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Journal of Bhutan Studies

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A Brief Account of Namkhai Nyinpo and his reincarnations

*Sangay Wangdi**

Om Swasti!

During the era of peerless Buddha Sakyamuni,
The Ancient Tradition of the Early Translation
Spread and flourish in Tibet, the land of snow,
Under the guidance of three outstanding figures,
Together with the eminent translator like Namkhai Nyingpo of
Nub

At the feet of the glorious Namkhai Nyingpo, I prostrate!

These words of homage introduce a brief account of Namkhai Nyingpo (*nam mkha'i snying po*), a famous monk and one of the twenty-five chief disciples (*rje 'bang nyer lnga*) of Guru Rinpoche. He was the heart son of Guru Rinpoche who became an accomplished siddha through esoteric practice on Vishudha Sadhana (*yang dag sgrub sde*), the deity of mind. The lineage of His Holiness is continued to the present day through successive reincarnations.

During the 8th century, Trisong Deutsen (*kbri srong de'u btsan*, 790-844) out of his deep desire to make the teachings of the Buddha flourish in the land of snow invited Shantarakshita (*zhi ba tsho*), the Abbot of Nalanda University and a powerful Siddha Guru Padmasambhava of the same university to build a monastery at Samye.

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Trisong Deutsen issued an edict that the first five monks ordained by Master Bodhisattva be venerated as supreme beings of respect. Namkhai Nyingpo was one of the first five monks. He received innumerable cycles of ripening empowerment and pith instructions both directly from Guru Padmasambhava and Master Bodhisattva. The King had them trained in translation from the Indian languages into Tibetan. At the command of Trisong Deutsen, an adept translator, travelled to India to receive the Vajrayana teachings of the Secret Mantra from the learned and accomplished Indian siddhas like Rolang Dewa and Kukuradz. The Vajrayana teaching of the Secret Mantra is the pith instructions for attaining the supreme accomplishment of Mahamudra (*phyag rgya chen po*) in a single lifetime. Through the power of karmic link, Namkhai Nyingpo received empowerment and essential transmissions from the accomplished Hungkara (*hung chen ka ra*), the Indian Siddha, one of the eight Vidyadharas (*rig 'dzin brgyad*), according to the prophecy. Having bestowed the Empowerment which is the root of Secret Mantra (*gsang sngags*), Hungkara gradually opened up the mandalas of the Fifty-Eight Crescent and the nine Crescents. Namkhai Nyingpo had the vision of Great Glorious One with a consort and attained the supreme and common accomplishment.

Namkhai Nyingpo was exceptionally intelligent and industrious. He possessed great merit to (who) could walk with his feet the width of a hand above the ground that the twenty-eight ishvari goddesses obeyed his command. On receiving the invitation from Dharma King, Namkhai Nyingpo arrived miraculously in Tibet and displayed his power by cutting open his chest with a curved knife of white silver. He showed Trisong Detsen the vision of the forty-two peaceful deities in the upper part of his chest and the fifty-eight heruka deities in the lower part. The Dharma King felt confident of such accomplishment that he regarded Namkhai Nyingpo as a supreme object of veneration. From him, Trisong

Detsen received the glorious Vishudha Sadhana teaching. Namkhai Nyingpo was also one of the eight chief recipients of Eight Pronouncements (*bka' brgyad* of Mandalas), a Sadhana teaching transmitted by Guru Rinpoche at the cave hermitage of Chimphu. The flowers of Namkhai Nyingpo of Nub fell on the mandala of Vashuddha Mind; so this particular tantra was destined to Namkhai Nyingpo through the practice of which he could travel by riding on the rays of the sun. An imprint of his body and foot which he left can be seen even to this day.

The evil Bon ministers became envious and laid ambush for the lives of the Dharma King and Namkhai Nyingpo. On discovering this plot through his divination Namkhai Nyingpo exclaimed fiercely, HUNG! HUNG! By clapping his hands he struck a lightning bolt from the sky and spun it around the fingertip of his threatening hand gesture. It made some of the evil minded ministers to faint and speechless while others were paralyzed with fear.

Similarly in another occasion Namkhai Nyingpo revealed his amazing signs of his achievement in occult powers by planting his teak dagger at the boundary between the sunlight and the shade. The sun turned red and disappeared as he later took out the dagger from the boundary of sunlight and shade. He miraculously transformed the boulders and pebbles into grain seeds and then flew in the sky. Delighted with such display of miraculously powers, Trisong Detsen expressed inconceivable gratitude to all the translators and proclaimed excellent Namkhai Nyingpo and Vairocana as his Vajra Masters. In presence of people from all walks of life the King prostrated before them with unflagging faith and became the most venerated tantric master in Tibet.

Then Namkhai Nyingpo visited upper, middle and lower valleys of Tibet and hid many profound termas for the benefits of future beings. As specifically prophesied by Guru Padmasambhava, he brought immense benefits to the sentient beings through many forms of manifestation. While meditating in Spindled Long Cave of Kharchu (*mkhar chu*) at Lhodra (*lho brag*), he had visions of numerous yidams and attained the Vidyadhara (*rig 'dzin*) level of mahamudra. Finally he departed for celestial realms without leaving a corpse behind.

Namkhai Nyingpo, the crown ornament of all the scholars and siddhas of the land of snows, manifested his enlightened activity as a Terton known as Jangchu Lingpa Palgi Gyaltshen. He then reincarnated as Terton Dawa Gyalchen and revealed Tercho concealed by Guru Rinpoche for the sake of worthy people in future generations.

During the age of degeneration through his karmic destiny and previous aspirations, Namkhai Nyingpo was reborn in 1670 with many amazing signs to Tshewang Ngedup and Logo, as his parents were known in the vicinity of Lhodra Shartsen Drolung, located nearby the seat of Guru Chowang. Even as a little boy of eight he was endowed with astonishing intelligence that the Dalai Lama the Great Fifth recognized him as the direct incarnation of Namkhai Nyingpo. He learned to read and write and developed an understanding of the meaning of the Dharma effortlessly, simply upon exposure to these subjects. Thereafter, he establishing a permanent seat at Lhodra Kharchu and since then the golden rosary of Namkhai Nyingpo lineage had been passed down in an unbroken transmission. His incarnations have continued to the present and his enlightened activity has spread far and wide.

The successive reincarnations are:

Rigzin Lobzang (1670), 1st incarnation
Kelzang Pema Wangchuck, 2nd incarnation
Jampal Ngawang Drukdra, 3rd incarnation
Kinzang Ggawang Namgyal, 4th incarnation
Kelzang Sangnag Thegchog, 5th incarnation
Pema Tenzin Thinley Namgyal, 6th incarnation

The present Namkhai Nyingpo po, the 7th reincarnation Jigme Thinley Namgyal was born in eastern Bhutan in 1966 at Tongshong to Tshering Gyaltshen and Sherabmo, the wisdom Dakini. At the time of his birth, many wonderful signs appeared. The rainbow appeared over the valley in the sunshine and the drinking water turned into white milk. The first word the child spoke was "Kharchu, Kharchu". He could remember his past lives clearly and he even vividly recognized his previous disciples. Through his pure wisdom vision, the 16th Karmapa Rigpai Dorji impeccably recognized the boy as the legitimate reincarnation of Namkhai Nyingpo. He was able to identify the belongings of his previous reincarnation displayed before him without a slightest hesitation and even went to the extent of calling his earlier disciples by their names, further validating him as a true reincarnation of *nam mkba'i snying po*. This fore-knowledge arose an immutable faith in his disciples.

Subsequently, his previous monk-disciples stationed at Bumthang as refugees formally enthroned him with elaborate ceremonies. He began his studies under his grandfather Geshe Pekar and Khenpo Namdrol. When he was taught he could comprehend through mere indications. He studied many texts and commentaries. While in audience with the 16th Karmapa Rangjung Rigpai Dorji (*rang 'byung rig pa'i rdo rje*, 1924-1981) at Tashichhodzong, he was made to read Buddhist text. The

Karmapa was delighted with his reading skills. He received his monastic ordination from Karmapa and gave him a special name, Karma Rigzin Jurme Tenpai Gyaltshen (*kar ma rin 'dzin gyur med bstan pa'i rgyal mtshan*).

Thereafter, over the period of many years Rinpoche received complete teachings along with empowerment and initiations from many prominent Buddhist masters such as the Dalai Lama, Dudjom Rinpoche, Jigdrel Yeshe Dorji (*bdud 'joms rin po che, 'jig bral yi shes rdo rje, 1904-1987*), Dilgo Khyentse Rinpoche (*dil mgo mkhyen brtse rin po che, 1910-1991*), Trulshik Rinpoche (*'khrul zbig rin po che*), Minling Trichen Jurme Kunzang Wangyal (*smin gling khri chen rin po che, 'gyur med kun bzang dbang rgyal, 1931-2008*) and so forth.

Similarly, he bestowed empowerment and scriptural transmission to many spiritual friends following the directives of his Root Teacher. The entirety of these teachings was transmitted and received just like pouring the content of a vase into another. In addition Rinpoche also patronized the five month Empowerment on Treasury of Terma Teachings (*gter mdzod dbang lung*) by Tsetrul Rinpoche at the Kharchu Dratshang (*lho drag mkhar chu*) in Bumthang. Known as Pema Shedrup Choling (*pad ma shes grup cho gling*), Kharchu Dratshang and other retreat centres are established for the study and practice of the Dharma particularly emphasizing profound clear light teachings of Rediscovered Northern Treasures (*byang gter*) of Tertön Rigzin Godem (*gter ston rig 'dzin rgyod ldem, 1337-1409*).

As long as space endures,
And as long as sentient beings exist,
May I, too, remain
To dispel the misery of the world.

Dangphu Dingphu: The Origin of the Bhutanese Folktales^u

*Dorji Penjore**

Abstract

Bhutan is no more an oral society and its store of oral tradition is depleting fast due to rapid social transformation and proliferation of mass media and modern communication system. There is little government or public effort to study, archive, translate, teach and use folktales. This paper makes a review of the Bhutanese oral tradition and discusses the origins of the Bhutanese folktales in light of major folklore theories. It attempts to promote better appreciation of the Bhutanese folktales through the study of their types, characters, themes, and narrative structure. It ends with a short discussion on its functions, primarily its role in educating children.

Introduction

Most Bhutanese have grown up listening to folktales at homes and schools, and there are folktales everywhere to know at least one of them. Ironically, it is this ubiquitous nature that very little interest is generated for studying it formally. Bhutan may have been rich in oral tradition (*kha rgyud*) until the 1960s, but recycling the same image today is blinding our sight to that fact that this oral tradition is fast dying. General public apathy, disinterested government, and negligible folklore scholarship do not help the situation. So far the government has stressed the

^u This paper was written for National Colloquium on Intangible Cultural Heritage organized by the National Museum of Bhutan, Paro.

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importance of folklore but very little has been done to archive and integrate it to the school curriculum. Whatever folklore literature we have today is the direct outcomes of individual effort. For Bhutan whose hallmark of nationhood is founded on cultural identity and Gross National Happiness, folktales are too important. It deserves to be narrated at homes, taught in schools, documented by archivists, studied by scholars, translated into different languages, and above all made into every day part of life.

Awaiting the first systematic study of the Bhutanese folktales, this paper could have benefited from folklore study of Tibet and those Himalayan Tibetan culture areas like Ladakh, Dolpo, Mustang, Manang, Solu-Khumbu, and Yolmo, Sikkim and Tawang. To my knowledge, the folklore scholarships in these areas are at best documentation of folktales in local languages and their translations, similar to Bhutan. This paper is partly based on my fieldwork in Trongsa in 2005 and Zhemgang in 2005 and 2007. Writing about the Bhutanese folktales, and particularly their origins is challenging. The study of folktale is everywhere charged with politics and power to represent and interpret. I will attempt to make preliminary discussion on possible origins (micro-theories) of the Bhutanese folktales in relation to existing macro-theories, which I hope will help in better appreciation of our folktales and provide leads for future research. By folktale (*srung*) here is meant all Bhutanese stories which begins with dangphu ... dingphu ... (*dang phu ... ding phu ...*). I have used the Wyle to transliterate Dzongkha, Khengkha and classical Tibetan words wherever applicable.

Any discussion on the Bhutanese folktales should be placed within larger religious and political contexts in which they were created, narrated, memorised, and adapted. Society may have served as direct inspiration as well as a censure. In the narratives of the state, the term 'folk' or secular (*jig rten pa* or *mi nag po*) is always

differentiated from the Buddha Dharma (*dam chos*). In other words, there is a clear sacred-profane distinction. It is my contention that compared to other societies and culture, Bhutan does not have as many folktales as they are claimed. Of the folktales which have been documented, are being narrated or had been lost, only a fraction could be considered as 'folktales'. The rest were influenced by Buddhism and other factors. During the ecclesiocratic period (1651-1907), Buddhism was the proper subject of the traditional scholarship, and monks neglected secular or worldly matters, particularly those concerning the ordinary people. They not only neglected secular concerns, but discouraged folk beliefs that did not conform to Buddhist values. The monastic culture then enjoyed an exclusive monopoly over the arts, education and government, and shaped popular attitudes and values of the lay community (Aris, 1987). The voices of the common people heard in some of the popular folktales, folksongs, sayings, beliefs, and superstitions are remnants of what had escaped the state censure. The current state of Bhutanese folk art and folk music best explains the monastic culture's trampling of common people's artistic creativity. Except for painted or hanging phalluses, I cannot think of other art or artistic expression of common people since the Buddhist art (*thang ka*) and fresco, and general society suppressed the individual creativity. Even today, a teenager playing a bamboo flute or reed pipe inside the house will be reprimanded to go out because Buddhist ritual music is the proper music. The proper place of folk music and instruments are forests far away from the civilizing centres of Buddhism.

