

# Simple Justice

JUDICIAL PHILOSOPHY IN THE KINGDOM OF BHUTAN

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**B**HUTAN IS A TINY mountain kingdom nestled in the Himalaya of central Asia, just south of Tibet, north of India, and east of Nepal. Never colonized or conquered, the nation of Bhutan has existed in its present incarnation since the mid-seventeenth century, and its cultural history stretches back uninterrupted for centuries before that. For hundreds of years, Bhutanese society has been structured around an ancient school of Vajrayana Buddhism, and the religion still permeates daily life in the country. This daily life is a simple one. Most Bhutanese are farmers, and the economy is largely based on subsistence agriculture. It is an isolated, undeveloped, and beautiful place. Traveling through the central foothills of the country, small villages and towns lie scattered like river rocks over the hillsides, and the high Himalayan mountains loom up to the north, dominating the skyline.

Until recently, Bhutan maintained a studied distance from its neighbors that

intensified its natural geographic remoteness, resisting the trends of modernization and globalization that have been bringing the rest of the world closer together. Indeed, Bhutan followed an extreme policy of near-absolute isolation until 1957, when China's invasion of Tibet made this course seem more risky than involvement. Since then, the Bhutanese government (and particularly the current king, Jigme Singye Wangchuck) has attempted to draw Bhutan gradually into the protective structures of the world community, while still maintaining the cultural independence it prizes. But the nearly impassible peaks that protected the Bhutanese from the military invaders of years gone by may prove to be a less effective barrier against the modern invaders of technology, commercialism and Western pop culture. Bhutan is changing, and changing quickly. The visual signs of this invasion are beginning to appear in the larger towns: satellite dishes and internet cafes amidst the traditional homes and markets,

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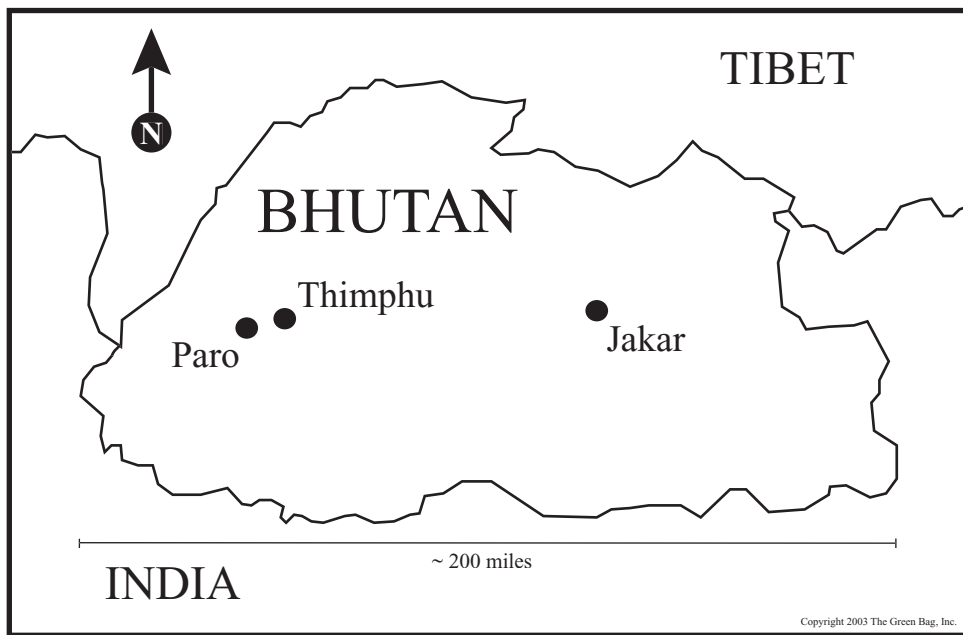
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blue jeans and leather jackets in place of the traditional dress.

