ***The Domestic Violence Prevention Act of Bhutan 2013***

While the Domestic Violence Prevention Act of Bhutan, 2013, does not specifically provide for the legal aid to the victims of the domestic violence, it imposes duty on the Protection Officer to assist the victim to avail free legal aid. There is scope for the victim of the domestic violence to avail legal aid from the State.<sup>12</sup> However, as stated earlier there are no specific laws dealing with legal aid, thereby making the provision ineffective.

### ***The Evidence Act of Bhutan 2005***

Having highlighted the relevant provisions on the legal aid and the right to a lawyer under the Bhutanese Legal System, it is also important to underline at what stage of a case the right to a counsel can be invoked. Logical deduction from section 86 of the Evidence Act is that

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<sup>12</sup> Domestic Violence Prevention Act of Bhutan, § 27(4) (2013) states that: *“The Protection Officer shall: ... Assist the victim to avail free legal aid and relief provided under the relevant law.”*

the right to a legal counsel may be exercised immediately when the investigation is initiated against the person. It states that:

*“If the confession is made to the police officer or any other police official, it shall not be valid unless the confession is proven to be made, after the police officer or the police official had:*

*(a) Warned the person that anything he says can be used against him in a legal proceeding;*

*(b) Notified that he has a right to a Jabmi; and*

*(c) Informed that, if he cannot afford a Jabmi, the Government will provide him with a Jabmi.”*

Section 86 of the Evidence Act is not only indicative of the stage of judicial process during which a person may avail a *Jabmi*, but also reinforces the assurance that the State will provide a lawyer if a person cannot afford one.

## **V. Institutions relevant to Legal Aid in Bhutan**

In Bhutan, there are various institutions closely associated with the issue of legal aid. Traditionally, the Royal Bhutan Police (RBP) was responsible for the investigation of offences in addition to its mandate of maintaining law and order, long before the erstwhile Office of Legal Affairs (subsequently upgraded to the Office of the Attorney General in 2006) was established in 2000 to act as the central prosecuting agency of the Government. Thereafter, the Anti-Corruption Commission (ACC) was established in 2006 to combat and investigate issues of corruption.

With policing and prosecutorial power vested with the bodies like the RBP, ACC, OAG and others, as the case may be, the next pertinent issue to be addressed is who is responsible to provide appropriate legal services to the person who cannot afford a lawyer.

The laws categorically mandates the State to provide legal aid to an indigent person who cannot afford a lawyer, legal aid to the children in conflict with the law and legal aid to the

victims of domestic violence. However, none of these laws identifies the institution directly responsible for provision of legal aid and under such circumstances, the right will remain on paper and the need for an agency to provide such service is further reiterated.

At the outset, it may be relevant to mention some of the institutions that would have some bearing to the issue of legal aid. They would include the:

- a) Judiciary;
- b) Office of the Attorney General;
- c) *Jabmi Tshogdey* (Bar Council);
- d) National Judicial Commission;
- e) Bhutan National Legal Institute;
- f) Non-Governmental Organizations, etc.

### ***Judiciary***

The Judiciary is one of the three branches of the Government under the Constitution<sup>13</sup>. The Judiciary could be one of the institutions to monitor legal aid delivery services in one form or other. The courts are in a best position to determine the need of the litigant but lack of clear power and responsibility of the courts in the legislation with respect to legal aid has only acted as an impediment to taking proactive roles of the courts in administration of legal aid.

Despite this limitation, according to the OAG, there was an instance where the court had directed the OAG to bear the fees for the services rendered by a counsel appointed by the court. However, the rationale for such decision by the court is not known and this case remains as the only example till date.

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<sup>13</sup> Constituion of the Kingdom of Bhutan, art. 1, § 13.

## ***Office of the Attorney General***

The OAG, established under Article 29 of the Constitution of the Kingdom of Bhutan, is the central prosecuting agency of the Government and also assists the Government in drafting of laws. The Attorney General is also the chief legal officer of the Government and the employees of the OAG are civil servants.

The OAG as a parent agency is responsible for monitoring the service conditions of the lawyers in other Government agencies and makes it the organization with highest numbers of lawyers to deliver legal services, but its mandate does not extend to providing legal aid to the indigent.

## ***Jabmi Tshogdey***

The *Jabmi Act*, 2003, provides for the establishment of *the Jabmi Tshogde* (Bar Council), consisting of:

- (a) The Attorney General as *ex officio* member;
- (b) Two retired *Drangpons* of the Supreme Court/High Court nominated by the National Judicial Commission;
- (c) President of the *Jabmi Thuentshog*;
- (d) Chairperson of each Disciplinary Committee; and
- (e) Three members elected from amongst *Jabmis*<sup>14</sup>.

The duty to organize legal aid is imposed by the *Jabmi Act* on the Bar Association. Section 9(g) of the *Jabmi Act* states that ‘the functions of the *Jabmi Tshogdey* shall be to:

“...organize legal aid to an indigent person (*Pro Bono*) in the prescribed manner”.

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<sup>14</sup> *Jabmi Act*, § 3 (2003).

However, the Bar Council is yet to be established and a Bar Association is also not in place. Besides this, the manner of providing pro bono legal services is not prescribed in the legislation. Further, the establishment of Bar Council cannot be justified under the current situation mainly because there are only a few practicing lawyers in Bhutan to be governed and regulated. In the absence of the Bar Council, the practicing lawyers are not supervised and monitored. It also means that there is no institution to coordinate and provide legal aid to the indigent accused by the practicing lawyers.

### ***National Judicial Commission***

The National Judicial Commission (NJC) is established under section 17 Article 21 of the Constitution and comprises of:

- (1) The Chief Justice of Bhutan as Chairperson;
- (2) The senior most Drangpon of the Supreme Court;
- (3) The Chairperson of the Legislative Committee of the National Assembly; and
- (4) The Attorney General.