The Survey of Bhutanese oral traditions

I want to begin with a cursory glance at some of the important Bhutanese oral tradition (*kha rgyud*, *gtam rgyud*, *sna rgyud*) which also includes folktales. Where possible some examples, mostly taken from my work, are provided.

<i>a lo'i glu/srung</i>	child-lore
<i>blo zas</i>	ballad
<i>chos log</i>	the dharma reversed
<i>dgod bra</i>	joke, lit. meaning 'sound of laughter'
<i>dpe gtam</i>	sayings
<i>gap tshig</i>	riddle
<i>glu gzhas</i>	folksong
<i>gtam</i>	legend
<i>gtam rgyud</i>	legend
<i>gtsog gtam</i>	filthy or dirty tales
<i>ka rtsom</i>	acrostic poem
<i>legs bshad</i>	aphorisms
<i>lo rgyud</i>	myth
<i>jig rten pa'i lug tshal</i>	superstition
<i>slab bya</i>	advice
<i>srung</i>	folktale
<i>gtsang mo</i>	quatrain

a lo'i glu/srung

There is a category of songs sung for children, which I call it *a lo'i glu* or *a lo'i srung*. They are normally sung by adults to children for teaching language, for putting them to sleep or for entertainment. I remember adults singing this child-lore, Acho Lala (The Brother Moon) to children in the evening or at night, usually in the moonlight. In this child-lore, adult assumes the role of Acho Lala. There could many similar child songs, which are slowly dying.

Acho Lala

Romanised Khengkha

*a cho la la
ma ma shag pa wai le
lang na bleg pa
lang a ni
gami nyum pa
gami a ni
khe na cho sa
khe a ni
jasa bari thong pa
jasa bari a ni
brag ning ga'i pa
brag ning ga'i pai deb a ni
rod pai khor pa
rod pai deb ani
dung mai nyng khrong pa
dung mai nyung a ni
bari chu sa
bari a ni
leng tsbo ro khor pa
leng tsbo sa'i deb a ni
a shom khrong pa
a shom a ni
to cham pa
To a ni
lang na bleg pa
lang a ni
ga mi nyum pa*

English translation

Brother Moon!
Give me the left-over food
It was kept on a shelf
Where is the shelf
It was burnt by a fire
Where is the fire
It was put out by water
Where is water
It was drunk by an ox
Where is the ox
It fell down and died
Where is the place the ox fell down
A flood washed it
Where is the place of the flood
Artemisia plants have grown over it
Where are Artemisia plants
An ox had eaten it
Where is the ox
It was taken for ploughing
Where is the ploughed land
Maize has been grown
Where are the maize crops
It has been cooked
Where is the food
It was kept on a shelf
Where is the shelf
It was burnt by a fire

ka rtsom

Also known as *ka shad*, this poetry genre is as popular among farmers as literate people. It is a type of acrostic poem whose first line begins with the first Dzongkha letter (Ka), follows alphabetically and ends with the last letter (A). Thus it will have 30 lines. Each line connects to the preceding and subsequent lines and seldom stands on its own. This poetry genre has been employed by eminent Buddhist masters to for religious compositions. It is a restrictive form but its alphabetical order and acrostic can help memory retrieval. This literary form became popular among common people to express the world around them. It is particularly popular among those with poetic gift. They are sung or recited by children and adults alike.

ka wa nam ning ling ma is a popular Khengkha *ka rtsom* sung in Wamling village, Zhemgang. Unfortunately, the older people could remember only 12 original lines. The last two lines throw insight on the nature of taxation. Poultry tax must also have been based on head counts.

Romanised khengkha text

*ka wa nam ning ling ma
kha ga sa ru ma cha
ga ru cho ro mut to
nga ni ngo ro ra sa
cha la mut lai kha ga
cha wai ra ning khor pa
ja ru ta se khor se
nya pa nyo pa chusa
ta ru gai dey bu ma
thag thug tsi ma zad
da ning kha ga khorpa
na mung khrai yang mi je*

English translation

As eagle circled in the sky
Hen could not rest on the earth
Unable to be happy or sad
I am made to cry
A poor hen has been
Scooped from beneath a pepper tree
Taken to a distant place
Eaten voraciously and cruelly
Thought of going to see it
But weaving is not completed
This year, a hen has been taken
Next year, there will be no tax

gab tshig

We have virtually lost this oral tradition. *gab tshig* is a standard Dzongkha or *chos skad* word, and it is called differently in different dialects. Its closest English translation is riddle. *gab tshig* competition is held between two persons or groups. In Khengkha, it is called *shaw shaw* la and is popular among young people. Every riddle question is closed by a loud and emphatic utterance of ‘shaw’.

me zon ai reng reng. Shaw! (Two persons holding height competition. What is it?) = *epa tok thang* (Two people pounding paddy in a *tshom*).

The respondent will have to answer within certain agreed time or surrender. The act of two persons beating paddy in a *tshom* alternately is similar to each trying to be taller than the other. One of its limitations is that most riddles are based on concrete imageries of every day life, habits, material culture etc. , and they do not make much meaning if these cultures are not extant. In the above example, the riddle solver will find it difficult to solve it since rice hullers have replaced *tshom*. Known as *khar*, riddle is played like a game during *lo gsar*, *tshe bcu*, marriage ceremonies, yearly religious rituals, and other socio-cultural and religious events. It is also played as entertainment during winter months before going to bed. It tests and sharpens intelligence (Tshering Cigay Dorji, 2010).

dpe gtam

dpe gtam, literally meaning ‘example through story’, are sayings. They are distilled expression of different experience for children. Human experiences often narrated in folktales are distilled in form of proverbs, which come as a moral at the end of the story. *blo zas*

for example contain a lot of *dpe gtam*. The Bhutanese proverbs have been classified as metaphorical and symbolic, circumlocutory, paradoxical, didactic, of despair, of choice and preferences, of action and consequence, and of experience (Dorji Thinley, 2009). Bhutanese *dpe gtam* can be traced to different sources like Buddhist works and sources like stories, poetry, legends, superstition, historical circumstances, and incidental remarks as well as of simple village life (Dorji Thinley, 2009; Sorensen and Tshering Nidup, 1999). Dasho Sherab Thaye is the only traditional scholar who has compiled Dzongkha proverbs, and currently there are two books in English translations.

blo zas

While thinking of *blo zas*, these lines come to our mind:

rdong dpon am 'brug nyi ma gis
bka' rgya 'bor na ser bas phang
gsun bya 'bag na ri bas lci

The command of Dzongpon Aumdruk Nim:
To dismiss it is dearer than gold
To carry it out is heavier than the mountains.

The meaning of this popular oral tradition depends on how you spell it: *blo bsral*, meaning 'products of clear or intelligent or educated mind' or *blo zas*, which means 'ornament of speech' (Karma Ura, 1995). Referred to as expressions of a genius in Buddhist scriptures, it is recited during marriage, mourning, and war, and this 'art of reciting without hindrance or obstacle' may have existed since twelfth to thirteenth centuries (Sonam Rinchen, 2009). Due to lack of English equivalent, it is translated as a ballad. It is a ballad in that it is a narrative poetry, which can be sung and put to music. It is not the language of ordinary people of

western Bhutan, but polished Dzongkha, whose closest parallel is the Tibetan epic; one difference being that the *blo zas* is declaimed but never chanted which is the case with epic (Aris, 1987). Its unique feature is the ubiquitous presence of established social, religious, religious and cultural norms and standards expressed in a beautiful poetry, and hence its function as ‘ornament of speech’ which can be used for effective communication. *blo zas* is a rich source of information on Bhutanese culture, customs, dress habits, and literature, which varies from place to place. It is unique to Dzongkha, but its popularity is pervading other dialects through direct use or translation into native dialects in eastern and central Bhutan.

blo zas serves as a means of interacting with friends and impressing upon girls. Like *btsang mo* it expresses love, friendship, courtship, dislike or insult (Sonam Rinchen, 2009). In fact, *blo zas* is recited in competitions between ordinary folks in the villages. Despite the usage of ordinary language, it achieves poetic height. It is never direct; meanings are conveyed through similes, metaphors, and symbols. The two most popular *blo zas* today is the *blo zas* of Pemi Tshewang Tashi and Gelong Samdar Tashi.

glu gzhas

Both *glu* and *gzhas* means a song. Not all songs, which are classified under the rubric of folksongs, have oral origin. Folksongs may be transmitted by oral narration or folk performance, but most songs were composed by lamas. Song composition was traditionally the domain of lamas and eminent religious persons and most songs contain Buddhist themes. Of two broad categories of Bhutanese folksongs, *gzhung gra* (literally, ‘the melody of the centre’) originated in dzongs and later spread elsewhere. *bod gra* were popularized by medieval court servants known as *bod gar pa*. Other minor categories include *gzhas*, *yul*

dra, *gzhas ma*, *btsang mo*, *a glu*, *kho ras*, and *a'u sa*. Some songs are dance-oriented, while others are voice-oriented. Folksongs are repositories and vehicles for transmitting social values for they contain historical and social information, narrate legends and stories of human dilemmas and relationships, and travelogues. Some are commentaries on dzongs, monasteries, lhakhangs, and sites of pilgrimages and ordinary houses.

legs bshad

legs bshad can be translated as elegant sayings or aphorisms. This is usually narrated by the literate persons like lamas and monks who are familiar with *legs bshad* of Buddhist luminaries such as Sakya Pandita Kunga Gyaltzen (1182-1251). His famous one, *sakya legs bshad* (*legs par bshadpa rin po che'i gter* - Jewel Treasury of Good Advice) is a practical guide for life especially for lay people. Dasho Sherab Thaya uses *'byad pa'i legs bshad* (elegant sayings) and *'jig rten pa'i dpe gtam* (proverbs) synonymously.

gtsang mo

This is the most popular oral narrative genre consisting of four lines of two couplets. Each couplet is a self-contained entity. The first couplet usually makes a statement or describes a situation; the second concludes or summarizes the points made by the first. In other words, the first couplet throws a tension and the second couplet resolves it, either positively or negatively, depending on the nature of *gtsang mo*. A person seldom recites or sings it alone, but engages an opponent in a competition normally held between two opposite sex or people from different groups. The subject is either of love or hate. Each will respond depending on the nature of preceding one. There will be a winner or a draw. Messages are never conveyed directly but through articulate usage of metaphors and symbols.

Example of *gtsang mo*

khyod ni shel gi bum pa	You are a glass vase
phyi mthong nang mthong ain pas	Visible both inside and outside
nga ni dngul gi bum pa	I am a silver vase
nang zung ga gi mi shes	No one will know its inner relics

Some believe that *gtsang mo* was popularized by the Love Songs of the Sixth Dalai Lama, *tshangs dbyangs rgya-mtsho* (1683-1706) who composed his love songs using four lines. A sample of his song is provided below (Dhondup, 1981, 98)

Bya dekhrung khrung dkar mo//	White crane!
Nga la gshog rtsal gyar dang//	Lend me your wings
Thag ring bskyangs la mi 'gro//	I shall not fly far;
Li thang bskor nas slebs yong//	From Lithang, I shall return.

chos log

Meaning heresy, perverted, false doctrine, incorrect teachings or the dharma reversed, *chos log* is a category of 'alternative voices' which removes not only the constraint of monastic tradition, but subverts the monastic authority, and express a new viewpoint of Bhutanese society (Aris, 1987). One piece of *chos logs* literature discussed by Aris is a satire that inverts Buddhist formalism: how a certain teacher Gyalwa Lodro bestows the 'dharma of copulation' (*rgyo chos*) on a great queen (Aris, 1987).

Types

The Bhutanese folktales can be classified as fairytale-like stories; stories of *ma sang* (men of super-human physical strength); stories of *srin po* (demons) and *srin mo* (demonesses); stories of stupidity and wit; sexually-oriented stories; funny stories; stories of poor man's son and rich man's son; stories involving talking animals; ghost stories, *ro glong* stories; story of jealousy where the jealous one gets punished; and stories involving the deities and spirits etc (Tshering C. Dorji, 20110). Characters and themes are two main criteria for this classification. They can also be classified by studying some common motifs of society and social structure; farming *tse ri* and mothers' trick to transform lazy sons; characters in disguise; journey for cattle business; and *klu*, ghosts, spirits, talking trees (Dorji Penjore, 2007).

Characters

What characters are encountered in the Bhutanese folktales? Because the structure of the Bhutanese folktales, Dangphu and Dingphu, links it to a time long past, the general tendency is to shelve them in history, having no relevance to the present time. But the folktale stories are beyond space and time as explained by migration or diffusion theory. The characters are in fact those we encounter and interact every day. Yetis (*mi rgod*) are encountered in the Bhutanese folktales as well as in real Bhutanese forest.

The characters can be grouped into humans, animals, *srin mo* and *srin po*, spirits, *lha*, *klu*, and inanimate objects. Human characters come from every stratum of social hierarchy: king, queen, minister, courtiers; lama, monk; merchant (mostly of cattle), rich man; farmer (mostly *tse ri* cultivators), fisherman, hunter, astrologer, herder (cattle, sheep, yak); poor man, poor man's son; and poor orphan. Two types of kings are encountered: all

powerful benevolent kings whose authority and power are accepted unquestioned because their rule is noble, compassionate and just. There is a second category of kings whose despotic rule not helped by their stupidity draws even an orphan to challenge and dethrone them. The second category can be said of the folk composition.