As Bhutan struggles to join the modern world while still preserving its heritage and traditions, the tensions and contradictions inherent in that process are playing out in the legal field as in others, with fascinating and sometimes awkward results. The Bhutanese legal system is perhaps best characterized by one revealing statistic: for its roughly 700,000 citizens, Bhutan has less than 70 lawyers.

problems of Bhutanese society, that lawyers are in most instances superfluous.

Or so Judge Wangdi, the magistrate of the district court in Bumthang, would have us believe. His views of the nature of traditional Bhutanese law – in particular his theory of “simple justice” – and his concerns about the ability of this ancient concept to withstand Bhutan’s ongoing efforts to integrate itself into the international legal system, provide an intriguing example of the thinking of legal



### KINGDOM OF BHUTAN

Upon hearing these figures, we were at first tempted to assume that the people of Bhutan do not rely on the law to structure their lives or settle their disputes (or at least that they are not especially litigious). But this view is based in the American understanding that law needs lawyers. In fact, the paucity of lawyers does not seem to have affected the Bhutanese interest in litigation (formal and informal) or ability to settle disputes through the courts. Rather, the legal traditions in Bhutan are so simple, so well-known and understood, and so appropriate to the

practitioners in countries facing a choice between historical legal traditions and modern global practices.

### MEETING JUDGE WANGDI

We met Judge Wangdi during a two-week visit to Bhutan in September 2001. Traveling with two other American lawyers, we arrived at Bhutan’s sole airport in the western city of Paro on one of the two airplanes of the Bhutanese national airline. We were immediately impressed by the beauty and ruggedness of the

land. Vast, dense forests and steep, rocky hillsides welled up around us on every side from the runway on the floor of the Paro valley. Although we had expected to fly in close over the mountaintops, in fact we had to fly literally through the mountain passes to descend into this almost vertical landscape.

We were met at the airport by our guide, Samdrup, and driver, Tenzing, whose presence on our journey was mandated by the tourism regulations of the Bhutanese government. (One cannot travel in Bhutan except through a government-sanctioned tour agency. This is just one expression of the government's concern for maintaining its cultural integrity generally, and, more specifically, for avoiding the plight of Nepal, overwhelmed by hordes of well-meaning Westerners.) After a quick stop in the capital city of Thimphu, we set off the next day for the central district, Bumthang, considered the cultural heartland of the country for its role as the location of many of the historical developments in Bhutanese Buddhism. Jakar, the small town that is the capital of Bumthang, is only about 300 kilometers from Thimphu, but unfortunately the roads in Bhutan are rather less impressive than the scenery: it was a long and bumpy two day trip.

We met Judge Wangdi at his chambers in the Jakar dzong. Bhutanese dzongs are stone fortresses originally built in the mid-17th century for three purposes: defense, government administration, and religious devotion. In this mountainous landscape that dwarfs all ordinary manmade structures, the dzongs nevertheless dominate a hillside in each district, bright golden roofs shining in the sun, turrets and flagstone courtyards, battlements and watchtowers overlooking the valley below. Although the defensive purpose of the dzong has long since become obsolete, each modern administrative district maintains a dzong as the home of both the regional government administrative offices and a monastery. On the surface, therefore, the separation of

church and state in Bhutan comprises the width of an interior dzong wall: monks and government officials work side by side, occupying separate rooms in the same building but never overlapping in function or in physical office space.

Due to the Bhutanese government's concern for the disruptive effect of tourists on the sacred function of their religious sites, tourists are not ordinarily permitted to enter monasteries and temples, including the actively functioning monasteries in dzongs. There are, however, numerous exceptions to this general rule, and Samdrup had arranged for us to visit the Jakar dzong on the basis of our interest in learning about Buddhism. While looking around the dzong, we noticed a sign for the district court and asked Samdrup if he could somehow arrange for us to peek in. A few minutes later we were being hustled into the courtroom by the judge's law clerk, who had secured us an invitation to talk with the judge as well.