The NJC, whose principal function concerns the appointment of Justices of the Supreme Court and the High Court, could also play a major role in policy formulation of legal aid because NJC is a body with representation from the Executive, Parliament and Judiciary. However, this body is also not empowered by any of the legislation on the issue of legal aid.

### ***Bhutan National Legal Institute***

The Bhutan National Legal Institute (BNLI) established under the Judicial Service Act, 2007 is primarily entrusted to impart training to the judicial personnel and the law does not empower it to engage in providing legal aid to the indigent persons.

### *National Commission for Women and Children*

The National Commission for Women and Children (NCWC) is statutorily obligated to assist the victims of domestic violence to avail legal aid. The Commission is responsible for identifying and maintaining the list of legal service providers but is not in a position to give legal aid on its own.

### *Non Governmental Organizations*

NGOs such as RENEW and others are engaged in providing legal aid services. In addition, retired judges have been providing pro bono legal services pertaining particularly to land issues.

## **VI. Scope of legal aid**

A number of international instruments provide a definition and a scope for legal aid.

The Universal Declaration of Human Rights lays down basic principles of criminal trial including equality before the law; the presumption of innocence; the right to a fair and public hearing by an independent and impartial tribunal, along with all the guarantees necessary for the defence of anyone charged with a penal offence; other minimum guarantees and the entitlement to be tried without undue delay. The most relevant provision with respect to legal aid is Article 11(1), which provides that:

*“Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.”*

The International Covenant on Civil and Political Rights provides for criminal trial

safeguards and the most relevant provision is Article 14(3) (d) which provides that:

*“To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;”*

Paragraph 1 of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems provides that:

*“Legal aid is an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law. Legal aid is a foundation for the enjoyment of other rights, including the right to a fair trial, as enshrined in article 11, paragraph 1, of the Universal Declaration of Human Rights, a precondition to exercising such rights and an important safeguard that ensures fundamental fairness and public trust in the criminal justice process.”*

As the title of the Guidelines and paragraph 1 suggests the provisions and principles of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems revolve around providing legal aid to a person only on the matter concerning criminal offence.

Under the Bhutanese legal framework, some laws categorically provide that legal aid be provided in criminal cases. This is clearly evident if section 34 of the Civil and Criminal Procedure Code is read in conjunction with section 86 of the Evidence Act, and section 180 of the Child Care and Protection Act. Further, the ruling of the High Court of Bhutan in the First Constitutional case also indicates that the legal aid may be available only in criminal cases where the accused cannot afford a lawyer.

Nevertheless, the Constitution does not explicitly provide that the legal aid should be accorded to criminal cases only. In fact, Article 9 (6) of the Constitution only states that ‘the State shall endeavour to provide legal aid to secure justice, which shall not be denied to any

person by reason of economic or other disabilities'. Under these circumstances, it is not clear whether legal aid is to be extended to both criminal and civil matters.

## **VII. Challenges**

While the Government is aware of the importance of the legal aid, the absence of an adequate number of lawyers in the market at present is one of the impediments for advancing the setting up of a body to deal with such a need.

As per the records maintained with the OAG there are approximately 112 individuals with law degree, serving in various capacities – public and private, but most of them are in the Government Agencies. Even if there is enough number of lawyers in the country, the Government may find itself in a dire need of finance to fund the requirement of legal aid.

Therefore, from the supply side, there are numerous impediments in the advancement of the legal aid system in Bhutan, including anomaly in the institutional set up and its roles in addition to the absence of specific legislative framework and lack of legal professionals.

The basic right for legal aid is enshrined in a few laws as cited above but these laws hardly lay down clarity as to who will take a lead role in providing legal aid and the mechanism for providing such legal aid is not provided under any of the laws. Further, there is lack of clarity on the categories of people entitled for legal aid and who should be approached for legal aid. Moreover, the existing legal framework does not provide any procedure on how persons engaged in giving legal aid are regulated by the state.

The institutions responsible for determining “eligibility” for legal aid is also not identified nor has the compensation and incentives by the State to those engaged in providing legal aid addressed. More importantly, it is also not clear whether legal aid should be confined to only criminal matters or should it also be extended to civil and administrative cases.

There is a proposal to amend the *Jabmi* Act, but amendment of the *Jabmi* Act per se would not comprehensively address the issue of legal aid.

## **VIII. Conclusion**

Even though the Constitution of Bhutan and various legislations provide for the right to legal aid, there are currently impediments for its enforcement. The issues are mainly associated with, but not necessarily limited to: lack of clarity on the institution responsible for dispensation of legal aid; categorization of people entitled to legal aid; scope of legal aid; mechanisms and systems for providing legal aid; and awareness of legal aid.

While laws may provide for the right to legal aid and an indigent person may be aware of such rights, in absence of an institution that is directly responsible for providing and monitoring legal aid, an aggrieved person will not know whom to approach. Clear criteria to determine the eligibility for legal aid would also facilitate the provision of legal aid to those in need.

While legal aid for civil matters may not assume as much importance as that of the criminal justice process, it is also equally important in the exercise of one's rights. For example, in a matrimonial dispute, although it is civil in nature, occasions may arise where one of the spouses is placed in an unfair and disadvantageous position and would have no means to pursue the matter with the appropriate body to seek justice. Hence, the scope of legal aid must be clearly defined to remove ambiguity.

In the absence of a well defined mechanism for the dispensation of legal aid, it would be difficult for the institutions to effectively provide legal aid to the needy. It must be borne in mind that such mechanism must have a wide coverage so that legal aid is taken to the needy. Even though laws provide for the right to legal aid, it is equally important that the people are made aware of the right to legal aid so that the needy can invoke this right as and when needed.