Animal characters are either friends, mostly domestic animals like cow, ox, horse, donkey, mule, pig, sheep, goat, hen, and rooster; resource competitors (some predators) like tiger, lion, bear, wild dog, monkey, jackal, deer, barking deer, porcupine, elephant, birds (crow, sparrow, cuckoo), and snakes. Animals like tiger and bear are known by honorific names – or human names: *meme* bear (grandpa bear), *a zhang zig* (uncle leopard), *a zhang tsa wa reng* (uncle wild dog), which are the residues of animism. The stories with animal characters or animal stories or fable, and the talking animals help draw children's attention. Human qualities are shown through their interaction with animals.

srin po and *srin mo* are generally portrayed as cannibals who should be avoided or killed. The stories start with a demon king who has to be fed with one human a day; a horde of demons going for man-hunting from valley to valley; a hero travelling to the land of demons to prove his heroism and bravery; a demon abducting humans as his spouse or servant. Their nature differs from story to story.

The common spirits are *'dre* or *dun* which is a western equivalent of a ghost. Harmful or harmless, visible and invisible, they are children's biggest fear. The threat of their coming or calling is enough to stop them cry. The ghosts interact with clever human characters and escape using their wits. In every day lived experience, ghost exists to scare away people from certain restricted time and place, and to discourage children from going

out of the houses at night and avoid physical danger. The perpetuation of the belief in ghosts of course perpetuates functions and relevance of Buddhist monks and practitioners. Other group of spirits are *lha*, *lha mo*, and *srin mo* residing on trees, rocks, rivers, cliffs, road, mountains, fields etc. In folktales, they are generally peaceful if unprovoked. They constrain human agency. The belief in these spirits is perhaps residues of animism, the belief in spirits which pervades the natural world. In one story, spirits write destiny of a child on the third birthday when a ritual is performed by making offering to the spirits. Inadequate or unsatisfactory feast offering make them write bad destiny. This beliefs force humans to respect these spirits and their abodes like tress, rocks, mountains, and water bodies.

lha (god) is another character, but not as common as humans and animals. Living in the upper realms of the tripartite divisions of the world, they are seen interacting with human and other characters. Heroes of the story travel to the realm of *lha* flying by themselves or are helped by some agents. Some heroes even defeat evil *lha*. Some of their qualities are just above humans and the distinction between them and humans blurs. Either they descend to the human world or the human characters travel to their realm.

klu are the beings of the world below or the water world who come up and interact with humans and animals. A category of *klu* dwelling in marshy lands and water bodies with whom humans come into daily contact is not as common as those living beneath the ocean with kings, queens, princes and princesses, palaces filled with riches of gold, silver an turquoise has less affinities with humans. They come to the human world they face *btsan* spirit, their principal foes, in which they lose the fight, paving the way for human intervention or help. The reward of gold, silver turquoise and bride or groom teaches humans to respect the *klu* and not disturb their abodes. Propitiation is believed to bring

prosperity. In many stories, *lha*, *klu* and *btsan* characters interact with human characters disguised as one of them and reveal their identities to change the plots. The inanimate objects imbued with life and qualities, which enable them to participate equally, or in fact, more than other characters is one important characteristic.

Themes

Another way of studying Bhutanese folktales is by classifying them by themes or motifs. Different spaces in which folktales take place from human world to realms of *lha* and *klu*, valleys of *srin po* and *srin mo*, and invisible world of spirits and ghosts are there in our world, and similar events take place every day in varying degrees. Folktales tell of different aspects of our lives in metaphors and allegory. They convey universal themes, and categorization as such is difficult. For this paper, I have divided Bhutanese tales into seven broad interrelated themes: moral, hero, good vs evil, conflict, relation, humour, and just stories.

Moral: Animal stories or fables always have didactic endings. Similarly, fairy tales through their happy endings provide lessons for listeners. The qualities like generosity, humility, honesty, hard work, integrity, and kindness, which help characters overcome difficulties, are cultivated, and those responsible for their downfall such as cruelty and deceit are negated.

Hero: Some stories are of achievement and exploits of characters who become heroes at the end. The masculine qualities such as strength, bravery, gentility, honesty and wit come out clearly. Heroes are mostly princes, rich men's sons, poor men's sons, or orphans who defeat demons terrorizing villages, dethrone evil kings, and kill wild animals that harm people. They overcome the greatest dangers using wits and stratagems. They demonstrate

their heroic exploits from the realm of *klu* below to the realm of *lha* above.

Good versus evil: The religious tales are mostly about the struggle between the benign and bad forces, mostly involving religious characters. The stories start with evil characters winning, and end with their annihilation or acceptance of their mistakes. An orphan dethrones an evil king, a disciple humbles a conceited lama, *lha* prevents an evil work; the reign of *srin po* ends with their slaughter. The good always wins, but the evil is not weak. Some folktales contain values and principles of the interaction of man and the outer forces of nature and of the cosmos, invisible to ordinary perception but highly influential and determinant in human existence. The plots provide clues to past ideas and behaviours, and customs and habits current in certain places at certain times and social conditions.

Conflict: Stories are filled with conflicts at many levels; it is in fact the conflicts which move the plots. The conflicts arise either between members of different social strata or members of same stratum. The highest conflicts is epitomized by humans and gods; king and subjects; ascending (*pha ma*) and descending generations (*bu tsha*); parents and children; adults and children; teacher and disciples; man and woman; and husband and wife. There are also conflicts between the humans on one hand and environment represented by animals, spirits and demons on the other. Actions are moralized – the deviants punished and the right rewarded. Stories are as much about tradition stifling individual talents as they are about individuals transforming the social reality.

Relation: This theme is a counter to conflict theme. Many folktales are interspersed with human relationship theme, especially friendship. The most trying circumstances test the nature and qualities of human friendship. In one folktale, a rich

man's son who would murder his best friend, a poor man's son, merely to become richer dies, while the poor man's son who trusts his best friend, live to become rich. Relation-fostering qualities are affirmed, while those which break human relations are negated through a reward and punishment system.

Humour: There is a group of tales whose main purport is entertainment. They of course perform other functions. Jokes for example satirize certain characters or events.

Other themes: There are some stories that do not contain any one of the above themes. They are just stories containing entertainment values, and adventure of characters without much significance.

Origins of Bhutanese stories

The folklore scholarship, particularly its origin is contested. There is no one hegemonic folklore theory, but only competing theories, and their relevance would largely depend on one's orientations, culture, national ideologies, civilizations and other factors. In the light of the types, characters, themes of the Bhutanese folktales presented above, I want to discuss some of the possible origins or sources of the Bhutanese folktales by relating them to some folklore theories, the comparative, the national, the anthropological, and the psychoanalytical (Dorson, 1963).

Local origin

There is a category of the folktales which could be called stories of the 'folk', created by Bhutanese farmers (*mi chung ku* - small people) out of their daily experience with the physical and invisible worlds to entertain and instruct children, to narrate, record, share, and pass down their hard-learned lessons to

descending generations, and to document history of their settlements, rocks, rivers, trees, etc. , around their world. If common people are the principle authors of the folktales, it then follows that the plots, characters, themes, motifs etc. , should reflect the social, political, and economic milieus in which they have principally lived. The Bhutanese folktales were created by Bhutanese people for fulfilling various functions, and contain information on society, economy, politics, social structures of family, society and village or communities. Folktale is a witness to and the mirror of real history and culture. The tales whose authorship can be attributed to small people differ from those which originated from the elites in their treatment of themes, plots, endings, characters etc. (Dorji Penjore, 2010). For example, elite characters are often ridiculed in oral folktales by characters coming from lower classes, and the latter always emerge as winners.

The local origin contends with the comparative method's revelation of India and Western Europe as the origins of widely diffused folktales, but affirms the polygenesis theory. The idea that the folktales were created by common people in a particular time and place was been used by small nations like Ireland and Finland to revive their folktales, and assert their cultural independence. Also known as the nationalist folklore theory, it emphasizes uniqueness of folktales found within a national boundary in contrast to the unity and commonality in themes of folktales across the world stressed by the comparative school (Dorson, 1963). In fact the rise of nationalism and folklore scholarship was no coincidence. Some nations used folktales for propaganda: folklorists reinforced Hitler's race ideology united through blood and culture; Soviet Russia located spirits of Bolshevik revolutions in the workers' songs and legends, and defined folktales as creative expressions of the working class. The study of relationship between folklore study and nationalism

revealed two broad divisions: independent nations where folklore study had achieved special character that either manipulated folklore study for political ends (Nazi Germany, Soviet Russia and some communist states), encouraged objective study for enriching national traditions, or were indifferent or opposed folklore scholarship (US and England). The second is the cultural areas where the formation of the nationhood had just begun; folklore materials were aplenty but their study by the intellectual not yet begun (Dorson, 1963).

In Bhutan folktales provide the alternative voices of the people, and reveal what has been suppressed by the monastic narratives. One interesting characteristic of the Bhutanese folktale is the presence of thematic elements of dissent, pitting small people against representatives of the ruling classes and elites (*mi sbom* - big people). The argument that the folktales reflect small people's discontent with the exploitative and unjust social order and coercive power of big people should be understood within the ecclesiocratic social structure, contested by small people in small ways. The acceptance, rejection, and contestation of the power-structure are recurrent themes of the folktales, and the endings of the folktales in particular are the common people's ideals of how the world should be, or an attempt to create an imagined alternative social order.

Using Sigmund Freud's psychoanalysis, psychological theory identified dreams as the source of folklore. Freud used myths and fairy tales to elaborate the subconscious mind. According to him, dreams are expression of the repressed wishes and fears of childhood sexuality in symbolic disguises, and he equated dreams with myths and other kinds of folklore. Infantile desires are not usually disclosed nakedly because of the censor imposed by the superego to screens the brute wishes of the libidinous id. These wishes emerge in dreams and myths in symbolic dress. To Carl

Jung, dreams form the substance of the mythical tales, and the existence of many variants of tales across space and time (synchronically and diachronically) are because psyche keeps reproducing similar myths and mythological components which he calls as “archetype”. Primitive man, he says, does not invent myths, he experiences them as revelations of the preconscious psyche; the modern man re-experiences myths in ‘autochthonous revivals’; and the archetypes are lodged in a collective unconscious (Dorson, 1963, 107).

Folktales reveal man’s attempts to escape from social repressions as well as from his geographical conditions and his own biological limitations (Bascom, 1954). It provides a psychological escape from social repression for the individuals (Hartland, 1900). It was only through their folktales that they took the centre stage and consigned big people to the periphery though it was the opposite in the real social circumstances. The happy endings of most Bhutanese folktales involving village characters were represent their ideals or aspirations. The transmission of folktales provided them a space to ridicule, satirize, lampoon, and avenge the big people. They are a medium to express their dissent, contrast their ideal world to their real life situations, and to lampoon the follies and foibles of ruling classes. The oral transmission and listening process provided psychological escapes from the repression and exploitation of social or state power. The process also provided a medium for alterative voices to express dissent by reversing the status quo: a social and political order dominated by monastic and property elites; religious and cultural life dominated and defined by Buddhist lamas and monastic groups; and an economic order dominated by their rich and greedy neighbours--landed aristocrats and powerful taxpaying free households. This dissent is not expressed for its own sake, but to improve the structures that generate inequalities.

Pre-Buddhist Origin

The structure (character or theme) of some Bhutanese folktales are beyond the scope of common people's creativity. They are full of non-Buddhist spiritual elements – gods and spirits as distinct from Buddhist pantheon, and the use of magic elements is ubiquitous. I distinguish this category as being of the Bon origin. The systematised Bon is almost non-existent in the country. I have followed the common definition in Bhutan of any non-Buddhist worship of gods and spirits living in the natural entities like mountains, water bodies, rocks, cliffs and land as Bon. Such beliefs and associated rites and ritual in rudimentary forms continue to this day. Its resilience and relevance is contingent on its little interference with Buddhism. The elements of magic or animated artefacts are of Bon. Some demon tales are also of this category because of the Bon's expertise in taming demons.

One important Tibetan origin myth explains Tibet as a supine *srin mo* spreading across Tibet and frontier regions. This *srin mo* was subdued by building 108 temples on the key points of her body. Nothing could be as memorable as the demons of Samye who destroyed at night what were built during the day, and how Guru Padmasambhava not only subdued them but made into protectors of Buddhism (*chos srung*). Thus there is a dominant presence of human-eating demons, life-force-snatching spirits and other malignant forces in some folktales. These tales are deliberately composed and narrated to inform about the land before the spread of the Buddhism and legitimate Buddhist dominance over indigenous faiths, chiefly Bon and Shamanism. An active suppression of alternative voices of ordinary people was equivalent to suppression of Bon religion since the popular beliefs of the common people were informed by Bon and animistic beliefs.

The Buddhist origin

The other sources of origin can be discussed through a comparative school, also called historical-geographical method or the Finish school, which uses a comparative method for reconstructing the history of each individual tale to understand how it originated and spread. Its premise is the belief that every tale has one particular time and place of origin and was invented consciously. It then travelled through diffusion. The theory rejects polygenesis and anti-diffusion theories. According to this theory, tales moves from more advanced to less civilized people, and identifies India and Western Europe as the origins of widely diffused folktales, and Asian Minor and other zones of Europe as secondary centres of diffusion. The theory is criticized for diverting the folklore scholarship's attention from philosophical and metaphysical questions of meaning to empirical question of fact; it also ignores folktale's style and artistry, creation process, their transformation, cultural influences, the social context, and the role of the individual narrators.