As we waited to speak with the judge, the design and décor of the courtroom gave us an immediate visual introduction to the influence of Vajrayana Buddhism. Considerably smaller than either the typical American courtroom or the temple facilities of the dzong, the courtroom was brightly lit by several windows and dominated by a few simple items, some purely functional, others bearing symbolic religious significance. At the front, the judge's bench stood on a wide raised platform, much like the ceremonial platform used by the monks in the adjacent temple. Hanging overhead were three Buddhist ceremonial masks: a mask representing good on one side, one symbolizing evil on the other, and a mask representing the judge in the center. In the corner were a single filing cabinet and an oddly incongruous Xerox copier/fax machine. There were no seats or benches for the public or the litigants, although the litigants were provided with small, low tables below the

judge's bench. Anyone there to observe the proceedings would have to stand.

The clerk soon beckoned us into the judge's adjoining chambers, which were no more elaborate than his courtroom. Aside from his desk and a few telephones, there were only a few chairs and a bench, to which the judge directed us. Perhaps the most notable item in the room was the sword that the judge wore on a belt at his waist. (All senior government officials wear swords, we were told, although we were not told whether they ever use them for more than ceremonial purposes. Judge Wangdi no doubt found it easy to keep order in his courtroom, at least.)

Our interview with Judge Wangdi consisted mostly of questions from us about the Bhutanese legal system. Neither the judge nor his clerk had many questions about the system in the United States, having heard enough about it through other sources to be familiar with its substance and procedure. Our guide, meanwhile, quaked visibly in the background, clearly nervous to be in the presence of the judge. All four members of our group had clerked for judges in the United States, and it occurred to us later on that we were perhaps less awed than we should have been under the circumstances. As it was, we asked our questions unabashedly and found the judge to be thorough and thoughtful in his responses.

Both the judge and the clerk, like most well-educated Bhutanese, were fluent in English. English is the medium of instruction in the public schools, and since there is only one university in Bhutan (and that of relatively recent origin), most students who go on to higher education after high school study in India, or if not there, in England or the United States. Therefore, our discussion with Judge Wangdi was carried out entirely in English, except for a few questions in Dzongkha, the official language, directed at our guide, and a few exchanges in Dzongkha between the clerk

and the judge themselves.

## THE STRUCTURE OF THE LEGAL SYSTEM & THE ROLE OF THE DISTRICT COURT

Introducing himself, Judge Wangdi, who is a man of about 50, told us that he had been on the bench for many years. Since there is no law school in Bhutan, he had studied law in India and then returned to Bhutan to practice. He was appointed to the bench directly by the King, as are all judges in Bhutan, both trial and appellate. (The King still holds substantial personal political power, of which the authority to appoint judges is but one example. While the King has been steadily devolving power from his own person to other branches of the federal government, this process is purely voluntary on his part, and there is as yet no institutional mechanism for establishing separation of powers or checks and balances.) The clerk had also carried out his legal training in India and would complete a mandatory four-year apprenticeship with the judge before being eligible to start his own legal practice. Such practical apprenticeships serve the purpose of providing solid training in Bhutanese law since classroom instruction is unavailable.

The Bumthang District Court is nominally the court of first instance for the district, although most disputes go through local mediation by the village headmaster before being filed in the district court. With only one judge and clerk, plus a few staff members, the court handles about 2000 cases per year, mostly property disputes and family issues, but some criminal cases and the occasional larger commercial dispute as well. A case begins when the plaintiff files his complaint, which he usually does himself, without the aid of an attorney. The court actively encourages settlement (the sword probably helps on this score too), but if this cannot be accomplished, the judge will eventually hold a hearing.

Usually, however, a settlement is achieved, and only a few cases go to trial.