Buddhism is perhaps the single biggest source of Bhutanese folktales. The use of parables as a teaching pedagogy is common to all faiths. The Buddha used simple fables to explain his profound teachings. Two important *mdo* (canon) of Tibetan Buddhism, *bka' gyur* (Translation of the Word of the Buddha) and *bstan gyur* (Translations of the Teachings) are punctuated with stories, particularly the Jataka Tales – stories of the previous births of the Buddha. They were used by the Buddha to teach the truth of the law of causality and the other basic principles of his teaching. It is an effective means to awaken deep spiritual knowledge and insight and guide the readers to understand basic principles of spiritual teachings, and cultivate moral conduct and good behaviour. The Jataka Tales is a literature and the inspiration for the Buddhist art and architecture. The painting of

mtbun pa spun bzhi was an artist's expression of the one of the Jataka Tales. This category of tales lack magical elements, but are dominated by moral principles. The animal characters are common. Imageries, similes or metaphors of ocean, *nor bu*, ocean travel, elephants etc in the Bhutanese tales, in addition to the belief in the tripartite division of the world into *lha* above, *klu* below and *btsan* in between which of course the Bon worldview as much are the evidences of the influence of the Jataka Tales.

Lamas, travellers, pilgrims, and traders

Folktales migrated to the Americas through four channels, from Europe across the North Atlantic, from Africa across the South Atlantic, from Northeast Asia via the Bering Strait, and from Southeast Asia across the South Pacific (Utley et al, 1974). The Tibetan culture areas mentioned before was once a 'free and fertile zone' across which stories travelled with lamas, pilgrims, refugees, and traders who then knew no national borders. It was only after the formation of modern nation states and delimitation of national borders in the regions that free movements of peoples ended. Peoples living this large Tibetan culture areas could preserve distinct local cultures and could easily identify with each other since similarities of religion (Tibetan Buddhism), peoples, culture, languages (Tibeto-Burman dialects), geography, climate, and ecology are greater than dissimilarities. The commonality was such that folktales almost required no adaption. Unless told, it is not easy to distinguish many folktales narrated in these regions. But this is not to deny other channels of folktale migration. Today, the trans-Himalayan human and animal traffic is not as heavy as in the past, not because people prefer other modes of communication, but because of the formation and consolidation of nation states. For example, Tibetan lamas sought the sanctuary of Bhutan to escape prosecution of dominant ruling school as well as to avoid conflicts among different schools and sub-schools. Some

had visited Bhutan to seek its peace and tranquillity; others to avail benefits of its many sacred places (*gnas*) and to spread Buddhism, particularly of their respective schools. Ordinary people crossed the 'border' freely, mostly for the purpose of trade and pilgrimage. They did not come empty but brought folktales which they used for teaching and entertainment. This does not suggest a one-way traffic. Bhutanese frequented Tibet and the neighbouring regions sharing common geography, religion, language, culture and climate, and took stories with them.

Local adaptation

The anthropological folklore theory emphasizes the functional elements of folktales. In studying non-literate societies, which included the study of folk culture, anthropologists fore-grounded folktale's style and content, artistic creativity of individual narrator; co-existence of its multiple variants; and its functions in the society. Folktale in a culture reflects the traits of the material culture, and provides clues to lost tradition and history, suggested the use of the culture concept framework for folklore study (Bascom, 1954). Preferring 'verbal art' to 'folklore' he distinguished it as the creative composition of a functioning society, and called for viewing it as "dynamic not static, integrated not isolated, central not peripheral components of the culture" (Dorson, 1963, 102). Folktale, according to him, is a living recitation delivered to a responsive audience for cultural purposes.

One group of folktales is the work of adaptation. Trubshaw (2003) uses roots, branches and twigs, propagation and pruning metaphors to explain the migration and local adaptations of folktales. Folktale originates in a particular place and time, is transformed through narration over generations or migration to other lands and societies, which is then followed by adaptations to suit the local contexts. One reason for resiliency of folktales is

that both narrators and listeners adapt countless stories they hear or read to suit local contexts. Folktales generally reflect the customs and beliefs, structures of families, communities and societies of the originating lands, adaptations render them servants to be witness to and mirror the local society, economy, culture, customs, tradition, beliefs, and faith of lands where they were adapted. Some of the Bhutanese folktales are versions of the folktales of other societies. They adapted those tales with the potential for children to appreciate and relate to their worldview, environment and lives.

The Structure

The structure of Bhutanese folktales is not as different from those of other cultures and societies. However, there are few distinguishing characteristics. One unique characteristic of the Bhutanese folktale is its starting formula (Tandin Dorji, 2002L; Kunzang Choden, 1994). ‘Once upon a time’ or ‘Long long ago’ etc. , starting formula is universal across all cultures, which in Bhutanese culture is *sngon ma ... sngon ma ...* or *hon ma ... hon ma...* However, *dang phu ding phu* is much more than ‘once upon a time’. The longer the pause between Dangphu and Dingphu, the further back in time in which the story is believed to have taken place. Dangphu and Dingphu are also personified and assume characters of the story. Some people narrate folktales as, once there lived one Dangphu, and there lived one Dingphu. There is a belief that Dangphu should never catch up Dingphu; otherwise, there will be no story.

There is a story about Dangphu and Dingphu. Dangpo once escaped from Dingphu and began to run until a thorn got inside his foot. Dangphu asked a Brokpa for a needle to remove the thorn but he refused. He then asked a mouse to eat Brokpa’s bag, but the mouse refused. A cat refused to eat the mouse, a dog

refused to chase the cat, a stick refused to hit the dog, a fire refused to burn the stick, and water refused to put off the fire. At last a ram agree to drink water. Frightened water flashed on the fire, who in turn burnt the stick, who in turn beat the dog, who in turn chased the cat, who in turn caught the mouse, who in turn gnawed the bag of a Brokpa, who in turn borrowed his needle with which Dangphu took out the thorn from his foot and could escape Dingphu by hair's breadth (Tandin Dorji, 2002). This story is also narrated to close the folktale narration.

Folktales are not told but *shig*, equivalent to undoing a knot or unspinning thread roll or yarn bundle (Kunzang Choden, 1994). In Dzongkha, stories are not narrated but *tang*, equivalent of releasing or sending. The first one conjures up an image of unspinning yarn spun into a ball until the last end of the yarn, and listener(s) spinning them into a ball so that it could later be unspin. The second term, *tang* paints an imagery of a narrator releasing or sending stored-story, and listener(s) receiving it. However, both suggest that un-spinning or releasing (namely narration) is easier, more spontaneous and quicker than spinning or storing.

Unlike most western societies where stories are narrated around campfires or by professional storyteller at particular settings, every Bhutanese space is a place where folktales are narrated. However, the ideal place is homes. There are no professional story tellers either. Stories are mostly narrated after dinner from the moment family members retire to bed to until they fall asleep. This does not mean that stories are not told at other times. The choice of night is deliberate. Night is the time when all family members gather under one roof; a time when they could rest from work and reflect; a time when children are amidst their siblings, parents and relatives in sharp contrast to the day when they are alone or with grandparents.

Storytelling is an interactive process between narrator and listener; the one is useless without the other. In an ideal case, story telling takes place at homes between grand-parents and grand-children. When narrating, a listener must respond, 'Ae' (meaning yes, ok). If not it is believed that a ghost, not humans, will be listening. The utterance of 'Ae' helps narration makes it into an interactive process and keeps listeners awake. It also ensured that the narration is completed before both go to sleep.

Functions

Bhutanese folktales serve multi-purpose functions for individual, family, community and nation through its multi-layered meanings. Stories may be of trivial events, but of great moral and social consequence, with experiences drawn directly from farmers' daily life. Elsewhere (see Dorji Penjore, 2007, 258-277). I have discussed four main functions of the Bhutanese folktales: their roles and functions in children's education, entertainment and communication, as repository of history, language, culture and values, and their spiritual functions. Its educational function in Bhutan is significant where universal education was made available only in 1960s. This is not to suggest that it has no role in the present society since "up to 70 per cent of the world's peoples are oral cultures, meaning they require or prefer to communicate through narrative presentations, storytelling and other traditional art forms (Evans, 2004). It will continue to be relevant for individuals, families, communities and the country. The four functions cannot be described in isolation but in relation to other functions.

One of the primary functions of folktales is to teach children *yon rten* (qualities, but often translated and understood as 'knowledge' or education) and *rig pa* (awareness, mistakenly translated as intelligence or memorization power) necessary for surviving and

thriving as farmers. When the monastic education was available to few children, the oral tradition served the role of today's universal western-style modern education. The traditional Bhutanese extended family system is today's equivalent of a school where ascending generations expose descending generations to knowledge, experiences, morals, customs, rituals and belief, and prepare them for their adult life. The folk composition, narration, memorization, adaptation and daily use of indigenous knowledge system transmitted through oral mediums were a continuous process. It fully met the learning needs of a traditional society.

Our grandmother's folktales are as meaningful as most school textbooks and classroom lessons mostly repeated enduring values of folktales, which are seldom found in other literary mediums. Demons of the tales stopped children from wandering alone in the forest; a cruel tiger is punished so that they can be kind; an ash of a frog-skin turns into gold overnight to fire their imagination; transformation of a lazy boy into a hard working person is their transformation as well; the spirits of trees and cliffs write human destiny, so that they respect nature; *klu* afflicts humans with leprosy so that people do not pollute their abodes.

What old people narrate during the day or night are what they had already experienced, what adults are experiencing during the day even as the tales are being told, and what children will face as adults. It serves as a medium for inculcating values to children. A tiger who does not honour his word is killed by a hunter to warn children about the danger of wild animals and travelling alone, and cultivating values of honesty at the same time. Values and wisdoms imparted have been time-tested through many years of interaction or experience with the real world. Storytelling is creative in the sense that they make children imagine and create their own mental pictures, thus leaving deep impression on them. The timing of the story telling, which mostly happen at night

before children go to sleep, is instrumental in plots or memorable scenes often appearing in dreams, which helps children draw lessons from tales, in addition to being a sleeping pill. All these happen without children being aware of the process: for children entertainment is the end, and value inculcation comes as a by-product without their being aware of it. To parents, value transmission is the main objective and the entertainment is a by-product. Devoid of any formal traditional sports or games, folktales provide entertainment to children.

Every folktale is a witness to the milieu (socio-economic, religious, cultural and political) of the time in which it was composed, narrated, and adapted. The ethnography of the past could be indirectly constructed from insights gleaned from the study of folktales. Folklore is a reservoir of local history and beliefs. Myths and legends in particular provide identity through insights they provide into local history and beliefs. The legends and myths associated with certain physical landscapes such as rocks, cliffs, waterfalls, lakes not only help people make meaning of the world around them, but help establish and perpetuate beliefs in spirits (*gnas po*) and conserve particular local ecosystem as their homes, which coincidentally are village water sources (Tshering C. Dorji, 2010). It instils a sense of belonging, patriotism and identity to their village. The settings and plots increase children's awareness of diversity of the culture and geography. Values affirmed by folktale characters are the same fundamental Bhutanese values which form the bedrock of our society: *bsam pa bzang po* (good intention); *dren lan* (returning gratitude), *dam tshig* (commitment), *mtha' dam tshig* (difference separating ruler and subject), *las rgyu 'bras* (the principle of cause and effect), 'jam pa dang *snying rje* (gentleness and compassion) (Tshering C. Dorji, 2010; Dorji Penjore, 2007).

Conclusion

Walls of rural Bhutanese houses may have once echoed and re-echoed with folktales narrations but frequency of narrations today is becoming ever fainter and lesser. There is a huge gap between original folktale reservoir and what could be narrated today. A Bhutanese folklorist would be disappointed by number of narrators and folktales surviving in the villages. The old people's ability to recollect or narrate folktales is decreasing, as there are rare occasions for them to narrate as school children take less interest in listening to parents' stories when they have worldwide choices of other stories in textbooks and the mass media. The death of any village elder is a loss of an important, irreplaceable heritage.

Culture is being promoted as Bhutan's unique identity. Value education is being emphasised as a priority by education system. Culture is one of the four pillars as well as the nine domains of Gross National Happiness. There is a scope for the study and use of folktales to fulfil those national objectives. Children more than any point in history need to learn Bhutanese values to balance non-Bhutanese values they consume through mass media in schools, homes and market.

But at the present rate of change, the folklore reservoir will be empty in the next few years. The current and urgent task is to document this important intangible cultural heritage before they are lost forever.

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Appendix: Bhutanese Folklore Literature

srung

Collection of Bhutanese Folktales in Dzongkha by Dasho Sherab Thaye

Folktales of Bhutan (1994) by Kunzang Choden

Ap Wang Dugay - A Bhutanese Folk Hero (1995) by John Michael Chiramal

Bhutanese Tales of the Yeti (1997) by Kunzang Choden

Tales from Rural Bhutan (1998) by Kinley Wangmo

Folktales of Bhutan (1998) by Rita Thomas

Talisman of Good Fortune and Other Stories from Rural Bhutan (2002) by Rinzin Rinzin

Heard from Grandparents (2002) by Drugyal HSS Literary Club

Bhutanese Folktales (From the South and the East) (2004) by Gopilal Acharya

Was it a Yeti or a Deity? A collection of folktales from Kheng (2006) by Dorji Penjore

The Cuckoo and the Pigeon: A Collection of Folktales from Rural Bhutan (2008) by Ngawang Phuntsho

The Spirits who Write Human Destiny - A Collection of Folktales

from Rural Bhutan (forthcoming) by Dorji Penjore

dpe gtam

'byad pa'i legs bshad dang jig rten pa'i dpe gtam by Dasho Sherab Thaye

'byad pa'i legs bshad dang bslab bya (1986) by Dasho Sherab Thaye

rdzong kha'i dpe gtam tshig 'grel (2003) (Commentaries on Dzongkha Proverbs) by Dasho Sherab Thaye

Sayings and Proverbs from Bhutan - Wits and Wisdom in Dzongkha Idioms (1999) by Per K Sorensen and Tshering Nidup (with Dzongkha text)

The Boneless Tongue: Figurative Proverbs, Wise Sayings and Incidental Remarks that Articulate a People's Way of Life, Culture Experience and Accumulated Wisdom (2005) by Dorji Thinley (with Dzongkha text)

dpe gtam tshig gyi lde mig (Sayings - Key to Witty Conversations) (2002) by Gyonpo Tshering,

glo zas

pad ma'i tshe dbang bkra shis kyis 'gyur ba'i blo bsral dang dge slong gsum dar bkra shis 'krun glu//

'brug gyi blo zas by Dasho Sherab Thaye

The Ballad of Peme Tshewang Tashi - A Wind Borne Feather (1995) by Karma Ura

Gaylong Sumdar Tashi – Songs of Sorrow (1998) by Sonam Kinga
(with Dzongkha text)

rtsang mo cccc

rdzong kha rtsang mo dpe chung (2001) by Dasho Sherab Thaye

dgod bra

jig rten pai dgod bra by Dasho Sherab Thaye

legs bshad

jig rten pai legs gshad dang pa by Dasho Sherab Thaye

glu gzhas

201 Folk Songs of Bhutan (1985) by Kunzang Tobgay and Mani Dorji

A Treasure of Songs of Bhutan (1999) by Gonpo Tshering.

Intellectual Property, Access to Medicines and Public Health Issues in Bhutan

*Kencho Palden***

Abstract

The effects of the trade liberalisation process has been felt in Bhutan; even though it is a developing country and one of the smallest markets in the world it has not been able to escape from the inevitable. This is evident from the accession process to the World Trade Organization, which is at an advanced stage. One important key factor in being compliant with the WTO is meeting the minimum standards of Trade-Related Aspects of the Intellectual Property Rights (TRIPS) Agreement. Multiple challenges exist in implementing the standards of the TRIPS Agreement. It has been argued that the effects of WTO-TRIPS compliance will be detrimental to Bhutan's free health care policy, particularly access to medicines in the light of a lack of pharmaceutical industry and manufacturing capacity. The present legislation on intellectual property in Bhutan lacks necessary safeguards and flexibilities in the public health arena; these safeguards are present within the TRIPS Agreement and that is further amplified by the Doha Declaration on TRIPS and Public Health. In order to sustain Bhutan's free health care policy, it is not only imperative to bring its legislation on intellectual property in line with the TRIPS Agreement but also other relevant institutional mechanisms on public health such as drug policy, technical capacity on pharmaceuticals and enforcement which need to be thoroughly examined.

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Introduction

Bhutan is one of the Least-Developed Countries (hereafter LDC)¹ in the world nestled in the high Himalayas between the two Asian economic giants, India and China.² The economy of the country is based on agricultural farming, forestry, tourism and the sale of hydroelectric power, mainly to India. Agriculture provides the main livelihood to more than 79 percent³ of the population. A cautious planned development in the 1960s⁴ opened Bhutan's door to the outside world, after which significant structural changes in the economy have been witnessed.⁵ Bhutan's economy continues to be one of the smallest in the world; however in recent years it has rapidly grown: by eight percent in 2005, 14 percent in 2006 and by 22.4 percent in 2007.⁶ At present there is increased economic activity, such as establishment of modern trade and a commerce system, infrastructural development, information and communication technologies, health and education etc. It is noteworthy that Bhutan did not embark on modern development

¹ The United Nations Office of the High Representative for the Least Developed Countries, *List of Least-Developed Countries: Country Profile* (2008) <<http://www.unohrrls.org/en/ldc/related/62/>> at 4 October 2010.

² National Statistical Bureau, *Statistical Yearbook of Bhutan* (2009) <<http://www.nsb.gov.bt/pub/syb/syb2009.pdf>> at 4 October 2010.

³ Ibid.

⁴ Lily Wangchuk, *Facts about Bhutan: The Land of Thunder Dragon*, (Absolute Bhutan Books, Bhutan: 2008), 28.

⁵ Gross National Happiness Commission, *Bhutan 2020: A vision for peace, prosperity and happiness* (1999) <http://www.gnhc.gov.bt/publications/pub/Bhutan2020_1.pdf> at 4 October 2010.

⁶ National Statistics Bureau, Government of Bhutan, *Statistical Yearbook of Bhutan 2009*, 24.

purely for economic pursuits, but the development activities are strongly well-balanced with the principles of Gross National Happiness⁷ (hereafter GNH). The principle is based on the ideology that the process of economic pursuit should not compromise the elements of social progression, such as culture and traditions and natural environment, which are all strongly associated with the promotion of the well-being of the people. Bhutan's development activities after the 1970s were grounded on the principle of GNH that promises to preserve the cultural values and natural environment focusing on sustainable development and promotion of good governance.⁸

Bhutan is an LDC and also a landlocked country and faces a plethora of challenges in the process of development, such as 'financial, administrative and economic' constraints. In addition, due to its geo-political positions, the modern economic activities that increasingly penetrated the country after the 1960s were viewed as a threat to the country's culture, traditions and natural environment. The philosophy of GNH was instituted at a vital time to protect from the threats of modernisation and the promotion of public health is one of the core components of the GNH principle.⁹

Bhutan has an interesting 'history of health set-up in 1960s' when it began the planned economic development. Human resources were one of the major constraints faced by Bhutan then, and even today, despite rigorous efforts to build capacity, human resource constraints continue to burden the government. In 1960 there

⁷ Wangchuk, above n 157, 161.

⁸ Ibid.

⁹ Gross National Commission of Bhutan, Government of Bhutan, *Tenth Five Year Plan Volume I Document 2008 – 2013* (2009) 17.

were only three medical doctors (two national and one external expatriate) and two nurses who worked in all parts of Bhutan.¹⁰ At that time there were only two hospitals and 11 dispensaries.¹¹ The 'diseases prevalent then were Malaria, Diarrhoea, Worm Infestations, Tuberculosis (hereafter TB), Goitre and venereal diseases like syphilis and gonorrhoea'.¹² Also there were high 'maternal and child mortality' that were mostly due to 'haemorrhage, prolonged labor and infections'.¹³ Despite this fact, Bhutan did have a health care system that was functional, which was managed by the limited number of health professionals.

An examination of the initial health system in Bhutan shows that numerous challenges such as lack of human resources (health professionals), finance and infrastructure were present. Due to the rugged terrain most of the far flung villages and remote parts of the country were virtually inaccessible to the health care services. The state of the population's health was very poor, and the failure to provide timely health care services and the lack of medical personnel was affecting thousands of people. Partly due to these reasons, traditional medicine has retained a 'significant role in the provision of health services' in Bhutan. It is widely practised across the country and even today it is 'provided side by side with modern allopathic health care'. The modernisation of the 'health system and infrastructure commenced in 1960, establishing Basic

¹⁰ Lungten Z. Wangchuk, *States of Bhutan's Health 2008* (2009), Annual Health Bulletin 2009, Ministry of Health, Government of Bhutan, 15.

¹¹ World Health Organization, *Country Health System Profile: Bhutan* (2007) <http://www.searo.who.int/en/Section313/Section1517_10768.htm> at 4 October 2010.

¹² Wangchuk, above n 15 - 16.

¹³ Ibid.

Health Units (hereafter BHU) in certain places in early 1970s'.¹⁴ The actual expansion of infrastructure started only in the 1980s. The health care system today has evolved into a 'fairly efficient system' that has a strong primary health care delivery system as the backbone of the overall system. Presently, the modern health care services are delivered 'through a four-tiered network' comprising of the National Referral Hospital, the Regional Referral Hospitals, District Hospitals and BHUs to 'outreach clinics at the community level'.¹⁵

Today Bhutan's health system is appreciated by the whole world for its coverage as well as for the effective delivery of its services. A significant improvement in the health indicators have been seen, such as: an increase in life expectancy at birth from 36.1 years in the 1950s to 66.1 years at present; a decline in under-five mortality from 108/1000 live births to about 60.1/1000 live births; and a decrease in infant mortality from 185/1000 live births to about 40.1/1000 live births.¹⁶

The problem that has now arisen as a result of the modernisation process is that the sustainability of the health care system in Bhutan is under enormous threat, predominantly from the intellectual property rights (hereafter IPR) regime. Bhutan enjoys free health care delivery system,¹⁷ mainly due to the fact that

¹⁴ World Health Organization, *Country Health System Profile: Bhutan* (2007)

< http://www.searo.who.int/en/Section313/Section1517_10768.htm > at 4 October 2010.

¹⁵ Ibid.

¹⁶ Wangchuk, above n 16.

¹⁷ Bhutan Health Management and Information System, Ministry of Health, Government of Bhutan (2010) *Annual Health Bulletin 2010*.

majority of people are poor¹⁸ and cannot afford modern medical treatments. They depend on the government for the delivery of medicines and treatments. Bhutan is steadily liberalising its 'trade, industries and financial polices'¹⁹ that call for the adoption of IPRs and compliance with international standards, so as to create a conducive environment for trade and commerce and an influx of investment²⁰ for internal and external markets. The IPR regime that Bhutan is intending to institute will seriously impact the delivery of the health care system in Bhutan.

This paper is divided into four parts that attempt to discuss the position of Bhutan as an LDC in the areas of IP, access to medicine and Public Health issues. Part I of the paper discusses the state of Bhutan's current health policy and system and investigates policy issues, the current health situation, health and drug policy and institutional linkages. Part II will study Bhutan's current IP laws; in particular, it will attempt to establish linkages between public health and access to medicines and other safeguards. Part III of the paper will examine Bhutan's position under the Doha Declaration (hereafter Declaration) on Trade-Related Aspects of Intellectual Property (hereafter TRIPS) Agreement and Public Health. Part IV will examine Bhutan's draft Industrial Property Bill that will discuss the flexibilities required on access to medicines and public health issues and other safeguards in order to accelerate accession to the World Trade Organization (hereafter WTO). Finally, the

¹⁸ National Statistical Bureau, *Statistical Yearbook of Bhutan (2009)*
< <http://www.nsb.gov.bt/pub/syb/syb2009.pdf> > at 5 October 2010.

¹⁹ Ibid 198.

²⁰ Nima Tshering Tamang, 'Low FDI ceilings to attract more investors'
Bhutan Times (Thimphu) May 30, 2010
< http://www.bhutantimes.bt/index.php?option=com_content&task=view&id=2002&Itemid=5 > at 5 October 2010.

paper will conclude with recommendations and a review of the situation in the context of the above.

Health Care System in Bhutan

Provision of free basic health care services that are ‘publicly financed’ has been one of the principles of State policy in Bhutan for more than four decades of planned socio-economic development.²¹ The State views the health care system as fundamental to upholding the principles of GNH. It is evident that the practice of providing health care in Bhutan was not an overnight decision but one that has been carefully executed from the early 1960s to the present. The foundations of the health care system are based on the fact that the majority of the population whose livelihood is agriculture and subsistence farming are poor and are located in remote parts of the country. The situation is worsened by the lack of infrastructure such as roads and hospitals, and the low rate of literacy.²² They obstruct the dissemination of information on health, nutrition and sanitation and hygiene. In order to improve the well-being of the people, improvement in their health is vital. This cannot be possible without improvement in the infrastructure such as hospitals, medical equipment, supply of medicines and drugs and development of human resources.

²¹ Tshering Dhendup, *The Present Free Health System and its continuity*, Annual Health Bulletin 2010, Ministry of Health, Government of Bhutan, i, iv.

²² Bhutan’s current literacy rate is 52.8 percent according to Human Development Report 2009 by the United Nations Development Programme. See <http://hdrstats.undp.org/en/countries/country_fact_sheets/cty_fs_BTN.html>.

Article 9 section 21 of the Bhutanese Constitution states that:

The State shall provide free access to basic public health services in both modern and traditional medicines.²³

The inclusion of free access to public health services in the Constitution highlights the importance the government has placed on health and on the overall health policy of the country.

Efforts to establish modern medical facilities began in 1962 and presently the Ministry of Health has a widespread 'network of health facilities across the country, covering 90 percent of the population'.²⁴ In the early phase of this development, institutional health facilities that were earlier 'concentrated in the urban centres are shifted to rural areas' increasing the access to more and more places. The most important change to the health system today is promoting wider coverage, especially to the remote parts of the country. In these places, an adequate number of BHUs are established providing treatment on 'ailments and advice on preventive measures to avoid the spread of communicable diseases'.²⁵

Commendable efforts have been made in terms of prevention of communicable diseases. Bhutan is one of the few countries that has high immunization coverage of more than 90 percent.²⁶ The prevention efforts saw significant health improvements particularly in the area of disease elimination. Leprosy was

²³ Bhutanese Constitution, Art 9, s 21.

²⁴ National Statistical Bureau, Government of Bhutan, *Statistical Yearbook of Bhutan* (2009), ch 2, 34.

²⁵ Ibid.

²⁶ Wangchuk, above n 18.

eliminated in 1997,²⁷ Poliomyelitis in 1984,²⁸ Iodine Deficiency Disease in 2003.²⁹ Considerable growth has been observed in terms of infrastructure and human resources. Recent reports record that in 2008 there were 171 national doctors, 567 nursing staff and 1250 other health workers delivering care at 31 hospitals and 174 BHUs.

Analysis of key health indicators from 1984 to 2008, such as maternal mortality rates and morbidity trends, suggest that there has been a significant decrease in the rates of mortality and morbidity. As already stated, one of the driving forces behind the overall improvements in the health status is the result of wider coverage and establishment of necessary infrastructure. In '2000, maternal mortality ratio stood at 255 per 100, 000 live births, a significant decline of 62 percent from the 1984 figure'.³⁰ A similar trend can be observed in the child health service that has dramatically reduced the infant mortality rate. The infant mortality rate per 1000 live births stood at 102.8 percent in 1984, 70.7 percent in 1994,³¹ 60.5 percent in 2000,³² and 40.1 percent in 2005 and 2009.³³

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Jayendra Sharma, *State of Bhutan's Health 2009* (2010), Annual Health Bulletin, Ministry of Health, Government of Bhutan, 3.