Bhutan maintains a civil law system based on a 1957 legal code whose historical antecedents date back to the mid-17th century and whose fundamental principles are ultimately based in Drukpa Kagyu, the Bhutanese school of Vajrayana Buddhism. While there is a formal and physical separation of church and state in Bhutan, there is not in fact a separation between Buddhist principles and legal ones, Judge Wangdi informed us. So just as monks, while not serving any official governmental function, are not stopped at the door of the dzong, so Buddhist principles, while not serving any official role in the law, are not stopped at the courtroom door. Drukpa Kagyu preaches a deep respect for all forms of life and promises karmic punishment for evildoers, and these values permeate every aspect of life, including the government and legal system. Accordingly, the content of the law, as expressed in the country's central legal code, is well known and understood, not only by the judge but by the people as well. (It is interesting to note, in light of these assertions, that there was no copy of the code in chambers or the courtroom. Either the content of the code must be in fact so well known as to make a written copy superfluous, or the principles applied by the court must not require reference to it.)

We asked many questions about procedure, and the judge answered patiently. Did the parties have the right to a lawyer? Yes, he assured us, any party could hire a lawyer to speak for them in court, and criminal defendants were entitled to have a lawyer paid for by the state. Most people, however, did not avail themselves of these rights. The court's procedures were not complex and it was easy for the litigants to speak for themselves. What about a right to appeal? Yes again, the party who lost in his courtroom could appeal to the Supreme Court and then to the King. What

about trials, were they open to the public? Yes, yes, that was why the courtroom was there.

## THE CONCEPT OF SIMPLE JUSTICE

Eventually, our questions spurred Judge Wangdi to launch into an extended explanation of the fundamental philosophy of the Bhutanese legal system. According to Judge Wangdi, the purpose of the Bhutanese legal system is achieving simple justice for the people through the implementation of the Buddhist principles embodied in the law. These principles, and the law itself, are not only universally known and accepted, but also universally appropriate to the society that is itself based on these same principles. Rather than being an artificial structure which must be learned and imposed on society by specialists, the law is itself an organic expression of social (Buddhist) values, and the court an expression of the social will. This vision of the legal ideal as effective implementation of a very specific set of moral values has vital implications for the role of the courts in deciding cases, for the structure of the legal system, and for the judicial system's social role outside the context of any particular case.

Functionally, this vision directs the court to a fact-finding role rather than an interpretative one. Because both the legal code and the moral precepts that underlie it embody basic Buddhist principles, the substance of the law should be familiar to everyone, from the most sophisticated Thimpu businessman to the simplest yak herder. Accordingly, when there is a dispute, the judge's role is not to determine or interpret the law, but solely to uncover the truth of what had happened between the parties. Discovery of the factual truth should automatically yield the necessary legal result. The judge's sole focus, therefore, should always be this search for factual truth, uncomplicated by notions of legal ambiguity.

Furthermore, because the legal code

expresses the people's fundamental ethical principles, the wrongdoer in each case should be aware of his own guilt, and will therefore often be compelled by his conscience to admit the wrong. This happens frequently, Judge Wangdi told us, in criminal cases as well as civil. The judge took great pains to emphasize that there were few hardened criminals in Bhutan – crimes of violence are especially rare – and that most could be counted on to confess their crimes if caught. Here, as in other areas, the motivation stems not just from an abstract sense of right and wrong but from a deeply rooted notion of Buddhist justice: those who do evil confess because of the risk that denying the crime will compound their punishment in the next life. (The judge did not go so far as to suggest, however, that those who deny guilt are necessarily innocent.) Apart from demonstrating the strength and pervasiveness of the Buddhist ideal of justice, this tendency on the part of criminal defendants and other litigants to concede when in the wrong is the principal basis for the resolution of so many cases through settlements without any need for a judicial hearing.

Structurally, Judge Wangdi's vision of simple justice means that the Bhutanese system focuses on substantive justice rather than procedural fairness, and also that the system depends on procedural simplicity to achieve its aims. In explaining his concept of simple justice, Judge Wangdi contrasted the Bhutanese legal system with the American. The Bhutanese judicial system lacks the sophistication, size, and scope of its American counterpart, a fact as to which the judge exhibited some pride. The law in Bhutan is capable of achieving simple and direct justice, he believed, in some part because it has not been cluttered with and burdened by the complicated procedures and immense body of precedent that characterizes the American common law model. Rather, a judge is free to get to the

heart of the case and discover the truth, avoiding messy technicalities and difficult procedural issues. Matters of procedural fairness are resolved by the judge on a case-by-case basis, but in any event are clearly secondary to the quest for factual truth. Indeed, the guiding principle for resolving procedural issues seemed to be a matter of determining which outcome would best serve this search. Procedural errors, if there were any, could be corrected through the litigants' right of appeal to the Supreme Court and then to the King. In this regard, procedural law, like the substantive law, is designed to be as simple as possible, fully able to function without the need for any involvement by lawyers.

Furthermore, Judge Wangdi asserted, the simplicity of the Bhutanese system is suited to the simplicity of Bhutanese society and its legal issues. As a largely agrarian society, Bhutan tends to experience relatively simple legal problems: property disputes, divorce, perhaps the occasional theft or bribery. There is, of course, something of a chicken-or-the-egg question posed by this fact. Whether the concept of simple justice makes these disputes seem uncomplicated, or whether the nature of the disputes has driven the development of the legal philosophy itself, is an unanswered question. In any event, the relatively limited and uncomplicated set of disputes that come before the court is one of the keys to the workability of Judge Wangdi's legal philosophy. There is, for example, currently no litigation for political and social ends of the sort that would challenge the society's basic legal principles, but rather, solely private dispute resolution and criminal law. As we learned later, the appearance of new and more complicated legal problems in Bhutan is a source of great concern to those who believe in simple justice.

Judging by our guide's behavior and by the small number of district courts in the country, we gathered that Judge Wangdi was in a position of no small power and influence. It

seemed that he had given a lot of thought to his role and how he wished to fulfill it, and his theory of simple justice seemed to be not an abstract ideal concocted for the moment but a guiding principle for his decision-making. Buddhist philosophy required that a judge provide justice to the people, and so "simple justice" was not merely a descriptive, but an imperative: a test of whether he was properly performing his role.

In later discussions with the judge's clerk, we discovered that his view of his work was less clear-cut than the judge's: he admitted of the possibility, and indeed of the frequent occurrence, of difficult cases, cases in which they simply could not know what had really happened or who among the parties was in the right or wrong. Whether the clerk's views sprang from greater candor on his part, greater experience on the part of the judge to whom the cases may have by now become simple and well-determined after seeing the same issues arise again and again, or simply a divergence between a judge educated thirty years ago and a clerk who was schooled in the modernity of present-day India, we do not know.

Nevertheless, it was apparent that Judge Wangdi's basic philosophy is shared by others in Bhutan, at least to some extent. Those that we spoke to (mostly non-lawyers) evinced similar views of the nature of the law, especially the idea that its roots are found in well-known and commonly understood Buddhist principles. If this is so, then "simple justice" has several significant consequences for Bhutanese society, as well as for the internal workings of the courts.

First, it seems that the approach used by Bhutanese courts has done a remarkable job of engendering wide-spread respect for and satisfaction with the law and the legal system among the general population. This respect seems to be based on the courts' faithful implementation of a common understanding of right and wrong, derived from the pervasive

influence of the common religion. Indeed, it seems unlikely that "simple justice" could work as a guiding principle for legal decision-making if Bhutan did not have such a homogenous culture and such a stable, widely-shared system of fundamental beliefs. (One question that we are not able to answer is how the minority groups in Bhutan view the judicial system. There is a substantial minority population of ethnic Nepalese in southern Bhutan who have for some number of years been in conflict with the Bhutanese government over a variety of cultural and political issues. They may well view the Bhutanese concept of "simple justice" as rather less just to them than to the indigenous population.)