³¹ Health Division, Ministry of Health and Education, Government of Bhutan, *A Report on National Health Survey 1994* (1996), 18.

³² Department of Health Services, Ministry of Health and Education, Government of Bhutan, *A Report on National Health Survey 2000* (2000), 3.

³³ Jayendra, above n 4.

A 'shift in the disease dynamics' has occurred and has changed from the most common illnesses being infectious diseases to being chronic diseases such as hypertension, cardiovascular diseases, cancers and diabetes. Other diseases are also common such as cholera, typhoid, measles, blood diseases, and other disorders of the muscular and nervous system.³⁴ It is reported that 'infectious diseases trends have taken challenging shift from curable to incurable like HIV and other viral diseases'³⁵ in addition to already prevalent diseases like malaria and TB, which are listed as major communicable diseases of the era. There was a total of 1159 reported cases of TB in 2009,³⁶ of which 30 people died. Although TB prevention programmes were initiated as early as the 1980s, it continues to be prevalent, especially in the remote parts of the country that remain unaware of the prevention programs. The most challenging aspect of TB prevention today is the 'drug resistant strains of TB and TB-HIV co-infections which seriously threaten prevention and control efforts'. Of the 185 reported cases of HIV infection, 11 of them are co-infected with TB.³⁷

One of the biggest concerns of the country today is related to the HIV/AIDS threat. The first two cases of HIV infection in Bhutan were detected in 1993.³⁸ Although the number of people who suffer from HIV/AIDS is at present only 185³⁹ (prevalence of 0.1

³⁴ Ibid.

³⁵ Wangchuk, above n 16.

³⁶ Jayendra, above n 4.

³⁷ Ibid.

³⁸ Ministry of Health, Government of Bhutan, *Annual Health Bulletin 2006* (2006), 11.

³⁹ Tandin Pem, 'Survey reveals poor lab facilities' *Bhutan Observer* (Thimphu) 14 May 2010, <<http://www.bhutanobserver.bt/2010/bhutan-news/05/survey-reveals-poor-lab-facilities.html>> at 5 October 2010.

percent), with respect to the size of the population, which is just over half a million, there is an imminent risk of an AIDS epidemic. The steep rise in the number of HIV/AIDS cases is attributed to a number of 'environmental factors such as higher prevalence rates of HIV/AIDS in neighbouring countries, rising level of substance abuse, multiple partners and demographical profile characteristic of young population' (about 43 % are younger than 15).⁴⁰ Additionally, the lack of awareness of the disease is deteriorating the situation and more and more cases are reported every year.

The government has developed a three-tier AIDS prevention strategy. Firstly, at the peripheral level, health assistants educate the community, train village health workers, counsel patients and refer them for AIDS tests and manage the symptoms. Secondly, at the district level, patients are tested for AIDS along with TB patients and those in the high-risk group. Anti-retroviral (hereafter ARV) treatment monitoring is also done in regional referral hospitals. ARV drugs are given to people with AIDS in an effort to enhance and prolong their life. It is also given to infected mothers in the hope of preventing mother-child transmission. The Multi-Sectoral Task Force ⁴¹ that was formed coordinates several activities in the districts for HIV/AIDS, among others. Thirdly, there are also programmes like the National AIDS programme (hereafter NAP) under the Ministry of Health which guides policy formulations in this area.

⁴⁰ Jayendra, above n 4.

⁴¹ Multi-Sectoral Task Force was formed in 2001 in all 20 districts in Bhutan. The task force consists of people from business community, corporation and regional and sectoral head chaired by the Governor of the district. The task force deals with emerging and re-emerging diseases (particularly awareness creation of HIV/AIDS) and disasters.

In a recent health policy discussion, it was stated that:

HIV/AIDS, tuberculosis and malaria prevalence would be reduced to a level at which it would no longer constitute a public health problem through multi-sectoral and multi-disciplinary approach. Provision of holistic health education in all educational institutions would be promoted through multi-sectoral approach.⁴²

Due to the urgency of the issue, the government has called for a collective effort across the public sector and private organisations in preventing the spread of the disease. Advocacy on the disease is regularly conducted across the country involving students and teachers, parents, the public and private sector, armed forces, monk groups and the general public. The government maintains absolute confidentiality of the identity of the HIV/AIDS patients for reasons of social stigma, among others.

Key components of the Tenth Five Year Health Development Plan (2008 – 2013)

Bhutan's overall long-term objective of the health system is 'attaining a healthy living standard by the people living within the broader framework of the overall development of the country'.⁴³ Four important programmes underscore the current Tenth Five Year Development Plan programme of 2008 to 2013: health management and development programme, health promotion and disease prevention and control programme, diagnostic and curative service programme and sustainability, and a regulatory and

⁴² Sonam Peldon, 'Policy for better health care facility' *Bhutan Observer* (Thimphu) 26 May 2010, < <http://www.bhutanobserver.bt/2010/bhutanestown/05/policy-for-a-better-healthcare-facility.html> > at 5 October 2010.

⁴³ Gross National Commission of Bhutan, Government of Bhutan, *Tenth Five Year Plan Volume I Document 2008 – 2013* (2009).

monitoring programme.⁴⁴ Firstly, under the health management and development programme, the focus has been on the overall intensification of HR development and capacity building programme. The programme outlines that during the plan period:

[A]ccelerated human resource development will be pursued to build the critical pool of clinical personnel required to close the existing human resource gaps through increased scholarships for Bachelor in Medicines program and other medical fields.⁴⁵

The present situation indicates an acute shortage of man-power, predominantly skilled medical personnel in the health ministry. In view of the lack of medical colleges in the country, students are sent outside the country to pursue higher education in medicine and other medical fields. As the medical field is a highly specialised field, fewer than thirty candidates⁴⁶ from the whole country get selected for the Bachelor of Medicine Programme every year. From a long-term perspective, it is believed that the shortage in medical personnel will be gradually addressed through such programmes; in the short-term, the shortage is being addressed through temporary recruitment from neighbouring countries.⁴⁷ Recently the government announced the establishment

⁴⁴ Gross National Happiness Commission of Bhutan, Government of Bhutan, *Tenth Five Year Plan Volume II Document 2008 – 2013* (2009), 173, 204.

⁴⁵ Ibid 174.

⁴⁶ Department of Adult and Higher Education, Ministry of Education, *Undergraduate Scholarship Program 2010* (2010) <<http://www.education.gov.bt/announcements/Announcement-2008-09.pdf>> at 5 October 2010.

⁴⁷ Gross National Happiness Commission of Bhutan, Government of Bhutan, *Tenth Five Year Plan Volume II Document 2008 – 2013* (2009), 174.

of the first ever medical college in the country. The college, which is tentatively expected to open in July 2011,⁴⁸ will see the introduction of a Bachelor of Medicine and a nursing programme, among others. The establishment of the college is 'expected to help address the country's current shortage of medical staff and additional need of 180 medical specialists, 896 medical officers, 45 assistant clinical officers, 872 nurses and 722 technicians required by 2013'.⁴⁹

Secondly, under the health promotion and disease prevention and control programme, it has been identified that there are still major challenges regarding disease prevention in the country. The major cause of morbidity continues to be Acute Respiratory Infection (hereafter ARI) and Diarrheal Diseases.⁵⁰ These diseases are a result of the poor supply of drinking water and sanitation facilities across the country.⁵¹ Another key focus of the programme is the prevention of TB and HIV/AIDS, which continue to remain rampant in the country despite vigorous control and awareness programmes.

⁴⁸ Dipika Chhetri, 'Foundation laid for future of medicine in Bhutan' *Kuensel* (Thimphu, Bhutan) 1 May 2010
< <http://www.kuenselonline.com/2010/modules.php?name=News&file=article&sid=15335> > at 5 October 2010.

⁴⁹ Rinzin Wangchuk, '2011 deadline for Ngultrum 250 million project' *Kuensel* (Thimphu, Bhutan) 6 January 2008
< <http://www.kuenselonline.com/2010/modules.php?name=News&file=article&sid=14410> > at 5 October 2010.

⁵⁰ Gross National Happiness Commission of Bhutan, Government of Bhutan, *Tenth Five Year Plan Volume II Document 2008 – 2013* (2009), 176.

⁵¹ *Ibid.*

The plan also highlights an intensification of preventive programmes for other diseases and health issues such as maternal and adolescent health, reproductive health, cervical cancer and several other communicable diseases such as malaria, dengue and leishmaniasis which are of significant public health concern.⁵² A growing concern today, however, is the increase in 'lifestyle related diseases' such as hypertension, asthma, cancer, chronic liver disease, heart disease and obesity that is proving not only costly, but at the same time induces the need to revamp major health services in the country.

Thirdly, the diagnostic and curative service programme incorporates the capacity to treat and handle threats from recent epidemics like Severe Acute Respiratory Syndrome (hereafter SARS), avian flu and Swine Flu. In light of such threats, it is proposed to construct bio-safety levels and a public health laboratory⁵³ in the capital Thimphu, that will conduct laboratory testing and institute necessary prevention strategies whenever the situation demands. However, most of the other hospitals across the country are poorly equipped lacking facilities such as X-ray machines, blood laboratory and ultrasound equipment to deal with major 'crisis situations'. Thus, owing to factors such as lack of necessary facilities, inadequacies in personnel and 'highly rugged terrain and harsh climatic conditions', telemedicine is considered as a viable alternative to enhance access to high quality diagnoses and care'.⁵⁴

Finally, a significant amount of expenditure in the health sector is incurred from the purchase of vaccines and drugs. The

⁵² Ibid.

⁵³ Ibid 181.

⁵⁴ Ibid.

sustainability of the health care delivery sector in light of the rising cost of vaccines and drugs depends on a secure financial system. Bhutan is a donor-driven country that depends immensely on external funds and assistance from international groups such as the World Health Organization (hereafter WHO), the United Nations Development Programme (hereafter UNDP) and bilateral countries.⁵⁵ Therefore, in order to ‘establish provisioning of health services on a sustainable footing, the government established the Bhutan Health Trust Fund’ in 1997⁵⁶ to ‘finance the purchase of essential drugs and vaccines’. The foundation of the Trust Fund is on the basis that by ‘ensuring the sustainable financing of essential drugs and vaccines through the Trust, the government can concentrate allocation of national budget to other ‘key elements of public health care’ such as human resource development and strengthening infrastructure.

Drug Procurement, Regulation and Policy

As noted already, in the absence of a pharmaceutical industry and manufacturing capacity, one of the priority concerns for Bhutan in the health sector is financing and procurement of drugs and medicines. In view of this constraint a systematic approach on procurement of drugs and medicines is imperative to ensure quality and an adequate and timely supply for the market in Bhutan. The health ministry outlines that in order to ‘safeguard and protect human and animal health against harm resulting from poor quality of medicinal products’ the control and regulations of

⁵⁵ Annual Health Conference, Ministry of Health, Government of Bhutan, *New era in Health and the challenges ahead* (2009), 3, 58.

⁵⁶ Bhutan Health Trust Fund, Ministry of Health, Government of Bhutan, *Bhutan Health Trust Fund* (2010)
< <http://bhutanfound.org/?p=955> > at 6 October 2010.

such products in the market is very important. Under the health ministry, the Drug Regulatory Authority⁵⁷ (hereafter DRA) was established in 2004 to regulate medicinal products and enforcement of the *Medicines Act 2003*.

The preamble of the *Medicines Act 2003* states that:

[w]hereas it is necessary to control the sales of medicinal products in the effort of ensuring safety, efficacy and quality at affordable prices the government will adopt necessary regulatory mechanisms to monitor licensed premises, strengthen laws relating to medicinal products and control the manufacture, storage, transportation, sale, import and export of such products.⁵⁸

On this basis, the *National Drug Policy 2007* guides the ‘pharmaceutical sector including traditional medicines, in the areas of quality assurance and regulations, supply management, manufacture, monitoring and evaluation’.⁵⁹ It was observed that, until 1986, numerous problems confronted the drug supply system such as ‘availability, quality, irrational prescription and high cost’, and it was these issues that triggered the institution of the Essential Drugs Programme (hereafter EDP) in 1987. The Policy mentions that ‘essential drugs shall be procured to ensure cost effectiveness and sustainability’⁶⁰ through a central procurement system whose

⁵⁷ Drug Regulatory Authority, Ministry of Health, Government of Bhutan, *Background* <<http://www.health.gov.bt/dra.php>> at 6 October 2010.

⁵⁸ Bhutan Medicines Act 2003, Preamble.

⁵⁹ National Drug Policy 2007.

⁶⁰ *Ibid* s 3.

objective 'shall be to procure acceptable quality drugs at reasonable prices'.⁶¹

From the financing aspect, despite acute financial constraint the government continues to allocate adequate financial provision to ensure procurement and supply of drugs in an effort to 'reduce dependency on donor'⁶² agencies. To overcome this constraint, alternative financing sources⁶³ are explored from time to time. In addition, to ensure the drug supply chain, local manufacture of pharmaceuticals⁶⁴ is encouraged through exemption of all forms of taxes.⁶⁵ The fact that drugs and medicines are costly, 'projection of drug cost from time to time and developing appropriate models for costing'⁶⁶ is strongly highlighted.

Accordingly, the drug policy on IPR and pharmaceuticals states the in order to 'safeguard the national interest concerning public health and ensure access to pharmaceuticals' the cost and benefit analysis of international treaties and conventions related to trade needs to be carefully studied. The policy underscores the importance of keeping the public health and access to pharmaceuticals at the forefront when undertaking any 'bilateral or international treaties related to trade in health'.⁶⁷ Particularly on TRIPS, the policy highlights that the government will take 'advantage of all the flexibilities and safeguards within the TRIPS Agreement for the promotion of public health and ensuring access

⁶¹ Ibid s 3 (2).