Second, simple justice means that judges wield enormous power. Free from the constraints of legal technicalities and rules of procedure, and operating with an absolute certainty of right and wrong, Judge Wangdi and his colleagues can dispense justice as they see fit, with few institutional mechanisms of limitation apart from self-imposed restraint. While a system granting judges broad discretion in procedural matters is perhaps unremarkable to lawyers coming from a civil law tradition, to us it seemed to place enormous faith in the competence and good-will of the members of the Bhutanese judiciary. Especially because they are so few in number, lawyers are something of an elite caste in Bhutan. The special status of Bhutanese lawyers and judges and the absence of procedural checks on their power might raise concerns about their ability to understand and deal with the issues of the common litigant. In Bhutan, however, this potential problem is mitigated somewhat by the other factors that weigh in favor of simple justice: the homogeneity of Bhutanese society and the almost universally-shared set of fundamental beliefs. Simple justice is, in this respect, the great equalizer – because of their shared beliefs, the judge and the litigants are operating on common ground.

Finally, Judge Wangdi's philosophy operates to maintain the existing social and political structure. By relying on ancient principles of right and wrong, with an emphasis on reducing disputes to one of several basic categories and on reconciliation and settlement over judgment, the Bhutanese legal system reinforces and validates the old ways of doing things, the old patterns of property ownership, the old hierarchies of social status and gender. Simple justice, as a legal principle, does not look kindly on technological or social innovation.

### THE SYSTEM IN TRANSITION: DISJUNCTION IN LEGAL REFORM

It is perhaps not surprising, therefore, that both Judge Wangdi and his clerk were troubled by some recent legal developments that, in their view, pose a subtle threat to Bhutanese justice. The federal government in Thimphu has been undertaking substantial legal reforms, adding new sections to the Bhutanese code that conform the legal system to international standards. By undertaking these reforms, the government hopes to foster further integration into the world community. Bhutan is, for example, seeking membership in the World Trade Organization. Thus, in the month before we arrived, Bhutan implemented a new intellectual property code, which is based on the codes of the large industrial nations. Likewise, a few months earlier, the first bankruptcy code had been introduced. The government is studying additional reforms along similar lines. (Can ERISA legislation be far behind?) While these reforms will no doubt help to satisfy international legal requirements, the changes have little to do with domestic Bhutanese legal issues. Bhutan is largely an agricultural society, based on yak and cow herding, rice and buckwheat farming, with a moderate dose of tourism mixed in. It does export some hydroelectric power and cement to India, and it takes in a fair number

of Indian consumer goods. But it does not have much in the way of industry and certainly little intellectual property to speak of. The judge and his clerk both took the view that the Bhutanese system did not really need reform – it worked well as it was.

This whole colloquy had been sparked by a question from us about what aspects of the law they thought should be improved or changed. It was an ordinary enough question from our point of view. We, as Americans, are always seeking the new and improved version, looking for a problem to be solved, for someone or something to blame for a miscarriage of justice. Not so, the Bhutanese. The judge and his clerk hastened to assure us that far from needing reform, it was, if anything, reform that was the legal system's problem. In their view, simple justice did the job for just about any problem that might arise. The traditional law of Bhutan was both substantively and procedurally adequate to the challenges of legal dispute resolution in their country.

This notion that the government's legal reform efforts would cause more difficulties than they solved was grounded in several specific concerns. So far as Judge Wangdi and his clerk were concerned, the ongoing legal reforms merely served to complicate an elegantly simple system. Reforms undertaken to advance Bhutanese law to a 21st century model add procedural and substantive flourishes that do not serve any purpose for the law's domestic constituency. Modernizing the legal code for modernity's sake, the judge suggested, is a waste of time and resources.

But beyond the new codes' failure to serve any positive function, the new laws actually impede the Bhutanese legal system's ability to dispense the simple justice in which the judge took such pride. Judge Wangdi feared that as the law grew more complex, it would grow more chaotic as well, both procedurally and substantively. As a lifelong devotee of the law, he seemed almost offended by this assault on