⁶² Ibid s 6.

⁶³ Ibid s 6 (3).

⁶⁴ Ibid s 9.

⁶⁵ Ibid s 6 (4).

⁶⁶ Ibid s 6 (5).

⁶⁷ Ibid s 13.

to pharmaceuticals'.⁶⁸ In order to do this, the collaboration of Ministry of Health and Ministry of Economic Affairs including other relevant agencies in the area of IPR is important in instituting a legal framework that is conducive to access to essential drugs and incorporating flexibilities such as Compulsory Licensing (hereafter CL) and Parallel Importation⁶⁹ (hereafter PI), which are discussed in the later part of this paper.

Intellectual Property and Public Health in Bhutan

Prior to 2001, IP laws were not a part of the national legal system in Bhutan. IP is a fairly recent concept in Bhutan that continues to face a series of challenges and constraints at the implementation level. The situation of IP can be best described as being in its nascent stages, with major institutional stakeholders and the general public only beginning to understand the importance of it. There is generally inadequate awareness among major players such as the public sector, creative industries and enforcement agencies⁷⁰ due to which the progress in terms of its development has been rather slow.⁷¹ As mentioned elsewhere in the paper, despite planned economic development activities as early as the 1960s,⁷²

⁶⁸ Ibid s 13 (1).

⁶⁹ Ibid s 13 (2).

⁷⁰ Jigme Wangchuk, 'Copyright Law enforcement seeks criminal sanction' *Bhutan Observer* (Thimphu), June 26, 2010
< <http://www.bhutanobserver.bt/2010/bhutan-news/06/copyright-law-enforcement-seeks-criminal-sanction.html> > at August 25, 2010.

⁷¹ Nima Wangdi, 'Getting a law to work' *Kuensel* (Thimphu), June 28, 2010

< <http://www.kuenselonline.com/modules.php?name=News&file=article&sid=15900> > at 6 October, 2010.

⁷² Lily Wangchuk, *Facts about Bhutan-the Land of Thunder Dragon* (Absolute Bhutan Books, Thimphu, Bhutan: 2008) 28.

very little progress has been made in areas that are intrinsic to IP. It has been viewed that a lack of industrial-based activities and a lack of Research and Development (hereafter R&D) has strongly held up the progress in IP.⁷³

The law on IP dates back to as early as 1995, when the World Intellectual Property Organization (hereafter WIPO) fielded an expert mission to initiate formulation of legislation for Bhutan. Subsequently, the *Industrial Property Regulations 1997* was adopted, which was seen as an initial step taken by the government in recognising the importance of IPR in the country. Under these regulations, facilities for registration of trademarks were commenced in May 1997, while enforcement of other parts of the regulations pertaining to patents and industrial designs were deferred until such time as the facilities could be instituted. It was only in 2001, when the *Industrial Property Act 2001* and the *Copyright Act 2001* were enacted, that IP laws became a part of Bhutan's national legal system.⁷⁴ However even today, most of the provisions of the Acts are still not operational,⁷⁵ owing largely to a lack of technical capacity, trained personnel and lack of necessary infrastructure. Due to its late inception, the law in this area is still struggling to gain importance in trade and commerce, research and the national legal system.

⁷³ Tashi Dorji, 'What's in a Brand name?' *Kuensel* (Thimphu), October 22, 2006

< <http://www.kuenselonline.com/modules.php?name=News&file=article&sid=7615> > at 7 October, 2010.

⁷⁴ National Assembly of Bhutan, *Record of list of Acts passed*

< <http://www.nab.gov.bt/legislation.php?start=60&slno=31&dept=act> > at 7 October, 2010.

⁷⁵ Intellectual Property Division, Ministry of Economic Affairs, Government of Bhutan, *About us: The Intellectual Property Division*, < <http://www.ipbhutan.gov.bt/aboutus.aspx> > at 7 October, 2010.

The importance of IPR protection is strongly highlighted in the recently endorsed *Economic Development Policy 2010*. It stresses the need to ‘initiate, promote and support R&D’ that has a resultant effect on IP. The Policy highlights the need to formulate a comprehensive legislative framework for recognition and protection of IPR⁷⁶ in the country. Besides opening up a host of business opportunities as a potential Foreign Direct Investment (hereafter FDI) under the policy, IPR protection is understood as an indisputable component of instituting an enabling environment for private sector development and FDI.⁷⁷

In order to understand the present situation on IP better, a brief mention of its legislative and administrative framework should be made. IP is governed by the *Industrial Property Act 2001* that covers industrial property titles such as patents, industrial designs, trademark, trade secrets and unfair competition, while copyright is governed by the *Copyright Act 2001*. Trademark protection was commenced as early as 1997 and it continues to be one of the most active Registries. About ninety nine percent of the trademark applications are filed from overseas through the Madrid System⁷⁸, and the rest are national and local applications. In spite of its early start, trademark popularity among businesses is only beginning to pick up. The figure of local trademark application is suggestive of its popularity in the business and commerce area.

One of the major challenges faced currently by Bhutan is the operationalisation of patents although a number of studies were undertaken, studying both the advantages and disadvantages of

⁷⁶ Economic Development Policy 2010, ss 7.1.12, 7.10.4

⁷⁷ Foreign Direct Investment Policy 2010, s 4.7.

⁷⁸ *Madrid Agreement Concerning International Registration of Marks*, opened for signature 14 April 1891 (entered into force 1 December 1995).

initiating patents, especially in the context of LDC; to date patents still remain under study. Bhutan as a technologically backward country perceived that the implications, benefits and consequences of patent initiation will have to be studied further. At present, with the level of technical capacity and constraints in financial and administrative resources, it is viewed that Bhutan is not yet ready to commence patents. Subsequently a feasibility study was carried out that recommended the draft Industrial Property Bill (hereafter draft Bill).

The *Industrial Property Act 2001* does not contain any specific provision on pharmaceutical patents; however, a number of possible situations are outlined that allows government intervention; these are situations concerning exploitation of patents such as in a national emergency or other circumstances of extreme urgency⁷⁹ determined by the government. Section 15 of the Act concerns the CL of patents. It begins by mentioning that the public interest in ‘nutrition and health’⁸⁰ among other issues, and in the case of anti-competitive behaviours,⁸¹ the government can authorise exploitation of the patent ‘even without the agreement of the owner’⁸²; however, the exploitation of the patent will be limited to the ‘purpose for which it was authorized’⁸³ and subject to the ‘payment to the said owner of an adequate remuneration’.⁸⁴ The section also points out that in case of inability to obtain or refusal to grant a contractual license for exploitation of patent from the owner on ‘reasonable commercial

⁷⁹ Industrial Property Act 2001, s 15 (6) (b).

⁸⁰ Ibid s 15 (1) (i).

⁸¹ Ibid s 15 (1) (ii).

⁸² Ibid s 15 (1) (ii).

⁸³ Ibid s 15 (1) (ii).

⁸⁴ Ibid s 15 (1) (ii).

terms and conditions and within a reasonable time',⁸⁵ the government can authorise a designated third party to exploit the patent exclusively for the 'supply of the market in Bhutan'.⁸⁶

Apart from Section 15 of the Act covering CL, there are no other provisions that safeguard public health and access to medicines such as PI and exhaustion of IP rights. In view of this, Bhutan is in the process of amending its patent legislation to incorporate necessary flexibilities that are present under the TRIPS Agreement and the Declaration on TRIPS and Public Health, which is discussed in the following part of the paper.

Bhutan's position under the Doha Declaration on TRIPS Agreement and Public Health

It is clear from the above discussion that, in the immediate time frame, Bhutan is not in a position to operationalise patents due to significant constraints in technical capacity and resources among others. Bhutan is only beginning to emerge in areas that are intrinsic to patent generation, such as R&D, increased industrial base activities and FDI; however, it is uncertain how soon the process is going to make an impact on patent culture. Even in other areas such as Trademark and Industrial Designs, national and local applications form an insignificant portion of the total applications.

The Doha Declaration on the TRIPS Agreement and Public Health is of significant relevance to Bhutan because of numerous reasons that are discussed below. In 2001, WTO members adopted a special Ministerial Declaration at the WTO Ministerial

⁸⁵ Ibid s 15 (6) (a).

⁸⁶ Industrial Property Act 2001, s 15 (7).

Conference in Doha, Qatar, to clarify ‘ambiguities between the need for government to apply the principles of public health and the terms of the TRIPS Agreement’.⁸⁷ The declaration was passed due to the growing concern that ‘patent rules might restrict access to affordable medicines⁸⁸ for populations in developing countries and LDCs⁸⁹ in their efforts to control diseases of public health importance such as HIV, TB and malaria.⁹⁰ A closer look at the Declaration shows the affirmation⁹¹ of the WTO members to implement appropriate measures to protect public health, through full use of the safeguard provisions of the TRIPS Agreement, in order to enhance access to medicines for poor countries.⁹² All but two aspects of the TRIPS Agreement under the Declaration are referred that are particularly relevant to LDCs; one: CL⁹³ and,

⁸⁷ World Health Organization, ‘Access to Medicines’ (2003) 19 [3] *WHO Drug Information* 236, 241.

⁸⁸ Stiglitz, E, Joseph, *Economic Foundations of Intellectual Property Rights* (2007) Duke University School of Law
< www.law.duke.edu/shell/cite.pl?57+Duke+L.+J.+1693+pdf> at 10 October 2010.

⁸⁹ World Health Organization, above n 236, 241.

⁹⁰ Phillippe Cullet, ‘Amended Patents Act and Access to Medicines after Doha’ (2002) 37 (24) *Economic and Political Weekly* 2278.

⁹¹ Declaration on the TRIPS Agreement and Public Health, adopted on 14 November 2001 by the Fourth WTO Ministerial Conference, Doha, Qatar
< http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm> Paragraph 4 (b) at 10 October 2010.

⁹² Phillippe, above n 1.

⁹³ Declaration on the TRIPS Agreement and Public Health, adopted on 14 November 2001 by the Fourth WTO Ministerial Conference, Doha, Qatar
< http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm> Paragraph 5 (b) at 10 October 2010.

two: the ‘freedom to establish the regime of exhaustion of IP rights’ and PI.⁹⁴

Compulsory Licenses

The TRIPS Agreement enables a ‘competent government authority to license the use of patented invention to a third party or government agency without the consent of the patent-holder’.⁹⁵The grant of CL is subject to certain conditions, such as consideration of ‘individual merits, need to demonstrate prior negotiations with the patent holder for a voluntary license and the payment of adequate remuneration to the patent holder’.⁹⁶In order to address a ‘national emergency or other circumstances of extreme urgency’ additional requirements such as the ‘need to obtain a voluntary license’ from the patent holder is waived.⁹⁷This process is further hastened by the Declaration through grant of the ‘freedom to Members to stipulate the grounds upon which such licenses are granted’. Recognising this need of poor countries with respect to public health, such flexibilities are enshrined in the TRIPS Agreement which is further amplified by the Declaration.⁹⁸

The granting of CL is mainly to regulate the ‘exclusive rights conferred by patents’ that restrict abusive use of patents. Particularly in the case of health, the rationale of CL is to prevent a situation whereby ‘the existence of patent in a protected

⁹⁴ Ibid Paragraph 5 (d)

⁹⁵ Trade-Related Aspects of Intellectual Property Rights Agreement, Art 31

⁹⁶ Ibid, Art 31 ss (a) – (j).

⁹⁷ Ibid, Art 31 s (b)

⁹⁸ Declaration on the TRIPS and Public Health, above n Paragraph 4.

medicine is not available to the public due to non-health related factors.⁹⁹

Parallel Importation

PI is the ‘importation without the consent of the patent-holder of a patented product marketed in another country either by the patent holder or with the patent holder’s consent’.¹⁰⁰ The underlying principle of exhaustion states that:

Once patent holders or any party authorized by him or her, have sold a patented product, they cannot prohibit the subsequent resale of that product since their rights in respect of that market have been exhausted by the act of selling the product.¹⁰¹

To illustrate the above, Bayer’s ciprofloxacin (500mg), an antibiotic, cost 740 US dollars in Mozambique. In India, Bayer sells the same drug for 15 US dollars, due to local generic competition. Considering the cost is cheaper in India, Mozambique can import the drug from India without Bayer’s consent.¹⁰²

Article 6 of the TRIPS Agreement on exhaustion states:

For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this

⁹⁹ Phillippe, above n 1.

¹⁰⁰ World Health Organization, *The Doha Declaration on the TRIPS Agreement and Public Health* (2010) <http://www.who.int/medicines/areas/policy/doha_declaration/en/> at 10 October 2010.

¹⁰¹ *Ibid.*

¹⁰² World Health Organization, *Parallel Imports* (2010) <<http://www.who.int/trade/glossary/story070/en/>> at 10 October 2010.

Agreement shall be used to address the issue of the exhaustion of intellectual property rights.¹⁰³

Further, the Declaration reaffirms this right by stating that each ‘member is free to establish its own regime for such exhaustion without challenge’.

Both CL and PI are important tools for Bhutan in the public health area. Under the present *Industrial Property Act 2001*, CL is strongly incorporated. There is, however, no provision on PI. These tools allow the government to address the public health issues, particularly access to drugs through ‘exploitation of patents’ and ‘import of lower priced patented drugs’ as illustrated. It is observed that pharmaceutical products (even the same pharmaceutical products) are sold at different prices in different markets; therefore, the rationale for PI is to enable the import of lower priced pharmaceuticals from a foreign market to supply the domestic market. Bhutan can incorporate CL and PI in its legislation to enable exploitation of patents and import of lower priced pharmaceuticals from neighbouring countries, considering the constraints in pharmaceutical patents and lack of manufacturing capacity.¹⁰⁴ A very important aspect of this flexibility to be noted, particularly regarding CL, is the fact that Bhutan lacks manufacturing capacity in the pharmaceutical sector. In the immediate future, if Bhutan initiates patents, there will be fewer patent applications and thus CL in this respect will be

¹⁰³ Trade-Related Aspects of Intellectual Property Rights Agreement, Art 6.

¹⁰⁴ Declaration on the TRIPS and Public Health, above n Paragraph 6.

irrelevant as it allows supply for the domestic market only.¹⁰⁵ On the other hand, PI will benefit Bhutan through the import of lower priced pharmaceuticals from countries like India.¹⁰⁶ In order to comply with the TRIPS Agreement, and subsequently incorporating the necessary flexibilities especially pharmaceutical patents, LDCs are allowed transitional period until January 1, 2016.¹⁰⁷

Amendments to the *Industrial Property Act 2001* and the draft *Industrial Property Bill*

The *Industrial Property Act 2001* lacks a number of provisions, such as flexibilities on the use of CL and PI and on pharmaceutical patents and enforcement measures, among others. In order to incorporate such provisions, Bhutan is currently in the process of amending its patent and IP legislation. This part of the paper will discuss the draft Bill and pertinent provisions that endeavour to incorporate the flexibilities and create a conducive environment for promotion, as well as protection of public health in the country.

The draft Bill begins by defining matters that are excluded from patent protection and this includes pharmaceuticals until January

¹⁰⁵ Alan O. Skyes, 'TRIPS, Pharmaceuticals, Developing Countries, and the Doha Declaration Solution' (2002) 3 (1) *Chicago Journal of International Law* 47.

¹⁰⁶ Tandin Dorji, 'Effect of TRIPS on Pricing, Affordability and Access to Essential Medicines in Bhutan (2007) Vol. 16, *Journal of Bhutan Studies*, 128.

< http://www.bhutanstudies.org.bt/main/pub_detail.php?pubid=104 > at 10 October 2010.

¹⁰⁷ Declaration on the TRIPS and Public Health, above n Paragraph 7.

1, 2016.¹⁰⁸ As mentioned already, protection of pharmaceuticals will not only be tedious, considering the complex technicalities and examination process, but also unnecessary because the number of applications foreseen is virtually zero. Realistically, the protection of pharmaceuticals will go a long way both in terms of technical capacity of the IP Office as well as local manufacturing capacity. The grant of pharmaceuticals in light of the public health crisis will deter access to drugs and medicines, as the pharmaceuticals become increasingly expensive as a result of patents.

As required by the TRIPS Agreement, the draft Bill grants both product and process patents.¹⁰⁹ The impact of this provision is largely going to be in the import and making of 'generic drugs' imported from India and other neighbouring countries.¹¹⁰ As a matter of fact, Bhutan continues to benefit from the import of generic drugs from India since patented drugs are highly expensive and thus, granting of product patents will not only impede the import of generic drugs, but also prevent any local pharmaceutical companies, from utilising the processes to make products or generic drugs.¹¹¹

A comprehensive provision relating to PI is proposed under the draft Bill. Section 11 (4) of the draft Bill states:

The rights under the patent shall not extend to acts in respect of articles which have been put on the market in any territory or

¹⁰⁸ Draft Industrial Property Bill, s 1 (ix).

¹⁰⁹ Ibid, ss 11 (2) (a) and (b).

¹¹⁰ Dorji, above n 131.

¹¹¹ Ibid 134.

country by the owner of the patent or with his or her consent, consequently exhausting the patent owner's rights.¹¹²

The draft Bill empowers the Minister concerned to declare patent rights exhaustion 'authorizing' a designated party or government agency to 'import the patented product from another territory when that product is not available or available in the territory of Bhutan with unreasonably low quality standards or in a quantity that is not sufficient to meet the local demand or at prices' that are abusive.¹¹³ The import of drugs is important to maintain the continuity of delivery of health services and particularly during a 'national emergency or circumstances of extreme urgency' when drugs and vaccines are required in a timely and sufficient manner, this provision will expedite the process of drugs and vaccines acquisition.

CL is further submitted under the draft Bill reasoning the requirement of CL as a measure to safeguard public health and other social objectives. This is precisely the subject matter under Paragraph 6 of the Declaration as already discussed. The Declaration acknowledged 'that countries with insufficient or no manufacturing capacity may find it difficult to make use of [CL] and thus allows import or export of products produced under [CL] provided that both countries of import and export have issued such licenses'¹¹⁴ upon duly notifying the TRIPS Council.

Section 13 of the draft Bill charts out an in-depth provision on CL. The purpose of CL rests on the basis that in situations such as

¹¹² Draft Industrial Property Bill, s 11 (4).

¹¹³ Ibid ss 11 (5) (i) – (ii).

¹¹⁴ HEPS, Uganda Coalition for Health Promotion and Social Development, *TRIPS flexibilities in Patent laws* (June 2008), 17.

‘nutrition, health or other vital sectors of the national economy’¹¹⁵, anti-competitive behaviour¹¹⁶, abusive exercise of exclusive rights by the patent-holder¹¹⁷ or when the ‘invention is not available in sufficient quantities or quality’ at reasonable prices in Bhutan ‘either through manufacture in Bhutan or through importation’¹¹⁸, the draft Bill empowers the Minister concerned, ‘even without the agreement’ of the patent holder, to exploit the invention by a government agency or a designated third party.

The conditions on the grant of CL that are already discussed are present under the draft bill. They are: a CL is to be considered on its individual merits; the exploitation of the invention shall be limited to the purpose for which it was licensed and a CL shall be subject to the payment to the said owner of an adequate remuneration.¹¹⁹ Specifically, the grant of CL with respect to pharmaceutical products or a process when other alternative process of making the same is not known or not available,¹²⁰ takes into account the Decision of the General Council of the WTO (hereafter the Decision) of August 30, 2003.¹²¹ This Decision is precisely the implementation of Paragraph 6 of the Declaration, stating that ‘member countries having insufficient or no

¹¹⁵ Draft Industrial Property Bill, s 13 (1) (a) (i).

¹¹⁶ Ibid s 13 (1) (a) (ii).

¹¹⁷ Ibid, s 13 (1) (a) (iii).

¹¹⁸ Ibid, s 13 (1) (a) (iv).

¹¹⁹ Ibid s 13.

¹²⁰ Ibid s 13 (b).

¹²¹ Decision on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, adopted by the General Council on 30 August 2003 at <http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm> at 11 October 2010.

manufacturing capacity in the pharmaceutical sector may choose to grant CL'. The Decision is the result of the instructions set out under the Declaration, where it creates a conducive environment to LDCs in making use of CL to import pharmaceutical products¹²² from a developed country, after both notify the TRIPS Council of the intention to use the CL. The exploitation of such an invention is predominantly for the 'supply of the market in Bhutan', and particularly if it concerns pharmaceutical products, the grant of CL is to enable import of pharmaceuticals from a foreign country in accordance with the Decision.

In terms of 'national emergency or other circumstances of extreme urgency or cases of public non-commercial use', the need to obtain a voluntary license is waived which is coherent with the Declaration.¹²³ The granting of CL whatsoever will not restrict or prevent the patent's owner from exploiting the invention and the owner will be entitled to cross-license¹²⁴ and the CL will be a non-exclusive license.¹²⁵

Enforcement and Border Measurement of IP

Enforcement of IP in Bhutan is a serious problem. The *Industrial Property Act 2001* sparingly covers the enforcement of IP¹²⁶ and border measures empowering Courts¹²⁷ and Customs¹²⁸ in the

¹²² Ibid.

¹²³ Draft Industrial Property Bill, ss 13 (5) (a) – (b).

¹²⁴ Ibid ss 9 (a) – (b).

¹²⁵ Ibid s 5.

¹²⁶ Copyright Act 2001, Pt IV.

¹²⁷ Industrial Property Act 2001, ss 16, 23, 29.

¹²⁸ Copyright Act 2001, Pt IV s 28 (3).

process of infringement¹²⁹ and enforcement of the IP law. There is not a single provision detailing how the police will correlate its role in the enforcement of IP under the Act. Not listing the roles of the police under the Act is a serious impediment for enforcement of IP. On several occasions, the police expressed that IP cases are not dealt with by them directly. In a recent media report, it was quoted that one of the reasons of ineffective enforcement is lack of familiarity of ‘police personnel with the provisions of the industry property and copyright infringement Act and other related laws and there is lack of training for the police in the field of intellectual property’.¹³⁰

The role of Customs is crucial, especially in preventing and identifying pirated and counterfeit goods at the border level. Once the goods have entered the country, customs officials are still entitled to search and seize the goods. Further, the customs law mentions the authority to seize,¹³¹ restrict and prohibit¹³² suspected and illegal goods that are ‘imported, exported or sold without prescribed documents, permit or pass’.¹³³

According to Ugyen Dorji from UC Associates, who is working on formulation of an enforcement framework on copyright:

[T]he main reasons for ineffective copyright enforcement were lack of training for the police, the Bhutanese judicial system being slow, time-consuming and burdensome, lack of trained intellectual

¹²⁹ Industrial Property Act 2001, s 41.

¹³⁰ Meto Dema, „The thieves and the authors“, *Bhutan Observer*, 4 February 2010, 11 <<http://www.bhutanobserver.bt/2010/featured-stories/02/the-thieves-and-the-authors.html>> at 12 October 2010.

¹³¹ Sales Tax, Customs and Excise Act 2000, s 7.2.

¹³² *Ibid* s 8.1.

¹³³ *Ibid*.

property prosecutors and judges trained in the field of intellectual property rights, and lack of public awareness.¹³⁴

The enforcement framework is particularly raised by the Creative Industry Sector, as piracy is becoming rampant not only inside the country but also at the borders.¹³⁵ Enforcement is a critical component of the overall IP development, affecting not only the Creative Industry sector but also other sectors such as health and education, technology, economy and the R&D sector. The enforcement mechanism is important to regulate as well as ensure safety and quality and to authenticate the import of pharmaceuticals inside the country.

Part III of the TRIPS Agreement covers enforcement of IP. Article 41 states that:

Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.¹³⁶

¹³⁴ Meto Dema, 'Copyright lack public awareness', *Bhutan Observer* (Thimphu), January 15, 2010
< <http://www.bhutanobserver.bt/2010/bhutan-news/01/copyright-lack-public-awareness.html> > at 12 October 2010.

¹³⁵ Kinga Dema & Gyalsten K Dorji, 'The issue is on other foot', *Kuensel* (Thimphu), January 20, 2010
< <http://www.kuenselonline.com/modules.php?name=News&file=article&sid=14525> > at 12 October 2010.

¹³⁶ Trade-Related Aspects of Intellectual Property Agreement, Art 41.

Accordingly, the draft Bill proposes a separate chapter on enforcement of IPRs, containing comprehensive measures such as infringement proceedings, provisional measures, evidence and burden of proof, damages and other remedies, border measures by Court and Customs and criminal procedures. In all of these measures, the basis is first instituting an effective enforcement regime that caters to promotion of IP in the country and secondly, as a broader concept, prevents entry of illegal goods that may have a negative effect on public interest issues such as health and nutrition.

Conclusion

Bhutan's position regarding the implementation of an IPR regime that allows undeterred access to medicine and addresses public health issues will depend on three key elements. Firstly, having discussed the flexibilities that are present within the TRIPS and subsequently amplified by the Declaration, it is of paramount importance to effectively utilise those flexibilities that will impact the overall health care system in Bhutan. Recognising the special needs of the country, in light of numerous constraints such as inadequate technical competencies, lack of pharmaceuticals and manufacturing capacity and financial and administrative constraints etc. the present draft Bill adequately incorporates the necessary flexibilities to safeguard public health interest. Primarily, the CL and PI in view of the above constraints, create the necessary system and channels through which public health interests such as 'exploitation of patents' and 'importation of drugs' are addressed. Additionally, other measures such as 'limitation on the exclusive rights conferred by patents' also endeavour to help address public health issues.

Secondly, in order to effectively implement IPRs, it is highly essential to put in place a workable enforcement regime. For this

purpose, relevant institutional stakeholders have to be proactively involved from time to time in matters that affect the enforcement of IP in the country and beyond. A multi-sectoral approach involving stakeholders from health and education, agriculture, science and information technology and creative industries, in addition to enforcement agencies *viz.* court, customs, polices and trade and commerce, should coordinate in areas of IP. The enforcement of IP eventually impacts issues that are critical to public health, such as counterfeit drugs, infringement of patents to produce low quality drugs and vaccines and unauthenticated generics that will undermine the state of public health.

Finally, in order to expedite the accession process to WTO,¹³⁷ as in the past, several WTO working groups were organised that discussed WTO and TRIPS among others. TRIPS contains the minimum standards on IP that a WTO member should put in place. Presently, the legislative framework covering IP in Bhutan is inadequate and lacks pertinent provisions on several other IP titles, enforcement mechanisms and also safeguards that are present within the TRIPS framework on access to medicines and public health. The discussions on WTO and TRIPS triggered amendments to the *Industrial Property Act 2001* and the draft Bill has been proposed, addressing access to medicines and public health issues among others. While accession to WTO is imperative on account of trade liberalisation and the foreseen benefits resulting from membership, basic standards on IP, including an enforcement mechanism and the necessary safeguards on public health, are packaged under the proposed draft Bill.

¹³⁷ World Trade Organization, *Accession: Bhutan*
< http://www.wto.org/english/thewto_e/acc_e/a1_bhutan_e.htm > at 14
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